

SOUTH AFRICA / JUDGMENT

Gcora and Another v Nelson Mandela Bay Municipality and Another (1414/2016 ; 992/2016) [2025] ZAECQBHC 10 (1 April 2025)

[2025] ZAECQBHC 10

COURT

Eastern Cape High Court, Gqeberha

BEFORE

J W Eksteen

CASE / FILE NUMBER

1414/2016 ; 992/2016

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IN

THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE DIVISION,

GQEBERHA

NOT REPORTABLE

Case No.: 1414/2016

& 992/2016

In the matter between:

SIPHO
GCORA
First
Applicant
GOBO-GCORA
CONSTRUCTION AND
PROJECT
MANAGEMENT CC
Second
Applicant
and
First
Respondent
THE
NELSON MANDELA BAY MUNICIPALITY
MEC
FOR THE DEPARTMENT OF
EASTERN
CAPE HUMAN SETTLEMENTS
Second
Respondent

and
SIPHO
GCORA
First
Applicant
GOBO-GCORA
CONSTRUCTION AND
PROJECT
MANAGEMENT CC
Second
Applicant
and
THE
NELSON MANDELA BAY MUNICIPALITY
First
Respondent
PUBLIC
PROTECTOR SA
Second
Respondent

JUDGMENT

EKSTEEN ADJP:

- [1] There are two applications before me for leave to appeal (the applications) arising from rulings that I made on 5 February 2025 relating to requests for leave to institute legal proceedings (the requests) pursuant to the applicants being declared vexatious litigants in terms of section 2(1)(b) of the Vexatious Proceedings Act, 3 of 195 (the Act). I shall deal with these respective requests and rulings below.
- [2] The underlying dispute between the parties has a long and unpleasant history that culminated on 16 May 2023 in an order issued in this court under case no. 1414/2016 and 992/2016. The material portion of the order for purposes of these proceedings was:
- ‘(c) The applicants be declared vexatious litigants pursuant to the provisions of s 2(1)(b) of the Vexatious Proceedings Act, 3 of 1956 “the Act”;
- (d) the first, second and/or third applicants shall not institute any legal proceedings in any Division of the High Court of South Africa ... against the first respondent relating in any way to the Public Protector’s report titled “Costs Deviation”, without the leave ... of the High Court or any Judge thereof as envisaged in s 2(1)(b) of the Act.’[1]

The order in paragraph

- (d) mirrors s 2(1)(b) of the Act.

[3] The applicants were represented by Ms Olowookorun in the applications for leave to appeal in which they cited the NMBM as a respondent. On 7 February 2025 they lodged an application

for leave to appeal against the first ruling[2] and delivered a copy thereof on Pagdens Attorneys, as representative for the NMBM. Pagdens Attorneys entered an appearance to oppose the application on the same day, and Mr Rorke and Ms Rawjee appeared on behalf of the NMBM at the hearing. The applicants, simultaneously, lodged an application for leave to appeal against the second ruling and cited the NMBM as a respondent in those proceedings, too. McWilliams & Elliot Attorneys entered an appearance to oppose this application and Mr Ronaasen and Mr Cetywayo appeared on their instruction.

The legal framework

[4] Before I turn to the facts of the applications it is necessary to consider the nature of the proceedings in issue. In Beinash[3] the Constitutional Court was required to consider the constitutionality of the Act. They held that s 2(1)(b) does indeed limit the protection of the right of access to courts set out in s 34 of the Constitution, but they considered that the limitation

was reasonable and justifiable and therefore constitutionally compliant.[4]

[5] In arriving at the conclusion, the Constitutional Court considered the purpose and the effect of the provision. They said that the purpose is to ‘put a stop to persistent and ungrounded institution of legal proceedings’[5] and explained that the Act does so by allowing the court to screen (as opposed to absolutely bar) a ‘person who has persistently

and without reasonable ground instituted legal proceedings in any court’. They further explained that this was necessary to protect at least two important interests. These are, first, the interests of the victim of the vexatious litigant who has repeatedly been subjected to the costs, harassment and embarrassment of unmeritorious litigation; and, second, the public interest that the functioning of the courts and the administration of justice proceed unimpeded by the clog of groundless proceedings.[6]

[6] The Act requires the fulfilment of two conditions before a vexatious litigant may institute legal proceedings. A judge has ‘to be satisfied that the proceedings are not an abuse of the process of the court and that there is prima facie ground for the proceedings.’ In other words, the applicant is required to show that he or she has a bona fide claim and that his or her claim is prima facie meritorious. The Constitutional Court recognised that an order under s 2(1)(b) may well be far-reaching, but they considered that it was not immutable because there is an escape from the restriction as soon as a prima facie case is made in circumstances where a judge is satisfied that the proceedings so instituted will not constitute an abuse of the process of the court.[7] They said that it was not unreasonable to require of the potential litigant to discharge an evidentiary burden. This is because it is justifiable, when confronted by a person who has ‘used the procedure ordinarily permitted by the rules

of the court to facilitate the pursuit of the truth for a purpose extraneous to that objective'[8]. Having demonstrated a propensity to abuse the process of the courts it can hardly lie in the mouth of a vexatious litigant to complain that they are required first to demonstrate their bona fides. In this respect the restriction is precisely tailored to meet the legitimate purpose. [9]

- [7] What emerges from all of this is, as I have said, that the aspirant litigant bears an evidential burden to satisfy a judge that they have a bona fide claim and that the claim is prima facie meritorious.[10] Ordinarily an evidential burden is discharged by presenting evidence on oath. Section 2(1)(b) of the Act provides for an application to seek leave from the court or from a judge in chambers. The section contemplates an application properly made, ex parte, supported by an affidavit demonstrating a bona fide claim and the merit of the proposed proceedings. Whether the claim is bona fide or not depends upon the merits of the claim, as raised in the affidavit.[11] It will be sufficient if an applicant swears to a cause of action, valid in law, in a manner which is not inherently or seriously

unconvincing,[12] or, put differently, if his affidavit shows that there is a reasonable possibility that the cause of action which he advances may succeed on trial.[13] Where it is apparent from the affidavit that the applicant is not bona fide he will not obtain leave to institute proceedings, because in such a case his claim, too, cannot be bona fide.

- [8] The application may be presented before a judge in chambers. The judge merely considers whether the facts alleged in the affidavit constitutes a cause of action, which is good in law, and whether the claim appears to be bona fide. In order to enable him to do so he must be apprised of the facts upon which the applicant intends to rely with sufficient particularity and completeness to be able to hold that if these statements of fact are found at the trial to be correct, judgment should be given in his favour. The ruling of the judge in chambers does not decide any issue between the parties, it does not constitute a judgment, and the process does not envisage an engagement with the proposed defendants. If leave is granted the defendants will have the opportunity to be heard and to present their case at the trial. In respect of each of the requests in this matter the applicants have

issued no court process, and the requests were not supported by affidavit, nor has the cause of action, or the relief which they

intend to seek in the proposed proceedings been formulated. Rather, the applicants submitted an informal request to me, supported

by legal argument signed by Mr Gcora. The evidential burden to establish the bona fides of the applicants and their claims cannot be discharged in this manner and the merit of the claim cannot be properly assessed when the cause of action has not been identified and the relief sought has not been clearly formulated. In view of the form in which the requests have been presented, unsupported by a process or evidence, I directed the registrar to record the rulings in the chamber book. Suffice it to say that for these reasons alone the requests could not succeed and I do not consider that there is a reasonable prospect that another court would come to a

different conclusion in this regard.

- [9] Nevertheless, I have accepted the requests and I have considered them on their merit, to the extent that it is possible to do, on what was presented. As I have said, I was not satisfied that the proposed proceedings are not an abuse of the process of the court or that there is prima facie ground for such proceedings. I, accordingly, refused leave.
- [10] That brings me to the applications for leave to appeal. I have referred earlier to the Constitutional Court's explanation of the purpose of the Act, which is to put a stop to persistent and ungrounded institution of legal proceedings. The object is to protect the victims of vexatious litigation against repeatedly being subjected to the costs, harassment and embarrassment of the litigation, and the functioning of the courts. I have explained that the ruling by a judge in chambers does not constitute a judgment,[14] or a decision of a court, as envisaged in s 16 of the Superior Court Act.[15] The rulings do not determine any issue between the parties and I entertain significant doubt about the appealability of the rulings.

As adumbrated earlier, the applications cited the NMBM as respondent and they were served on the respective attorneys for the NMBM, who entered appearance to oppose the applications. If applications for leave to appeal, appeals, and further appeals, involving the proposed defendants, were permitted it could serve only to increase the victimization of the opposing parties, who would be exposed to ongoing litigation about litigation, before the litigation even commences, with all the concomitant cost implications, harassment and embarrassment, and the functioning of the courts would be further clogged with groundless proceedings. Such a course would defeat the very purpose of the Act.

- [11] Nevertheless, by virtue of the conclusion to which I have come, I shall assume, in favour of the applicants, without making any finding in that regard, that the rulings of this nature are appealable. I shall accordingly address the applications for leave to appeal on their merit below.

The history

- [12] As adumbrated earlier, the matter has a lengthy and unpleasant history that is extensively traversed in various judgments, in particular the judgments of Pickering J[16], Van Zyl DJP[17] and Potgieter J[18], to which I shall revert. I do not intend to deal herein with all the litigation between the parties, and I deal only with events that I have considered to be material for purposes of these proceedings as they are recorded in the various judgments. The dispute finds its origin in two tenders awarded by the Nelson Mandela Bay Municipality (the NMBM) to two separate companies, namely, WK Construction SA (Pty) Ltd, and WK Pipelines (Pty) Ltd (collectively referred to as WK). The tender awards related to the installation of services and the construction of houses in KwaNobuhle in areas 9 and 10. The main contracts that were concluded between the NMBM, as employer, and WK, as contractors, provided for the appointment by WK of subcontractors under certain conditions in each case. Clause 6.4 of the applicable General Conditions of Contract

regulated the relationship between the parties, and it read:

‘Any ... appointment of a subcontractor in accordance with Clause 6.3 shall not imply a contract between the employer and the

subcontractor, or a responsibility or a liability on the part of the employer to the subcontractor and shall not relieve the contractor

from any liability or obligation under the contract, and he shall be liable for the acts, defaults and neglects of any subcontractor

....’[19]

[13] WK appointed Goba-Gcora Construction and Project Management CC (the close corporation) as a subcontractor to construct houses on the project. The relationship between WK and the close corporation was created and regulated by a separate contract entered into by them. The NMBM was not a party to that agreement.[20]

[14] In due course various disputes arose between the close corporation and WK relating to payment for work performed by the close corporation in terms of the subcontract with WK. It attempted, unsuccessfully, to recover money directly from the NMBM in respect thereof. In December 2013 the estates of Mr Sipho Gcora and Ms Kuselwa Gobo-Gcora, the sole members of the close corporation, were sequestered and the close corporation was placed under provisional liquidation in 2016. The latter order was later discharged in July 2016.

[15] In the interim, the close corporation turned to the public protector for assistance. The public protector embarked upon an

investigation. Her main findings were that the tender by the NMBM for the building of houses was irregularly awarded to the main contractor[21], WK, and that the project was improperly and insufficiently funded, with the result that the close corporation ‘who is a small business person, suffered enormous prejudice in that it was left out of pocket after using its own money to fill the gap arising from the municipality’s funding shortfall, after the latter had wrongly used, for internal purposes, the grant meant for the top structure of construction’. The material portion of the remedial action directed by the public protector was as follows:

‘9.1.1 In consultation with the complainant[22], to reconcile payments made to the complainant for the top structure and pay the complainant the deficit, with interest within 30 days thereof.

9.1.2 To audit works done as per the drawings of the houses that would have given rise to adjustment in the bill of quantities, and pay the complainant accordingly those relating to the construction of the top structure.

9.1.3 To issue a written apology to the complainant and its directors. (sic)’

[16] Thus, in March 2016, the applicants and Ms Kuselwa Gobo-Gcora launched an application (the enforcement application) under case no. 992/2016, wherein they sought to compel the NMBM to comply with the remedial action ordered by the public protector. In response, the

NMBM said that it intended to launch a review application (the review application) to set aside the report of the public protector. The matter came before Smith J, who directed that the two applications should be heard simultaneously and he put the NMBM to terms to issue its intended review proceedings. This they duly did under case no. 1414/2016. The review application was launched on 29 April 2016, while the close corporation was under provisional sequestration. Accordingly, the NMBM cited the public protector, the liquidators of the close corporation and the trustees of the insolvent estates of Mr Gcora and Ms Gobo-Gcora, as respondents.

- [17] The launching of the review application prompted the applicants and Ms Gobo-Gcora to launch a separate application in terms of rule 30 and 30A of the Uniform Rules of Court, under the same case number, 1414/2016, in which they sought an order that the review application be set aside, alternatively, struck out. This application (the striking out application) came before Plasket J, who dismissed the application with costs. In arriving at this conclusion Plasket J first considered the procedural objection. He found that the applicants and Ms Gobo-Gcora did not have standing, first because they were not parties to the application and had not made application to be joined, and further, that they could not be parties in their personal capacity, by virtue of sections 20(1)(a) and 23 of the Insolvency Act, 24 of 1936. However, notwithstanding this finding, he proceeded to consider the merits of the application. The application was founded on two legal contentions, firstly, that it was not timeously instituted, as directed by Smith J, and, secondly, that the NMBM had failed to comply with its obligations in terms of s 41 of the Constitution.[23] Plasket J found no merit in these objections, and, as I have said, he dismissed the application on its merits, with costs. This is the first of the cost orders that form the subject of the request to institute interdict proceedings to which I shall revert.
- [18] Displeased with the result, the applicants and Ms Gobo-Gcora proceeded to bring a further application, again under the same case number (1414/2016), for a declaratory order that the judgment of Plasket J was null and void and of no force and effect. The application (the nullity application) served before me. I considered that the reasoning and order of Plasket J was sound, and that the orders made were final in nature and were valid and binding on the parties. Accordingly, I dismissed the application, with costs. This cost order, too, is subject of the request to institute interdict proceedings. What the applicants were in effect asking for in the nullity application was that the striking out judgment be declared void, because they considered it to be incorrectly decided. I found that the appropriate remedy in those circumstances, would have been to seek leave to appeal against the striking out judgment.
- [19] The applicants and Ms Gobo-Gcora were not content. They sought leave to appeal against the nullity judgment, which I duly considered, and dismissed with costs. Thereafter they proceeded, unsuccessfully, to seek leave to appeal to the Supreme Court of Appeal. When this application failed a petition was directed to the Constitutional Court, again without success. Undeterred by these setbacks, they then, belatedly, sought leave to appeal against the striking out judgment, which Plasket J dismissed with costs. They elected not to pursue

this application any further.

[20] As adumbrated earlier, Smith J had directed that the enforcement application and the review application should be heard simultaneously. They came before Pickering J who dealt with the two matters together in one judgment. In the review application the public protector acknowledged that her directive that the close corporation must be compensated by the NMBM could not stand, because there existed no contractual nexus between the NMBM and the close corporation, and because her directive would compel the NMBM to pay money to the close corporation, a subcontractor, in circumstances where the fault, if any, for the subcontractor not receiving payment lay with the principal contractor, WK. Accordingly, the remedial action in favour of the close corporation, as directed by the public protector, was found to have been ultra vires her powers in s 181(2) of the Constitution and the review application was upheld to that extent. In consequence of the finding in the review application the enforcement application was dismissed, with costs.

[21] In the review application Mr Gcora, and Ms Gobo-Gcora, who were still unrehabilitated insolvents, filed affidavits, and sought to appear to present argument. Mr Gcora asked that he and Ms Gobo-Gcora be joined as parties to the proceedings, and affidavits were filed to address this issue. Ms Roberts, who represented the NMBM at the time, deposed to an affidavit in this regard, in which she acknowledged that her earlier perception relating to Mr Gcora and Ms Gobo-Gcora's interest in the proceedings may have been incorrect. Mr Gcora has annexed selective portions of this affidavit to his request for leave to institute interdict proceedings. Suffice it, for present purposes, to note that the affidavit recorded that the NMBM would abide the decision of the court in respect of the joinder. Pickering J considered that it was in the broader interests of justice that Mr Gcora and Ms Gobo-Gcora be joined as respondents, despite their failure to have applied for such joinder at an earlier stage in the proceedings. He, accordingly, permitted them to participate in the hearing and had regard to the affidavits filed by

them prior to their joinder. I shall revert to these findings.

[22] Again, as in the previous matters, the applicants and Ms Gobo-Gcora were unpersuaded by the judgment of Pickering J, and they sought leave to appeal. When the application for leave to appeal was dismissed they proceeded to seek special leave from the Supreme Court of Appeal. This, too, was refused, which prompted them to serve an application for leave to appeal to the Constitutional Court. The latter application was later abandoned as they consciously chose, instead, to seek rescission of the review judgment.

[23] The application for rescission (the rescission application) came before Van Zyl DJP, who dismissed the application, on 16 April 2019, with costs. In the rescission application Mr Gcora had argued that the finding of Pickering J, in the review application, that he and Ms Gobo-Gcora should be joined as parties to the application had the consequence that the finding of Plasket J in the striking out application, that they lacked the necessary locus standi, was wrong, and the order was consequently granted in error, and therefore, by

necessary implication, that the judgment in the nullity application was also wrong. Van Zyl DJP dealt extensively with this argument. He quoted the findings of Pickering J[24] and proceeded to find:

‘On a reading of this paragraph it is clear that the issue of joinder was not determined with reference to the status of Mr Gcora and Ms Gobo-Gcora as unrehabilitated insolvents, and/or that they had a direct and substantial interest in any orders that the court might make in the review application. The decision was rather made in the exercise of the court’s discretionary power in terms of the common law to allow someone to be joined as a party on the basis of convenience, or as Pickering J put it, in “the broader interest of justice”.’

Accordingly, Pickering J did not find that Mr Gcora and Ms Gobo-Gcora were necessary parties to the litigation.

[24] When the rescission application was dismissed an application for leave to appeal was launched. It, too, was dismissed by Van Zyl DJP, which, in turn, gave rise to an unsuccessful application to the Supreme Court of Appeal for special leave. Thereafter, a further application followed, in which the applicants sought declaratory relief that both the judgment of Pickering J, in the review application, and the judgment of Van Zyl DJP, in the rescission application, ‘should be confirmed a nullity’ (the second nullity application), together with certain ancillary and alternative relief. The second nullity application came before Gqamana J who dismissed the application with costs on 2 June 2022. They sought leave to appeal against the

judgment

of Gqamana J, which was dismissed, with costs, on 3 August 2022, and an unsuccessful application for special leave to appeal to

the Supreme Court of Appeal followed. These events culminated in the order by Potgieter J on 16 May 2023 that declared the applicants

vexatious litigants.

[25] However, in the interim, on 28 March 2023, Ms Roberts of Gray Moodliar Attorneys, who had at all material times represented the NMBM in all these matters, forwarded a letter to the applicants, to which she attached the allocatur for the taxed costs that are challenged in the first request. She demanded payment of these costs. The demand prompted the applicants and Ms Gobo-Gcora to launch a further application (the allocatur application)[25] in which they sought to set aside the allocatur. The application was opposed. The allocatur application was unresolved at the time when Potgieter J declared the applicants vexatious litigants, however, as the application had been launched prior to the order it remained unaffected.[26]

[26] As I have said, the NMBM had been represented at all material times by Gray Moodliar Attorneys. During July 2024 Gray Moodliar Attorneys merged with Pagdens Attorneys and the merged firm continued to practice under the name and style of Pagdens Attorneys: Incorporating Gray Moodliar (Pagdens). On 29 July 2024 the erstwhile Acting City Manager issued a 'Resolution' to Pagdens that recognised the merger of the firms and purported to authorise Pagdens to continue to represent the NMBM in legal proceedings against the applicants which had commenced before the said date. Accordingly, Ms Roberts, for Pagdens, continued to represent the NMBM in the allocatur application.

[27] The allocatur application was set down for argument on 7 November 20024 and the notice of set down, reflecting Pagdens as the representatives

of the NMBM, was issued on 7 October 2024. On 17 October 2024, in compliance with the Eastern Cape Practice Directive paragraph

15A,[27] Ms Roberts filed the NMBM's practice note for the hearing, in the name of Pagdens. A supplementary practice note was filed on 30 October 2025, again in the name of Pagdens, and they represented the NMBM at the hearing on 7 November 2024. I shall revert to these events.

[28] Save for the ongoing allocatur application, relating to the same cost orders referred to in the first request, all was quiet after the order of Potgieter J, until January 2025, when a flurry of requests were submitted, pursuant to the order granted by Potgieter J, to institute legal proceedings. Three requests were received. One was referred to Gqamana J for his consideration and I considered the other two. I was unpersuaded that the intended proceedings were not an abuse of the process of court or that there were prima facie grounds for such proceedings. Hence, the applications for leave to appeal.

The first request for leave to institute proceedings

[29] The first request was formulated thus:

'Request to make an application for an interdict against the municipality from seeking any costs against us relating to the judgment of Honourable Justices Plasket and Eksteen in view of paragraph 29 of the Honourable Pickering J judgment dated 21 September 2017 under the same case number and the affidavit of Mr (sic) Roberts under the same case number.'[28]

As I have said, the request was not supported by evidence on oath and the proposed interdict was not formulated, but I shall assume that it is intended to seek an order that the NMBM be interdicted from executing in terms of the cost orders made in the striking out application, and the nullity application, or the further cost orders made in respect of the various applications for leave to appeal against these judgments.

[30] In order to succeed in the proposed interdict proceedings, the applicants would be required to establish:

(i) A clear right;

(ii) an injury actually committed or reasonably apprehended or an actual or threatened invasion of that right; and

(iii) the absence of similar protection by any other ordinary or suitable legal remedy.

[31] Neither of the cost orders, in the striking out application or the nullity application, have been set aside and they both remain in full force and effect. The legal validity of the striking out application was challenged in the nullity application and all avenues of appeal against that judgment have been exhausted. The NMBM is entitled to execute in terms thereof.[29] The first request was predicated on the findings of Pickering J at paragraph 29 of the review judgment.[30] But his findings in this paragraph are largely irrelevant to the orders made by Plasket J, in the striking out application, because he did not dismiss the application only on the basis of the applicants' standing. He considered the merits of the application and held that the application was ill-founded. Thus, he found, effectively, that even if the applicants did have locus standi and were joined, the application was to be dismissed as it lacked merit. Accordingly, the fact that Pickering J granted the applicants leave to join in the review application has no bearing on the correctness of the orders made by Plasket J in the striking out application. As Van Zyl DJP explained, Pickering J did not find that they were necessary parties to the litigation and his finding does not establish a non-joinder in either the striking out application or the nullity application.

[32] That brings me to the content of the application for leave to appeal. The notice in the application for leave to appeal constitutes only argument. The 'grounds of appeal' make no reference at all to paragraph 29 of the judgment of Pickering J in the review application. The thrust of the argument now was directed only at the merits of the striking out application, and it was contended that the notice of motion in the review application had been fatally defective because it did not contain a prayer that the conduct of the public protector was invalid for being inconsistent with the Constitution.[31] Accordingly, it was argued that the striking out application ought to have been upheld, with the result that the judgment in the striking out application, and the nullity application, are nullities for want of compliance with a mandatory constitutional requirement.

[33] The difficulty with this argument is that the review application did not serve before Plasket J in the striking out application. What was before him was an application launched by the applicants herein, and Ms Gobo-Gcora, who had sought to prevent the review application from being heard. In application proceedings the affidavits fulfil the role that is played by both pleadings and evidence in action proceedings. The applicant is required, in his founding papers, to make out the case that he intends to advance. The purpose is to define the issues so as to inform the other side of the case that it is required to meet.[32] It is not only for the benefit of the other side, but for the court, and any subsequent court of appeal, whose duty it is to adjudicate on those disputes and only those disputes.[33]

[34] As I have said, the applicants in the striking out application raised two grounds that they relied on. The respondents were called upon to meet the case advanced. Plasket J adjudicated the matter on that basis, and all the costs incurred in the striking out application arose as a result of those two disputes raised by the applicants. Section 172(1)(a) of the Constitution was not raised as an issue in either the striking out application or the nullity application. Nor did the applicants rely on the section in their various applications for leave to appeal. It simply had no bearing on the cost order that are now contested.

[35] The history of the matter is set out earlier. An application for leave to appeal against the judgment in the striking out application was refused and not pursued further. The judgment was challenged, unsuccessfully, in the nullity application, and all channels of appeal against that judgment have been exhausted. These matters have now been litigated to finality. In *Minister of Justice v Ntuli*[34], Chaskalson P emphasised:

‘The principle of finality in litigation which underlies the common law rules for the variation of judgments and orders is clearly relevant to Constitutional matters. There must be an end to litigation ... ’

The end has been reached in both the striking out application and the nullity application.

[36] I have given careful consideration to all the arguments raised before me and, for the reasons set out in my ruling and in this judgment, the proposed interdict proceedings, in my view, constitute an abuse of the process of court and have no prospect of success. Accordingly, even if the rulings were appealable, the applicants have demonstrated no clear right to found an interdict, and I do not consider that there is a reasonable prospect that another court would come to a different conclusion in respect of the proposed interdict proceedings. I turn to the second request.

The second request for leave to institute proceedings

[37] The second request was formulated as follows:

‘Request for permission to institute enforcement proceedings relating to mediation outcomes in KwaNobuhle area 9 and 10 housing projects and to compel the second respondent to release funds for work done, which it has withheld.’[35]

[38] Neither the cause of action nor the relief that applicants intend to seek have been properly explained in the request. However, as far as it may be gleaned from the material presented with the second request, it seems to me that the proposed litigation seeks payment of the same money referred to in paragraph 9.1.1 and 9.1.2 of the public protector’s original remedial action[36], just under a different guise. I do not intend to deal herein with all the arguments raised in the application for leave to appeal and I shall confine myself to those that I consider to be material. As adumbrated earlier, clause 6.3 of the main contract provided that the appointment of a subcontractor shall not imply a contract between the employer and the subcontractor, or responsibility or liability on the part of the employer to the subcontractor. It was the obligation of the contractor, WK, to perform in terms of the

contract and it was liable for the acts, defaults or neglects of any subcontractor. During the course of the performance of the contract disputes arose between WK and the NMBM relating to amounts due by WK to the close corporation, for work performed by it in terms of the subcontract. The disputes were referred to a mediator in terms of clause 58 of the main contract[37] for mediation between the NMBM and WK[38]. The close corporation was not a party to the mediation and the jurisdiction of the mediator extended only to disputes between WK and the NMBM, as circumscribed in clause 58 of the main contract[39]. In respect of some of the payments that WK had claimed in the mediation from the NMBM it had submitted the invoices, together with the motivation in support of the claims, that it had received from the close corporation in order to establish its entitlement to payment from WK. Accordingly, it presented the claims that had been made by the close corporation against WK in order to justify WK's claims against the NMBM.

[39] In respect of this approach the mediator commented:

'The contractor WK has submitted claims A-G. These are claims which he has submitted, quite properly, on behalf of his subcontractor GGC (the close corporation), as if he were claiming himself. This is quite normal procedure. There is no other way to deal with the matter.'[40]

He also expressed his opinion in respect of the validity and extent of these claims, and where he upheld claims, he considered that they were payable to WK, based on the claims made by the subcontractor against WK.

[40] Thus, in arriving at his conclusions the mediator noted:

'The Contract is between the NMBM and WK. There are no third parties to the Contract. A subcontract agreement exists between WK and Gobo-Gcora construction (GGC), which is of no concern to the NMBM or the Mediator. ... As far as the Mediator is concerned the NMBM is a Developer who has contracted WK to construct services and build houses for it. How the Developer financed or intended to finance the Contract is not the concern of WK or the Mediator unless the Contract specifically makes it a concern, which as far as the Mediator can see it does not.'[41]

[41] Later, the mediator reiterated his opinion in respect of the invoicing methodology and motivation when considering, inter alia, a claim for additional expenses due to price increases as a result of delays in handing over possession of the site. He recorded:

'What contract the Contractor had with the subcontractor, Gobo-Gcora Construction, is not known to the Mediator, nor is he or the employer concerned with what is a private subcontract outside of the scope of the Contract. If the Contractor has not passed the Contract Price Adjustment ... on to his subcontractor then that's a matter between the Contractor and the subcontractor and beyond the jurisdiction of the Mediator.'[42]

[42] In each case where the mediator expressed an opinion that a particular claim submitted 'on behalf of' the close corporation was payable he found it to be payable to the contractor,[43] not to the subcontractor.

[43] The mediation in respect of area 9 was completed in November 2011 and the mediator's written opinion is dated 7 December 2011. In support of the settlement agreement reached the applicants have annexed a letter directed to the close corporation on 12 January 2012 by Manong and Associates (Pty) Ltd (Consulting Civil, Structural and Developmental Engineers). The letter records that the final agreement had been reached and it concludes by recording:

'Please note that because WK Construction was the main contractor, payment will be made to them. You thus need to liaise with WK Construction for payment of what is due to you.'

[44] The mediation in respect of area 10 was completed and agreement reached on 19 January 2012. On the same day the project engineer addressed WK to record the agreement that the NMBM were in agreement with the mediator's opinions number 2 and 3 'as presented by him' and have agreed to settle all claims specifically dealt with by opinions 2 and 3, in full and final settlement of all claims on this project.

[45] On the same day, a separate agreement, that is annexed to the second request, was concluded between WK and the close corporation in respect of area 10. The agreement was headed 'Mediation Agreement' and recorded:

'Subsequent to our meeting of this morning attended by the employer and the engineer we record the agreements reached at the meeting:

1. With respect to all the mediator's opinions given on area 10;

1.1 The employer (NMBM) accepted all the mediator's opinions as given. The contractor (WK) accepted all the mediator's opinions as given.

2. We further record that prior to the above acceptances GGC (the close corporation) had reservations on three of the mediator's opinions given with respect to claims entered by GGC via WK.

2.1 After private discussion between WK and GGC consensus was reached on the three opinions on which GGC had reservations: ...'

[46] The mediation agreement was signed on behalf of WK and by Mr Gcora and Ms Gobo-Gcora on behalf of the close corporation. The NMBM was not a party to the agreement.

[47] Thus, the opinion of the mediator favoured the close corporation, but neither the opinion, nor the acceptance thereof, created any liability on the part of NMBM to the close corporation, nor did it create rights in favour of the close corporation. The rights and obligations of the respective parties were regulated by the terms of their respective contracts.

[48] That brings me to the findings of Pickering J in the review application, to which I have referred in my ruling. Pickering J had emphasised that there was no contractual nexus between the applicants and NMBM and he noted that if any amounts were due to the close corporation it was the fault of WK, with whom the close corporation enjoyed privity of contract. This was the ratio for the judgment in the review application and for the concession made by the public protector. It follows that

the applicants could also not obtain any rights against the NMBM from the mediation between WK and the NMBM, conducted in terms of the main contract. As I have said, the settlement agreements accepted the opinions of the mediator ‘as presented by him’. His opinions, as presented, found certain payments were due to the contractor, WK, not to the close corporation. In the review application Pickering J recorded the undisputed evidence before him that the NMBM had paid to WK all money due to it. Accordingly, they had honoured all their obligations arising from the mediation.

[49] In his heads of argument in the application for leave to appeal Mr Gcora submitted that I had erred in relying on these findings of Pickering J because, so the argument went, the Constitutional Court had already disposed of the issue of a contract in cases arising out of state subsidies. He referred me to *KwaZulu-Natal Joint Liaison Committee v Member of the Executive Council, Department of Education, KwaZulu-Natal and others (Centre for Child Law as amicus curiae)*.^[44] But I do not think the case is authority for the argument. In *Joint Liaison Committee* the MEC had issued a notice to independent schools advising them of the approximate funding levels that would be provided to them as subsidies for 2009/2010. They had accordingly relied on the expectation in arranging their financial affairs for the said

period. In May 2009, after the first payment was already due, they were advised to expect a cut in subsidy, but not exceeding 30% of their current subsidy allocation. The applicant in that case, an association of independent schools, then sought to enforce what it called ‘promises’ made to them, notwithstanding that there had been no bilateral contract. The Constitutional Court held that the particular setting in which the undertaking had been given to them indicated that it was a promise seriously given, in the expectation that it would be relied upon, and that payment in terms thereof would be forthcoming. That is a far cry from the facts set out in this case. Here, there is no nexus between the NMBM, or the MEC for Human Settlements, and the applicants. There has been no allegation of any undertaking, or promise, given to the applicants by either of them, nor that the close corporation had placed any reliance on such an undertaking. In this case, at best, the MEC had given an undertaking to the NMBM upon which the NMBM was entitled to rely. There is no suggestion of any undertaking given by the NMBM to the applicants. On the contrary, the express terms of the main contract stipulated that it incurred no liability to the close corporation.

[50] As the history demonstrates, it was held in the review, and admitted by the public protector, that the applicants had its contract with WK and had to look to them to recover what was due to it. That, as I have said, was the ratio of the judgment and the concession by the public protector. All appeal channels in respect of the judgment of Pickering J have been exhausted.

Attempts to rescind the judgment or to nullify it have failed, and there is no such attempt pending. The proposed litigation is simply another attempt, under a different guise, to recover the same money from the municipality which the judgments have held that they are not entitled to. On the undisputed evidence in the review application, all that became due to WK pursuant to the mediation was paid.

[51] As adumbrated earlier, the relief that the applicants would seek in the proposed litigation has not been formulated and I am unable to discern what the intended cause of action would be. It cannot be a contractual claim, as the close corporation were not party to the main contract. Ms Olowookorun was unable to direct me to any apparent cause of action that could be gleaned from the request submitted, but she argued that a new contract was created between the close corporation, WK, and the NMBM by the acceptance of the mediator's opinions. The argument is not born out by the documentation. The terms of the respective settlement agreements have been discussed earlier. I do not consider that there is a reasonable prospect that another court would come to a different conclusion.

[52] I concluded in my ruling that the contractual issue was dispositive of the request, but even if I had erred in respect of the contract, I considered that any claims to which the close corporation may have become entitled to as a result of the mediation, have, prima facie, since become prescribed. By virtue of the conclusion that I came to in respect of the contractual relationship, it is not strictly necessary to address this issue further. However, Ms Olowookorun, in the application for leave to appeal, has contended that I may have erred in coming to that conclusion. In doing so she has referred me to the provisions of the Prescription Act.[45] Section 17(1) thereof provides that a court shall not of its own motion take notice of prescription. The provision is not contentious, but, as I have said, where a judge in chambers considers a request in terms of the Act he does not sit as a court. He is not adjudicating a dispute between two parties. He is required to assess whether the vexatious litigant has discharged the evidential burden to establish that he has a bona fide claim and whether there are, prima facie, grounds for the proposed litigation. The latter requires an assessment of whether the litigation has any reasonable prospect of success. Where a complete defence to the claim is readily available to the proposed defendants, I consider that it must come into play in this assessment.

[53] Ms Olowookorun further contended that construction claims do not prescribe until and unless a final account, or a final payment certificate, has been issued. She has referred me in this regard, amongst others, to the decision of the Supreme Court of Appeal in *Martin Harris & Seuns Ovs (Edms) Bpk v Qwa Qwa Regeringsdiens; Qwa Qwa Regeringsdiens v Martin Harris & Seuns Ovs (Edms) Bpk* 2000

(3) SA 339 (SCA).

[54] When prescription commences to run in a contractual matter depends upon the terms of the contract. *Martin Harris & Seuns* was decided on the terms of the particular contract. However, it is generally correct that construction contracts, by their nature, are said to be entire contracts. A contract is said to be an entire contract when the complete fulfilment of the promise by either party is a condition precedent to the right to call for the fulfilment of any part of the promise by the other party. Thus, in a construction contract, where the contract provides for interim payments, upon payment certificates being issued by the engineer, such payments usually constitute advances on the contract price. The contract price becomes payable when the final payment certificate has been issued in terms of the contract. The difficulty for the applicants in the present matter is that they were not parties to the contract. Their rights, if any, arise from a different agreement with WK. Thus, even if the mediation process had established rights of action against the NMBM, which it did not do, it could relate only to the particular claims considered by the mediator in respect of work performed on behalf of WK, in terms of the subcontract, prior to the settlement on 19 January 2012. Accordingly, having given careful consideration to these submissions I remain unpersuaded that the intended litigation is not an abuse of the court process or that there is any reasonable possibility of ultimate success.

[55] There remains one aspect arising from the application for leave to appeal that requires attention. It was argued that I had omitted to make a ruling in respect of the relief sought against the MEC for the Department of Eastern Cape, Human Settlements. There are two responses to the attack. First, the order of Potgieter J relates only to litigation against the NMBM and the applicants do not require leave to litigate against the provincial government. Second, on a reading of the request for leave to institute proceedings the relief sought against the MEC is entirely dependent on the applicants obtaining leave to litigate against the NMBM. I am unable to find any allegation in the request, or the argument in support thereof, that suggests any

independent cause of action against the MEC. There is no contract with the MEC, and, as I have said there is no allegation of any

undertaking or promise made by the department to the applicants. What the MEC had approved was funding to the NMBM to pay for the housing project. That creates no nexus with the applicants. The applicants suggested in the second request that they would be entitled to payment directly from the MEC, if successful in the proposed litigation, by virtue of s 38(1)(f) of the Public Finance Management Act, 1 of 1999. But the submission is unsound. Section 38(1)(f)

provides for the accounting officer of the department to settle all contractual obligations and pay all money owing, including intergovernmental claims. It had no contract with the applicants, nor was any money owing to the applicants by it. At best they may have been bound to the NMBM in terms of its undertaking to them. But that cannot assist the applicants.

Accordingly, in my view, the applications for leave to appeal must be dismissed.

Costs

[56] As recorded earlier, the NMBM was cited as a respondent in both applications and they entered an appearance to oppose the applications for leave to appeal. In view of the longstanding propensity of the applicants to litigate, repeatedly, in respect of the same issue, over and over again, I consider that it was a prudent step for them to have taken and that they should not be out of pocket as a result of their endeavours to protect their interests. However, I do not consider that the applications justified the employment of two counsel.

[57] In respect of the first request a further issue has arisen that may have an effect only on the cost order. On 29 January 2025 Mr Gcora delivered a notice in terms of rule 7 of the Uniform Rules of Court to challenge the authority of Pagdens to act in case number 1414/2016 and 992/2016. It is not entirely clear what the challenge was directed at as there was no litigation pending under either of these case numbers at the time. As I have said, the allocatur application was the only live dispute at the

time and it was launched under a separate case number. Nevertheless, following the application for leave to appeal, on 7

February 2025 Pagdens entered an appearance to oppose the application. Ms Olowookorun directed a letter to Pagdens on 20 March 2020 requesting Pagdens to provide them with a copy of the authority to represent the NMBM. Ms Roberts responded on the same day. She annexed the resolution to which I have referred earlier, together with a further resolution received from the then City Manager dated 29 November

2024. She then recorded:

‘Without prejudice to our rights to contend that your Rule 7 Notice is late and requires the leave of the Court before it can be formerly served and filed, in order to avoid any dispute, we enclose the Acting City Manager’s Resolution dated 29 July 2024 and 29 November 2024.’

[58] Ms Olowookorun did not accept that the resolutions were adequate to establish the authority of Pagdens and argument was addressed to me from the bar on this issue. On the view that I have taken of the matter it is not necessary to resolve this dispute.

[59] The anterior question is whether the challenge has been properly made in terms of the provisions of the rule. Rule 7(1) of the Uniform Rules provides that the authority of anyone acting on behalf of a party may, within 10 days after it has come to the notice of a party that such person is so acting, or with the leave of the court on good cause shown at any time before judgment, be disputed, whereafter such person may no longer act unless he has

satisfied the court that he is authorised so to act, and to enable him to do so the court may postpone the hearing of the action or application.

- [60] The effect of the rule is that a litigant seeking to challenge the authority of any person acting on behalf of a party is entitled, as of right, to deliver his notice within 10 days of becoming aware of the representation. In the event that a litigant has failed to deliver the notice within the stipulated period they may nevertheless, with leave of the court and on good cause shown, be permitted to do so at any later stage prior to judgment. In Janse van Rensburg[46] a Full Court in the Western Cape explained that the subrule demands that the challenge be made within 10 days, because a delay in challenging the authority is ‘inimical to the efficient administration of justice’, and that such challenges to the authority of an attorney to represent a litigant, ‘if they are to be raised at all, should be raised promptly and at the earliest opportunity’.
- [61] Accordingly, it was incumbent upon the applicant to deliver their challenge to the authority within 10 days of becoming aware of Pagdens acting in the litigation in respect of the cost orders. The history of the matter demonstrates that Pagdens have been so acting since July 2024. The applicants have not explained when they became aware of the fact that Pagdens were acting on behalf of the NMBM nor have they given any explanation for delay in bringing their challenge, but, at best for the applicants, the notice of set down in the allocatur application was delivered on 7 October 2024. The notices filed by Pagdens and the date of the hearing are set out earlier. The rule 7(1) notice was delivered on 29 January 2025, more than 3 months after receipt of the notice of set down in the allocatur application.
- [62] Having been alerted to the terms of the rule the applicants made no attempt to apply for condonation for the late filing of the notice nor did they apply for leave, on good cause, to bring a late challenge. [47]
- [63] In the result, the applications for leave to appeal in respect of both the rulings are dismissed with costs, such costs to be limited to the costs of one counsel to be taxed on scale B.

J W EKSTEEN

ACTING DEPUTY JUDGE PRESIDENT OF THE HIGH COURT

Appearances:

For Applicants: Ms Olowookorun

Instructed by: Bukky Olowookorun Attorneys

GQEBERHA

For Respondents

in the interdict

application:

Adv Rorke SC and Adv Rawjee

Instructed by: Pagdens Attorneys

in the enforcement

application:

Adv Ronaasen SC and Adv Cetywayo

Instructed by: Mc Williams & Elliot

GQBERHA

Date Heard: 24 March 2025

Date Delivered: 01 April 2025

- [1] The first and second applicants in the said application were Sipho Gcora and Kuselwa Gobo-Gcora, respectively and the third applicant was Gobo-Gcora Construction and Project Management CC. The first respondent was the Nelson Mandela Bay Municipality.
- [2] The ruling relates to the first request that is more fully set out below.
- [3] Beinash and Another v Young and Others 1999
- (2) BCLR 125 (CC).
- [4] Beinash para 16.
- [5] Beinash para 15.
- [6] Beinash para 15.
- [7] Beinash para 19.
- [8] Beinash para 20.
- [9] Beinash para 20.
- [10] Beinash para 13.
- [11] See, in respect of a ‘bona fide defence’, Silverleaf Pastry and Confectionery Co. (Pty) Ltd v Joubert and Another NNO 1972 (1) SA 125 (C) at 129; and He & She Investments (Pty) Ltd v Brand NO and Others 2019
- (5) SA 492 (WCC) at 497B.
- [12] See Breitenbach v Fait SA (Edms) Bpk 1976 (2) SA 226 (T); Standard Bank of SA Ltd v Friedman 1999 (2) SA 456 (C) at 462G; confirmed in Friedman v Standard Bank of SA Ltd 1999 (4) SA 928 (SCA) at 938D-H.

[13] See, inter alia, *Shepstone v Shepstone* 1974 (2) SA 462 (N) at 467; *Citibank NA, South Africa Branch v Paul NO and Another* 2003

(4) SA 180 (T) at 200J-201A; and *He & She Investments* at 497B-C.

[14] See *Zweni v Minister of Law and Order* 1993 (1) SA 523 (A) at 532F-533F.

[15] Superior Court Act 10 of 2013.

[16] *Gobo-Gcora Construction and Project Management CC and Others v Nelson Mandela Bay Municipality and Others* (Case No. 992/2016) (delivered on 21 September 2017).

[17] Case No. 992/2016 (delivered 16 April 2019).

[18] Case No. 1414/2016 and 992/2016 (delivered 16 May 2023).

[19] Quoted at para 4 of the judgment of Pickering J.

[20] Clause 6.6 of the General Conditions of Contract, annexed to the applicants' second request, confers on the employer an

entitlement to make payment directly to a subcontractor under certain circumscribed circumstances, but it creates no obligation

for any contractor, nor any rights for a subcontractor.

[21] The main contractor, WK, was not registered as a 'home builder' as defined in the Housing Consumers Protection Act, 95 of 1998, and should therefore have been disqualified.

[22] The complainant was the close corporation.

[23] Section 41 is concerned with intergovernmental relations and disputes. Section 41(3) provides: 'An organ of state involved in an intergovernmental dispute must make any reasonable effort to settle the dispute by means of mechanisms and procedures provided for that purpose, and must exhaust all other remedies before it approaches a court to resolve the dispute'.

[24] Paragraphs 29 in the review judgment reads: 'In the broader interests of justice I considered it appropriate that he and Ms Gobo-Gcora be joined as respondents in case no 1414/2016, despite their failure to have applied for such joinder at an earlier stage of the proceedings; that regard therefore be had to the affidavits filed by them prior to their joinder; and that Mr. Gcora be permitted to address me on the various applications filed by him, Ms Gobo-Gcora and the CC as well as on the merits of the review application.'

[25] The allocatur application was launched under case number 941/2023.

[26]

Judgment

in the allocatur application is currently pending.

[27] Paragraph 15A of the Eastern Cape Practice Directives provides: ‘(a) The parties to an opposed motion shall not later than 8 days before the hearing of the matter file a Practice Note which shall set out-

(i) the names to the parties to the application, the case number and its number on the roll; (ii) the name of each party’s legal representative appearing, whom they represent and their cellular and landline numbers; (iii) a description of the nature of the dispute; (iv) the issue(s) to be decided;

(v) ...’

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(iii) a description of the nature of the dispute;

(iv) the issue(s) to be decided;

(v) ...’

[28] The first request is referenced under case number 1414/2016.

[29] See MEC for Economic Affairs, Environment and Tourism v Kruizenga and Another 2008

(6) SA 264 (Ck) at 288B-D; E- F; and G-H 189A; and Department of Transport and Others v Tasima (Pty) Ltd 2017

(2) SA 622 (CC) at para 190 and 191.

[30] The paragraph is quoted in full in fn 24 above.

[31] See s 172(1)(a) of the Constitution.

[32] South African Police Service v Solidarity obo Barnard 2014 (10) BCLR 1195 (CC).

[33] Molusi and Others v Voges NO and Others 2016 (3) SA 370 (CC); Fischer and Another v Ramahlele and Others 2014 (4) SA 614 (SCA) para 13; and Barkhuizen v Napier

[2007] ZACC 5; 2007 (7) BCLR 691 (CC) para 39.

[34]

[1997] ZACC 7; 1997

(3) SA 772 (CC) at para 29.

[35] The second request reflects no case number of this court, but is referenced under ‘CCT case number CCT 249/2024.’

[36] See para 15 above.

[37] The relevant portion of the main contract was annexed to the request.

[38] Clause 58, which provides for mediation, is an integral part of the main contract. It stipulates that it is severable from the remainder of the contract and remains valid and binding on the parties to the contract even where it may be found that the contract is void or voidable.

[39] Clause 58 of the main contract is annexed to the second request.

[40] Mediator’s opinion dated 4 August 2011.

[41] Mediator’s opinion dated 4 August 2011 at p1.

[42] Mediator’s opinion dated 17 October 2011.

[43] Mediator’s opinion; (i) dated 17 October 2011 – Claim B, Claim C; (ii) dated 26 October 2011 – Claim A, Claim C, Claim 2 (extras for Blockwork); and (iii) dated 7 December 2011 – Claim 3.

[44] 2013(6) BCLR 615 (CC) at para 48.

[45] Section 17(1) of the Prescription Act, 68 of 1969.

[46] Janse van Rensburg v Obiang and Another (unreported, WCC case number A338/2018, delivered on 10 May 2019 at para 17).

[47] See Kaap-Vaal Trust (Pty) Ltd v Speedy Brick & Sand CC (unreported, GP case number 23143/2020 dated 18 October 2021) at paras 17 – 20.

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Prepared on 10 October 2026 · Esheria