

SOUTH AFRICA / JUDGMENT

Independent Development Trust (IDT) v Bakhi Design Studio CC and Others [2023] ZAGPPHC 363; 033351/2023 (12 May 2023) [2023] ZAGPPHC 363

COURT

North Gauteng High Court, Pretoria

BEFORE

EC Labuschagne

CASE / FILE NUMBER

033351/2023

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IN

THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION,
PRETORIA

Case

No: 033351/2023

(1)

REPORTABLE: NO

(2)

OF INTEREST TO OTHER JUDGES: NO

(3)

REVISED: YES / NO

In

the matter between:

INDEPENDENT
DEVELOPMENT TRUST (IDT)
Applicant
and
BAKHI
DESIGN STUDIO CC First
Respondent
ADV
TERRY MOTAU SC Second
Respondent
AFSA
Third
Respondent

JUDGMENT

[1] The Independent Development Trust (IDT) is a public entity listed in Schedule 2 of the PFMA. It awarded various contracts to the First Respondent over a number of years, in terms of which the First Respondent was appointed to render architectural services to national departments of government. The IDT launched an application in two parts. Part A serves before me on the basis of urgency. In terms thereof the IDT in essence seeks the suspension of arbitration proceedings between the Applicant and the First Respondent, currently underway and set down for 5 to 9 June 2023. In Part B the IDT seeks to self-review five decisions of the IDT appointing the First Respondent as principal consultant/project manager for the provision of architectural services and project manager services for various projects of the Department of Agriculture, the Department of Social Development, the Department of Education and the Department of Correctional Services.

1.1 The IDT and Bakhi Design Studio (“the First Respondent”) have had a contractual relationship since 2012/2013. On 11 April 2013 the IDT appointed the First Respondent as principal consultant/project manager for the provision of architectural services and project manager services in respect of the implementation of various projects of the Department of Agriculture. On 5 December 2013 the IDT appointed the First Respondent for similar services for projects of the Department of Social Development. On 23 January 2014 the IDT appointed the First Respondent for similar services for the projects of the Department of Education. The First Respondent was similarly appointed on 7 October 2014 for projects of the Department of Education. On 15 December 2014 the IDT appointed the First Respondent for similar services for projects of the Department of Correctional Services.

[2] Following a dispute between the IDT and the First Respondent, the latter instituted action proceedings against the IDT on 14 November

2018. Subsequent to a plea being filed, the parties agreed to have their dispute referred to an arbitrator and the Second Respondent was appointed under the auspices of AFSA, the third respondent.

[3] The IDT is an entity listed in National Legislation (Schedule 2 of the PFMA) and therefore falls within the definition of an organ of state in Section 239 of the Constitution. Self-review by organs of state is not conducted in terms of the Promotion of Administrative Justice Act, but in terms of the principle of legality (State Information Technology Agency SOC Limited v Gijima Holdings (Pty) Limited 2018(2) BCLR 240 (CC) at [38]).

[4] The First Respondent raised a point in limine regarding the citation of the Applicant. The contention is that as the IDT is a Trust, it can only act through its trustees, who have not been cited. The same issue served before the Supreme Court of Appeal in Tusk Construction Support Services (Pty) Ltd and Another v Independent Development Trust

[2020] JDR 0496 (SCA). The question to be decided was whether the summons launching legal proceedings by the IDT was a nullity, since it did not cite its trustees, or whether it could be cured by means of an amendment.

[5] At para [25] the SCA endorsed Rogers J (as he then was) in *Hyde Construction CC v The Deuchar Family Trust and Another* 2015(5) SA 388 (WCC) where he said the following at para [47]:

“One commonly refers to a trust by name even though it is not a juristic entity. Given the legal character of a trust, the citation of a trust by name in litigation must, I think, be understood as a reference to the trustees for the time being of the trust, whoever they may be.”

[6] The IDT raised an amendment in reply. The amendment changes the citation of the Applicant to read “the trustees for the time being of the Independent Development Trust (in their capacity as the duly appointed trustees of the Independent

Development Trust) (Registration Number 669/91)”. The amendment causes no prejudice to the First Respondent. The First Respondent contended that the amendment had to cite the names of the individual trustees as applicants. I disagree. If there were a dispute about their identity, then evidence identifying the trustees could be presented. If there was a dispute regarding whether all the trustees were in support of the proceedings, then rule 7 could be utilised. In the registration of deeds in the names of trusts, it is common practice to register those properties in the names of “the trustees for the time being” of the Trust. Since trustees in a commercially active trust may change from time to time, it would be unduly formalistic to insist on trustees being cited by name in all instances. If there were questions about whether all the trustees are acting in concert, rule 7 could be utilised. I therefore grant the amendment.

[7] The crux of the Applicant’s contentions before me is that the judicial review of the decisions appointing the First Respondent are public law matters based on the principle of legality and that these are matters which cannot be decided in a private arbitration. It expressly relies on section 217 of the Constitution and the legality principle – i.e. in the rule of law provision arising from section 1(c) of the Constitution. The First Respondent contends that the jurisdiction of the arbitrator is sufficiently wide to cater for what amounts to a self-review based on legality. Assuming this to be so, the question is whether that is competent in law.

[8] In *Airports Company South Africa Limited v ISO Leisure* 2011(4) SA 642 (GSJ) the Court found that Section 7(4) of the Promotion of PAJA, exclusively to the jurisdiction of the High Court. Further, any municipality is precluded from submitting matters relating to the validity of their decisions to private arbitration (Section 109(2) of the Local Government: Municipal Systems Act 32 of 2000). The legislature excludes all PAJA reviews from arbitration and thereby reserves most actionable exercises of public power for the High Court to review. The legislature precludes municipalities from submitting disputes about the validity of their decisions to arbitration. What remains are reviews in terms of legality. Since municipalities cannot arbitrate on the validity of their exercises of public power, they are precluded from

arbitrating on what amounts to a legality review as well.

[9] Provisions like Section 7(4) of PAJA and Section 109(2) of the Municipal Systems Act manifest an underlying principle emanating from the constitution, namely that the Court is the arbiter of legality in constitutional matters. It is the arbiter of legality in all such legal proceedings.

[10] There are compelling reasons why the issue of legality is the sole preserve of the High Court.

10.1 In *Department of Transport and Others v Tasima (Pty) Limited* 2017(2) SA 622 (CC) the Constitutional Court stressed that the Court is the arbiter of legality.

10.2 Procurement of services in terms of Section 217 of the Constitution is a constitutional issue. Such procurement is required to be in terms of a system which is fair, equitable, transparent, competitive and cost effective. Any conduct which breaches one of these principles, has to be declared invalid in terms of Section 172(1)(a) of the Constitution. The Court then has a discretion to grant just and equitable relief in terms of Section 172(1)(b) of the Constitution. These are powers which, in terms of the Constitution, are the preserve of the Court.

10.3 The privatisation of litigation regarding legality would not pass constitutional scrutiny. The fact that arbitrations are private removes those proceedings into a private realm. In the High Court public participation in litigation on constitutional issues is fundamental. Notification of the public of the constitutional issue at hand takes place in terms of Rule 16A. This provides an opportunity to interested parties to apply to join the proceedings as *amici curiae*. There is no equivalent process for public participation in private arbitrations.

10.4 Further, the publication of judgments in Law Reports and online has the effect of notifying the general public of decisions relevant to constitutional matters. This in turn fosters public debate within the context of a constitutional democracy and has the effect of bolstering confidence in the Constitution. Public participation and general publication of arbitration awards are not features of private arbitrations.

[11] In the present matter the arbitration proceedings are less than a month away. It cannot be expected of the Applicant to participate in arbitration proceedings where it raises a legality challenge to the contracts referred to in Part B of the notice of motion. The IDT is funded with Taxpayer funds and such funds would be wasted in an arbitration in which the arbitrator does not have the jurisdiction to decide constitutional issues arising from the principle of legality.

[12] Section 6 of the Arbitration Act, 42 of 1965 provides that a Court may stay legal proceedings if the parties to the dispute have concluded an arbitration agreement, submitting their dispute to arbitration. The Court has the discretion to grant the stay and may do so on any terms it deems meet. The party opposing the stay application bears the onus of satisfying the Court that the matter should not be referred to arbitration as per the agreement it concluded with the other party. In this instance, the First Respondent has raised Section 6 as a defence and seeks such a stay. The onus is therefore on the Applicant to establish why the

stay must not be granted. (See: *Airports Company South Africa SOC Limited v ISO Leisure OR Tambo (Pty) Ltd and Another* 2011(4) SA 642 (GSJ) at para [71]. In that matter the Court stated the following at para [72]:

“In Inter-Continental Finance and Leasing Corporation (Pty) Ltd v Stands 56 and 57 Industrial Ltd and Another Botha J said:

[72] As far as the reasoning in the last-mentioned case is concerned, it appears to me, with respect, that it is unrealistic and inconvenient to expect a party who contends that impending arbitration proceedings will be invalid, to take part in such proceedings under protest, or otherwise to await the conclusion and then, if the result is against him, to oppose the award being made an order of court. Every consideration of convenience and justice, it seems to me, points to the desirability of allowing a party to seek an order preventing the allegedly futile proceedings before they are commenced. Moreover, as a matter of law, the probability of harm or injury seems to me to be present in the form of wasted and, to some extent at least, irrecoverable, costs incurred in relation to the abortive proceedings if they are ultimately established to have been such. In my view, therefore, the applicant is entitled to an order in terms of its main prayer.

[73] I believe that the dictum of Botha J is apposite to this matter. It makes little, if any, sense to stay the Rule 53 application in order to allow the parties to have the same issue decided at arbitration, only to find that the outcome of the arbitration is susceptible to being declared a nullity. The arbitrator has already pointed out that in his opinion arbitration proceedings are proscribed by Section 7(4) of PAJA. While I am mindful of the fact that he is prevented by law from deciding his own jurisdiction, and that he has yet to pronounce definitely on the issue, I am, in any event, firmly of the view that Section 7(4) of PAJA prohibits the dispute from being resolved by way of arbitration proceedings’.”

[13] The First Respondent opposed Part A of the relief by contending that the Applicant does not have a prima facie right. Adv Madonsela SC contended that the Applicant has pinned its colours to the mast by relying solely on the PFMA and non-compliance with its provisions, as the basis for the judicial review. Adv Mnisi for the IDT disputes that characterisation of its cause of action.

[14] Adv Madonsela contends that the PFMA is not applicable to a Schedule 2 entity. Further, insofar as the IDT has embraced the PFMA as part of its Trust Deed in para [7] of the Trust Deed, and thereby voluntarily submitted to it, such conduct would in itself be ultra vires. In this regard he relies on the judgment of *Excellerate Services (Pty) Ltd v Umgeni Water and Others* [2020] ZAKZPHC 41 (17 July 2020). In that matter the applicability of the deviation rules found in Treasury Regulation 16A.6.6 was under consideration. At para [60] the following is stated:

“Umgeni alleges that it has always been cognisant of the fact that it is ‘not required or obliged to comply with the stringent procurement processes contained in the Treasure Regulation 16A’ but has sought to comply with section 217 by passing resolutions and adopting supply chain management policies which in turn adopt TR16A principles and concludes that it is clear that Treasury Regulation

16A is voluntarily applicable to the Umgeni Water Board. ... I am in agreement with the submissions made on behalf of the applicant that the reference in the supply chain management policies to the Treasury Regulations can only be a reference to those Treasury Regulations applicable to Umgeni; to argue otherwise would mean that Umgeni has (itself) re-written the Treasury Regulations; that any adoption of a Treasury Regulation that is not applicable to Umgeni is ultra vires; that TR16A.6.6 is not available to the public sector; that public business entities may not utilise the regulation which is a policy laden decision of National Treasury and not open to debate in this forum nor is it open to Umgeni to simply disregard it."

- [15] In *OUTA National Treasury and Others v Opposition to Urban Tolling Alliance and Others* 2012(6) SA 223 (CC) the Constitutional Court highlighted the following at par [46]:

"If the right asserted in a claim for an interim interdict is sourced from the Constitution, it would be redundant to enquire whether the right exists."

- [16] The Applicant contends that its application for review is based on the rule of law, or the principle of legality as entrenched in Section 217(1) of the Constitution and other legislative frameworks which give effect to the provision. The founding papers confirm this.

- [17] The Applicant contends that the appointment of the First Respondent was unlawful for a number of reasons, a few of which include irrational conduct:

17.1 None of the directing minds of the First Respondent are registered as architects in terms of Section 18(1) of the Architectural Professions Act, No. 44 of 2000;

17.2 There was no appropriate bidding process as required by the competitiveness required in Section 217 of Public Procurement.

- [18] Adv Madonsela contended that it is not prima facie irrational to appoint a firm to render architectural services, when none of the directing minds of that firm is an architect. He contends that professional architects can be hired by such an entity to render architectural services. This, however, begs the question as to why the First Respondent was appointed in the first place to render architectural services if none of its directing minds is an architect.

- [19] While I make no finding on this topic, I leave it for the review court to decide it. I am satisfied that there is a prima facie case of irrationality that would warrant judicial review of the appointments. This irrationality flows from the facts and does not require consideration of the provisions of the PFMA or Treasury Regulations or their applicability.

- [20] If conduct is found to be unconstitutional, it must be declared invalid (sec 172(1)(a) of the Constitution). The doctrine of objective invalidity means that such conduct is invalid from inception. The court however has a discretion as to whether it will enforce this default position or not. a judge to craft a just and equitable remedy bound only by the Section 172(1) (b) of the Constitution to cater for the facts at hand. An arbitrator is bound by his mandate and does not have the discretion the Constitution affords a court in terms of sec 172(1)(b)- i.e. to craft a remedy bound only by justice and equity.

- [21] In *Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others* 2011(4) SA 113 (CC) the following was stated at para [84]:

“It would be conducive to clarity, when making the choice of a just and equitable remedy in terms of PAJA, to emphasise the fundamental constitutional importance of the principle of legality, which requires invalid administrative action to be declared unlawful. This would make it clear that the discretionary choice of a further just and equitable remedy follows upon that fundamental finding. The discretionary choice may not precede the finding of invalidity. The discipline of this approach will enable courts to consider whether relief which does not give full effect to the finding of invalidity, is justified in the particular circumstances of the case before it. Normally this would arise in the context of third parties having altered their position on the basis that the administrative action was valid and would suffer prejudice if the administrative action is set aside, but even then the ‘desirability of certainty’ needs to be justified against the fundamental importance of the principle of legality.”

- [22] The Applicant, if forced to continue with the arbitration, would face the risk of the wasting of public funds. Further, if its contentions in Part B were found to be correct, then the crafting of a just and equitable remedy in terms of Section 172(1)(b) would be necessary to determine the consequences and the way forward. This is not a jurisdiction which, can vest in an arbitrator. Even if the mandate were formulated in such broad terms, the issue of legality remains the sole preserve of the courts.
- [23] I am therefore satisfied that the Applicant faces the risk of irreparable harm if the arbitration were to continue.
- [24] When it comes to the balance of convenience, the need to ventilate a legality challenge before a court of competent jurisdiction weighs heavily. I am mindful of the First Respondent’s frustration, if not irritation, in having been persuaded by the Applicant to go to arbitration, only to have that arbitration undone by the current application. The public interest concerns arising from a legality challenge however weigh heavier than the parochial interests of the parties. A legality challenge, to my mind, needs to be ventilated in court proceedings. I am therefore also satisfied that the Applicant has no alternative remedy and is therefore entitled to an order staying the arbitration.

COSTS

- [25] The issue of costs is rarely urgent. In this instance there is some truth to the fact that the Applicant could have brought these at an earlier stage. Nevertheless, the short time periods involved are such that a review in the normal course would not have been competent. The Applicant would therefore not have obtained substantial redress in the normal course. A counterargument is that the application for a stay by the Applicant was inevitable, due to the legality principle lying up the core of the review proceedings. On balance, I am of the view that fairness dictates that the costs of this application be costs in the Part B proceedings.
- [26] I therefore make the following order:

1. The application is heard on the basis of urgency in terms of Rule 6(12) and the forms, service and time periods prescribed by the Uniform Rules of Court are dispensed with.
2. The arbitration proceedings between the parties are stayed pending finalisation of the review application envisaged in Part B.
3. Pending the finalisation of the review application in Part B, the Respondents are interdicted from proceeding with the arbitration proceedings between the Applicant and the First Respondent.
4. Costs of this application will be costs in the proceedings envisaged in Part B.

EC LABUSCHAGNE AJ

ACTING JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

Delivered: this judgment was prepared and authored by the judge whose name is reflected and is handed down electronically and by circulation to the parties/their legal representatives by email and by uploading it to the electronic file of this matter on Case lines. The date for handing down is deemed to be 12 May 2023.

APPEARANCES

FOR THE APPLICANT: ADV. J MNISI

ADV. D NAPO

FOR THE RESPONDENTS: ADV. TG MADONSELA SC

ADV. CM MLABA

HEARD ON: 10 MAY 2023

DATE OF JUDGMENT: 12 MAY 2023

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