

SOUTH AFRICA / JUDGMENT

Sokhani Development & Consulting Engineers (Pty) Ltd v Alfred NZO District Municipality (1254/2024) [2024] ZAECMKHC 44 (26 April 2024) [2024] ZAECMKHC 44

COURT

Eastern Cape High Court, Makhanda

BEFORE

Zono AJ

CASE / FILE NUMBER

1254/2024

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IN

THE HIGH COURT OF SOUTH AFRICA

(EASTERN

CAPE DIVISION, MAKHANDA)

CASE

NO:1254/2024

In

the matter between:

SOKHANI
DEVELOPMENT & CONSULTING
ENGINEERS
(PTY) LTD
APPLICANT
And
ALFRED
NZO DISTRICT
MUNICIPALITY
RESPONDENT

JUDGMENT

ZONO AJ:

INTRODUCTION

[1] This matter was set down on an urgent basis for hearing on 23 April 2024. The application is divided into two parts, namely, Part A and Part B. What was before court was Part A of the application, which was an urgent application seeking numerous interdictory relief.

[2] The relief in Part A of the application is couched in the following terms:

“1. That the applicant’s non-compliance with the rules relating to time periods, form and service for bringing the application is condoned and that the matter be heard as urgent in terms of Rule 6(12)(a) of the Uniform Rules.

2. That pending the determination of the relief sought in Part B hereof, the respondent be and is hereby:

2.1 interdicted and/or restrained and/or prevented from implementing the purported cancellation of the applicant’s appointment dated 23rd September 2023, read together with the Service Level Agreement concluded and/or entered into between the parties;

2.2 interdicting and/or restrained and/or prevented from appointing alternative service providers to render the services set out in the applicant’s letter of appointment dated 23 September 2023, read together with the Service Level Agreement concluded and/or entered into between the parties;

2.3 directed to allow and/or permit the applicant to perform its obligations in terms of the appointment letter dated 23 September 2023 read together with the Service Level Agreement concluded and/or entered into between the parties until all the contractual obligations arising thereto are performed; and

2.4 interdicted from withdrawing the project registration from the Provincial Department of Co-operative Governance.”

3. That the relief sought in paragraph 2 above shall operate as an interim order with immediate effect and shall continue to do so pending the finalization of the review proceedings in Part B thereof.

4. That the respondent and/or any person who unsuccessfully opposes the application be directed to pay costs of this application, which costs must be on punitive scale of attorney and own client.

5. Further and/or alternative relief.”

- [3] Part B of the application essentially deals with the review of the decision of the respondent to cancel applicant's appointment dated 23 September 2023, which appointment, so the argument goes, is pursuant to the Service Level Agreement concluded between the parties. The applicant as a consequence of the above seeks to be allowed or permitted to perform its obligations in terms of the appointment letter dated 23 September 2023 read together with the Service Level Agreement aforementioned. Punitive cost order is sought. The review application foreshadowed in Part B of the application is not before court for determination at this stage. Only interdictory relief sought in Part A is for determination. Part A is an application for interim interdict pending the final determination of Part B, which is a review application.
- [4] The application is opposed by the respondent and in so doing it has delivered its opposing affidavit. Thereanent to this application the respondent raises the following paraphrased points: Firstly, it challenges the urgency of the matter and contends that the matter lacks the necessary urgency. Secondly, the respondent complains about non-compliance with the provisions of Rule 41A of the Uniform Rules of Court. Thirdly and lastly, it contends that the applicant has failed to satisfy the requirements of the interim interdict. I hereinafter deal with the points raised.

Urgency

- [5] The respondent in its answering affidavit contends that the application is not urgent. In canvassing this point the respondent asserts as follows under the rubric "URGENCY":
- "11. The application is not urgent for a variety of reasons. The decision to appoint the applicant was one taken on the 26th March 2013 after the applicant became the preferred service provider through a tender process. This appointment consisted of three stages and the applicant had already been appointed to proceed and finalize the third and last stage as far back as 14 September 2018 for a period of five years.*
12. Any appointment after the one of the 14 September 2018, should have followed the Supply Chain Management process and the applicant cannot claim to have not been aware of the respondent's internal processes that had to be followed before it could be appointed to continue providing the same services for the third stage.
13. After all, the respondent can provide the basic services whilst attempting to correct the irregularities caused by the appointment of the applicant.
14. With regard to the salaries of the applicant's employees, the applicant cannot claim it was entitled to the monies that would have come about as a result of irregular appointment and invalid Service Level Agreement. All the monies due and payable to the applicant were paid by the respondent."
- [6] From these allegations, it is apparent that the point about the urgency of the matter deals with some allegations in the applicant's founding papers. I observed that this point is ineluctably bound up and intertwined with the merits of the case. However, the respondent

traces the urgency of this matter back from the stage of applicant's appointment on 26 March 2013 when the tender was awarded to the applicant. Alternatively, from 14 September 2018 which is allegedly the date of appointment to proceed with the final stage of the services. To bolster this point the respondent asserts that the applicant should have been aware that the respondent's internal processes were not followed.

[7] The applicant in its founding affidavit makes the following allegations:

"32. On the 7th of February 2024 the respondent forwarded to the applicant by email a letter of cancellation of its appointment. This letter purportedly

cancelling the applicant's appointment is dated 30 January 2024 but was only emailed to the applicant on the 7th of February 2024 at 10:46

42. The letter of cancellation was forwarded to the applicant by email on the 7th of February 2024. The applicant consulted its attorneys to handle this matter. Having consulted with the applicant's attorneys at the first available date being Monday, the 12th of February 2024 at 16:00. The applicant's attorneys thereafter forwarded a letter on the 14th of February 2024 by email to the respondent requesting further information as well as confirmation as to which letter of appointment

has been cancelled. Further information was sought as to precisely what supply chain processes were not followed. Thereafter, as no response was received to the letter of 14th of February 2024 a further letter was forwarded to the respondent on the 15th of February 2024 in which letter the applicant indicated that the cancellation was not accepted and that the cancellation of the appointment was wrongful, unlawful and fell to be reviewed and set aside. The applicant's attorney Mr Mathew Moodley subsequently

telephoned the Acting Municipal Manager who confirmed receipt of both letters.

44. I state that the need to bring an application to interdict the respondent from implementing the cancellation of the agreement pending a review of the decision to do so is a matter of crucial urgency for the reasons set out above. In particular, a pressing concern is the fact that the community that Mbizana requires urgent service delivery in respect of the processing of water which is a human right. The decision by the respondent to cancel the applicant's appointment has massive financial implications for the applicant and these implications are overwhelmingly obvious. There are labour complications involving possible retrenchments of staff members all of whom must be treated humanly and sympathetically by the applicant."

[8] The applicant continues to make submissions in the founding affidavit to the effect that if the interdictory relief sought in Part A of the application is not granted, the applicant faces a situation that, if it succeeds in Part B of the application, that may result in an undesirable consequence of having a hollow judgment in its favour.

- [9] In the replying affidavit the applicant alleges that it made out a case for hearing of the matter on a semi-urgent basis by the utilization of truncated time limits. The nub of the applicant's case on urgency is that this application was prompted by the letter of cancellation of its appointment dated 30 January 2024 that was delivered to the applicant on 7 February 2024. A submission was made on behalf of the applicant that this application was brought with necessary promptitude. I accept that the instant proceedings were triggered by the service of the letter of 30 January 2024 that was received by the applicant on 7 February 2024. Were it not for that letter these proceedings would not have been instituted.
- [10] This application was only brought on 28 March 2024. The last step taken by the applicant after the receipt of the cancellation letter was on 15 February 2024 when it demanded of the respondent to withdraw the cancellation letter before the close of business on Friday 16 February 2024. A threat of litigation was made in that demand that if the respondent failed to adhere to applicant's demand, this application would be brought.
- [11] During argument, applicant's counsel was invited to make submissions as to the steps taken between 16 February 2024, when it was clear that the respondent is not willing to adhere to the demand, and 28 March 2024 which is the date of institution of these proceedings. Put differently, the applicant was requested to account for the delay of approximately one and half month before institution of the present proceedings. No answer at all was given by the applicant to explain the delay.
- [12] It is well established that the applicant cannot create its own urgency by simply waiting until the normal rules can no longer be applied[1]. There are degrees of urgency and it is well established that applicants in urgent applications must give proper consideration to the degree of urgency and tailor the notice of motion to that degree of urgency. On this point Plasket AJ (as he then was)[2] held that:
- "[37] It is trite that applicants in urgent applications must give proper consideration to the degree of urgency and tailor the notice of motion to that degree of urgency.28 It is also true that when courts are enjoined by rule 6(12) to deal with urgent applications in accordance with procedures that follow the rules as far as possible, this involves the exercise of a judicial discretion by a court 'concerning which deviations it will tolerate in a specific case.*
- [38] it is not in every case in which the applicant may have departed from the rules to an unwarranted extent that the appropriate remedy is the dismissal of the application. Each case depends on its special facts and circumstances. This is implicitly recognised by Kroon J in the Caledon Street Restaurants CC case when he held – looking at the issue from the other perspective, as it were – that the 'approach should rather be that there are times where, by way of non-suiting an applicant, the point must clearly be made that the rules should be obeyed and that the interest of the other party and his lawyers should be accorded proper respect, and the matter must be looked at to consider whether the case is such a time or not."

[13] Notwithstanding applicant's failure to explain the delay between the 16th February 2024 and 28 March 2024, the applicant carefully characterises its application as a semi-urgent application. It further tailored its notice of motion in such a way that it is heard in approximately a month after its institution. Papers demonstrate that the respondent was served with the application papers on 4 April 2024 as the date of hearing thereof was on 23 April 2024. Sufficient time was given to the respondent to deal with the matter adequately. Accordingly, the respondent managed to deliver its comprehensive answering papers accompanied by its counter-claim. The applicant accordingly replied to the respondent's answering papers. No prejudice was alleged or contended for by the respondent. The matter is not extremely urgent, but sufficiently urgent to be heard on an ordinary motion court day, as it did.

[14] It is well established that in pronouncing on the issue of urgency the court exercises a wide discretion[3]. The following considerations are pivotal in the exercise of discretion: Firstly, whether the respondent can adequately present

its case in the time given; secondly, other prejudice to the respondent and the administration of justice; thirdly, the strength

of applicant's case and any delay in asserting its rights (self-created urgency)[4].

[15] I have dealt with the fact that the respondent adequately presented its case both on the papers and during argument in court. No prejudice alleged to have been suffered by the respondent as a result of time shortage. With regard to the strength of applicant's case, I will carefully deal therewith in the ensuing paragraphs when dealing with the respondent's submissions on applicant's prima facie right. I accordingly find in favour of hearing the matter as I have found that it possesses an attribute of a semi-urgent matter. In any event, no matter would have been finalized in a space of less than one and a half month, which is the time unaccounted for by the applicant, if the normal rules relating to time periods, form and service were to be applied[5]. Sympathy to the applicant and respondent's rights to present its case are evenly balanced[6].

[16] This brings me to the point relating to non-compliance with the provisions of Rule 41A of the Uniform Rules.

Non-compliance with Rule 41A of the Uniform

[17] The respondent complains that this application is premature as Rule 41A(2)(a) provides that in every application proceeding, an application must together with its notice of motion, serve on the respondent a notice indicating whether such applicant agrees to or opposes referral of the dispute to mediation. In the present matter the respondent complains that no such notice was provided. From the onset I must indicate that it was filed of record, but after this challenge had been raised.

[18] It is fitting to refer verbatim to the provisions of Rule 41A(2) of the Uniform Rules. The provisions provide that:

“(2)

(a) In every new action or application proceeding, the plaintiff or applicant shall, together with the summons or combined summons or

notice of motion, serve on each defendant or respondent a notice indicating whether such plaintiff or applicant agrees to or opposes

referral of the dispute to mediation.

(b) A defendant or respondent shall, when delivering a notice of intention to defend or a notice of intention to oppose, or at any time

thereafter, but not later than the delivery of a plea or answering affidavit, serve on each plaintiff or applicant or the plaintiff’s

or applicant’s attorneys, a notice indicating whether such defendant or respondent agrees to or opposes referral of the dispute

to mediation.”

[19] A clear reading of the provisions plainly demonstrates that they provide an equal election to the parties to seek to probe from each other whether they are desirous of resolving the matter by way of mediation. The parties enjoy the equal probe opportunity if they agree or oppose the mediation process. That probe occurs in the context of a litigation in the high court. The ordinary grammatical meaning of the words in the provision admits of no interpretation that they will result in a conclusion that, without notice in terms of Rule 41A the proceedings are premature. It is re-iterated that the engagement on mediation process occurs in the process and in the context of litigation[7].

[20] I am in agreement with Majiki J[8] that subrule 2(b) enjoins the respondent to also file its notice as to whether it agrees to or opposes referral of a dispute for

mediation. The subrule does not suggest that the respondent’s compliance is dependent on the applicant’s filing of a Rule 41A(2)(a) notice. I find that subrule 2(b) is a self-standing rule which is directed at the respondent. Accordingly, it cannot be said that the filing of respondent’s answering papers is premature because there was no notice in terms of Rule 41A(2)(b). That kind of interpretation can definitely result in absurdity[9]. Rule 41A(2)(a) and 41A(2)(b) are independent of each other.

[21] What is also clear in the provisions of Rule 41A(2)(b) is that if the respondent elects to serve a notice in terms thereof, it may do so before the filing of a plea or answering affidavit. That simply means that answering affidavit may be filed without that notice and if that happens the respondent or defendant is “ipso facto” barred from doing so. The respondent misses an opportunity to suggest to the applicant a resolution of the dispute by mediation once it files

its answering papers. By parity of reasoning, the applicant misses an opportunity to suggest to the respondent or probe to the respondent his or her attitude about the referral of the matter for resolution by mediation once it fails to file same at the prescribed time. This leads me to the conclusion that the provision of Rule 41A are not peremptory. Accordingly, they are not fatal to the proceedings. That of course is an interaction that takes place outside court in terms of which the parties seek to agree between themselves on mediation of their dispute[10].

- [22] There is an authority for proposition that parties are not compelled to mediation. It is not even a procedural requirement for validity of application or action proceedings. Rule 41A notices are exchanged on a without prejudice basis and need not be filed in court[11].
- [23] Mediation may be agreed upon even without notice, at the trial stage or during the hearing of the opposed matter, but with the leave of the court[12]. That demonstrates that non-compliance with the provisions of Rule 41A does not vitiate the proceedings.
- [24] Formalism in the application of the rules is not encouraged. Technical objections to less than perfect procedural steps should not be permitted, in the absence of prejudice to interfere with the expeditious and, if possible, inexpensive decision of cases on their merits[13]. Rules should be interpreted and applied in a spirit which will facilitate the work of court and enable litigants to resolve their disputes in a speedy and inexpensive manner as possible[14]. Rules of court are designed to ensure fair hearing and should be interpreted in such a way as to advance and not reduce the scope of the right to a fair trial entrenched in section 34 of the Constitution[15]. I accordingly find that the prematurity point based on Rule 41A raised by the respondent cannot be sustained and it must accordingly fail.
- [25] In addition to the above, this is an urgent application in terms of which the normal rules relating to time periods, form and service is requested to be dispensed with. The form complained of cannot be above substance[16]. Accordingly, it is inconceivable that Rule 41A can be applied in urgent applications especially for interim relief where the applicant

makes out a case that he has no other adequate alternative remedy available to it. In the whole tenor of its answering papers the

respondent does not allege that there is an alternative remedy available to the applicant. That invariably means that invocation of Rule 41A would be fruitless and amounting to putting the form above substance, a practice of which the courts are eschewed from doing.

- [26] The respondent, without relying on the answering papers, raised a related point in its heads of argument about non-compliance with clause 15.4 of the Service Level Agreement, which reads as follows:

“15.4 If the dispute has not been resolved between the parties within 30 days then the issue must be referred to a dispute resolution or to a mediator.”

- [27] This clause depends for understanding on clause 15.1 which reads as follows:

“15.1 If Sokhani Development and Consulting Engineers fails to comply with its obligations in terms of this SLA, ANDM, shall notify Sokhani Development and Consulting Engineers within 7 days of discovering that there has been such breaches.”

- [28] The clause deals with the escalation of disputes arising from applicant's failure to comply with its obligations in terms of the agreement or appointment.
- [29] This case is clearly not about applicant's failure to comply with its obligations, but about respondent's conduct of cancelling applicant's appointment. I find no merit in this argument and I therefore reject it.

Requirements of interim relief/interdict

- [30] The final point raised by the respondent in its papers in relation to the interim relief is that the applicant has failed to satisfy the requirements of the interim interdict. During hearing of the matter the respondent strenuously argued a requirement relating to applicant's rights, as I will demonstrate hereafter. The basis of the argument is that the underlying basis for applicant's rights is impugned as there is no lawful basis for a tender to have been awarded to the applicant or why the applicant was appointed. No supply chain management processes were followed. If one is not careful in dealing with this point as the respondent was arguing, it he may be tempted to or end up eventually dealing with the merits of the review application and pre-judging Part B of the application. It is so because the respondent contends that the applicant's rights emanated from the appointment, which the respondent submit that it was unlawful and no one, so the respondent submits, may be entitled to a benefit out of an unlawful enterprise. The rights sought to be protected in Part A hereof are interwoven if not the same as those require resolution in Part B.
- [31] It is prudent to look into the founding affidavit as it is to that affidavit that the court must look to understand what the applicant's case is; what rights the applicant is pursuing[17]. I do that hereafter.
- [32] The following allegations are made in the applicant's founding affidavit:

“36. The applicant most certainly does not find the unilateral cancellation of its appointment without any interaction between the parties, to be in order and rejects the cancellation which is totally unfounded, irrational and arbitrary.

37. At no stage has any authorised representative of the respondent called upon the applicant to provide its views or intentions in regard to the lawfulness or otherwise of the appointment and at no stage has the applicant ever been invited to a hearing or to provide input or to make representations in respect of any discussion of any nature relevant to the very far reaching decision to unilaterally cancel the applicant's appointment after the applicant has been carrying out its obligations to the full extent and to the highest special standard for a long period since the tender was awarded way back in 2013.

38. The principle of audi alteram partem has been entirely ignored and the respondent's conduct in cancelling the contract amounts to self-help. At no stage has the applicant been invited to a hearing on the issue, nor being afforded the opportunity of making any representations whatsoever."

[33] The applicant repeats the aforestated allegation in paragraph 41 of his founding affidavit but in different words. It refers to the rights it seeks to enforce as "its rights to procedural fairness" (that is to be heard and/or to make representations). It premised its application on the alleged violation of applicant's

administrative law right to procedural fairness. In paragraph 47 of the founding affidavit the applicant adverts the cancellation of appointment as administrative action.

[34] In the same paragraph 41 the applicant makes the following allegations:

"41. The following of the applicant's rights have been violated:

41.1

41.2 its contractual right to specific performance and/or to a mandamus as the case may be."

It is now apparent that in addition to administrative law right to procedural fairness, the applicant invokes its contractual rights. It is those rights that are alleged to have been violated.

[35] In its answering affidavit the respondent does not meaningfully deal with those pertinent allegations. There is no pertinent and meaningful denial by the respondent to these allegations. These allegations must be taken to have been admitted.

[36] In *Makhuvu & Others v Lukoto Bus Services (Pty) Ltd & Others*[18] the Learned Judge held as follows:

*"In the course of argument I put it to Counsel for the applicant that where the defendant is under a duty to admit or deny or confess and avoid a direct allegation, a reply that the allegations are taken note of would, in the circumstances, amount to an admission. See in this respect the case of *McWilliams v First Consolidated Holdings (Pty) Ltd* 1982 (2) SA (1) (A) at 10 E – D where it is stated that whilst "quiescence is not necessarily acquiescence" a party who does not make a firm repudiation of an allegation when bound to do so incurs the risk of an adverse inference being drawn against him. As to admissions, denials, confessions and avoidance in pleadings, See Rule 22(2) and 25(1) and as to affidavits in motion proceedings, see Rule 6(4)(d) and 6(4)(e). It is clear that affidavits really constitute both pleadings and evidence in support of the allegations made and the rules as to the pleadings should, to that extent, be applied to affidavits."*

I respectfully agree with the Learned Judge that a party who does not make a firm repudiation of an allegation when bound to do so incurs the risk of an adverse inference being drawn against him[19]. I accept applicant's allegations to have been admitted.

[37] The requirements which an applicant for an interlocutory interdict has to satisfy are the following[20]:

“(a) *prima facie* right;

- (b) a well-grounded apprehension of irreparable harm if the interim relief is not granted and the ultimate relief is eventually granted;
- (c) a balance of convenience in favour of the granting of the interim relief; and
- (d) the absence of any other satisfactory remedy.”

Prima facie right and irreparable harm

[38] The approach laid down by Clayden J[21] is as follows:

“The right to be set up by an applicant for a temporary interdict need not be shown by a balance of probabilities. If it is “prima facie established though open to some doubt” that is enough

The proper manner of approach I consider is to take the facts as set out by the applicant, together with any facts set out by the respondent which the applicant cannot dispute and to consider whether having regard to the inherent probabilities, the applicant, could on those facts obtain final relief at trial. The facts set up in contradiction by the respondent should then be considered. If serious doubt is thrown upon the case of the applicant he could not succeed in obtaining temporal relief, for his right, prima facie established may only be open to some doubt.”. But if there is mere contradiction or unconvincing explanation, the matter should be left to trial and the right be protected in the meanwhile, subject of course to the respective prejudice in the grant or refusal of interim relief.”

[39] I have already expressed myself on the existence of a right to fair administrative procedure and the contractual rights relied upon by the applicant and that the existence of those rights is not disputed by the respondent.

[40] Even at the level of legality review it is authoritatively required that there must be a rational connection between the means and ends. The means is everything the public officials does to arrive at a decision. The means is a process employed by a public functionary or administrator to arrive at a decision. The notice or a process of calling upon the applicant to make representation is a process (means) necessarily to have been followed to ensure the fairness of the decision. Both the process for which the decision is made and the decision itself must be rational[22]. Without a rational process there can be no rational decision.

[41] Khampepe J in the Constitutional Court[23] made the following dictum:

“[86] The rule of law does not permit an organ of state to reach what may turn out to be a correct outcome by any means. On the contrary, the rule of law obliges an organ of state to use the correct legal process.”[24]

It is plainly the legal position that an administrator or public official or functionary is enjoined to embark on a process before the decision is taken. He or she cannot just land without following the due process.

- [42] It is a common cause that on 7 February 2024 a cancellation letter dated 30 January 2024, cancelling applicant's appointment as a service provider was communicated to the applicant. The cancellation was not preceded by a notice. A right to just administrative action is a constitutional right^[25] and is sacrosanct. The effect of that cancellation letter was to take away the enjoyment of the contractual rights that existed in favour of applicant as a result of the appointment and Service Level Agreement concluded by the parties. It is apparent from the respondent's papers that once those rights are taken, they will never be returned as the respondent's ultimate aim is to appoint another service provider. Therefore, I am satisfied that the applicant may suffer an irreparable harm, even if it succeeds in Part B of the application. That success would be meaningless to the applicant as the horse will have been bolted.
- [43] The applicant makes a point that its employees who are breadwinners at home will tremendously suffer an irreparable harm as they will have to be laid off for operational reasons. It cannot meaningfully be disputed that employees are assets and constitute human capital of every organization. Therefore, the cancellation of that huge contract that has taken so long from March 2013 to the date of cancellation would, costs applicant the assets and human capital in the form of its valuable employees. The cancellation occurs at a time when two of the three stages of the project had already been finished.
- [44] I further observe that the cancellation occurs at a time when applicant was constantly demanding payment for an already performed work. I say this without deciding it that the cancellation appeared to be a witch hunt. It is undisputable that the applicant exhausted the only avenue available to it by seeking an amicable resolution of the dispute by requesting the respondent to withdraw the cancellation letter but to no avail. This application was a measure of last resort. Then the applicant has no adequate alternative remedy available to it.
- [45] The respondent, as a sigh of despair, sought to rely on the provision of section 82 of Local Government: Municipal Systems Act 32 of 2000 which deals with the internal appeals within the Municipality. The respondent did that without any facts having pleaded for proper invocation of those provisions. Fortunately, that argument was properly jettisoned upon concession that it is impermissible to argue a case without it having been foreshadowed in the papers.
- [46] The concession was well made because Theron JA^[26] had this to say:
- "[13] Turning then to the nature of civil litigation in our adversarial system it is for the parties, either in the pleadings or affidavits, which serve the function of both pleadings and evidence, to set out and define the nature of their dispute and it is for the court to adjudicate upon those issues. That is so even where the dispute involves an issue pertaining to the basic human rights guaranteed by our Constitution, for 'it is impermissible for a party to rely on a constitutional complaint that was not pleaded'."*

This dictum was confirmed by Constitutional Court on several occasions[27].

[47] The respondent contends in its heads of argument that the applicant will have an opportunity of bidding if the tender is advertised. Therefore, the applicant has an alternative remedy. There is no merit in this point and it deserves a short shrift. Bidding in a newly advertised tender presents no possibility of returning an agreement which has its own terms and conditions, containing peculiar rights and obligations. The contractual rights in issue here, once taken will never return. A new tender will have its own new rights and obligations peculiar to itself.

[48] Another unmeritorious point raised in the heads of argument is that granting of an interim order will prevent the respondent from correcting an illegality. I disagree. The counter-claim brought by the respondent serves exactly that purpose, if it succeeds.

[49] I have indirectly dealt with the requirements of balance of convenience above when I was dealing with a requirement of an irreparable harm. If the applicant succeeds on review, that judgment will be a hollow judgment or will amount to a “brutum fulmen”. I am therefore satisfied that all the requirements of the interim interdict have been satisfied, therefore this application must

succeed.

[50] On the debate between the court and the respondent, the question of legality of the cancellation of the appointment arose. That debate was relevant for purposes of paragraphs 2.3 and 2.4 of the notice of motion which require that the applicant be allowed to perform its work and that the respondent be interdicted from withdrawing the project. It does not appear that the cancellation was effected in terms of any cognizable legal dispensation.

[51] There is a legal authority for proposition that a valid exercise of public power must have a source in law. That is a requirement of the doctrine of legality which forms part of the Rule of law[28]. It is fundamental to our constitutional order that the legislature and executive in every sphere are constrained by the principle that they may exercise no power and perform no function beyond that is conferred upon them by law[29]. Khampepe J[30] authoritatively stated that:

“[1] State functionaries, no matter how well-intentioned, may only do what the law empowers them to do.”

In a nutshell the cancellation letter was without any lawful basis. Respondent’s counsel was at pains to point out to the law in terms of which that cancellation was made.

[52] It is common cause that a decision was taken by the respondent appointing the applicant to perform public functions. That appointment attracted public law functions. It is well settled in our law that until a decision is set aside by a court in proceedings to judicial review, it exists in fact and has legal consequences that can simply be overlooked[31]. The appointment was not set aside by a court, and on the above authorities I find that it continues to produce legal consequences.

This authority re-enforces the question of applicant's rights. Accordingly, the applicant is well entitled to perform its duties in terms of the appointment letter until that appointment is set aside by a court of law. Performance of duties is a legal consequence of the appointment.

Costs

[53] Costs of this application are to be payable in the main application. A party who succeeds in the main application is entitled to the costs of this application because of the interwovenness of the issues.

ORDER

[54] In the result I make the following Order:

1. That applicant's non-compliance with the rules relating to time periods, form and service for bringing this application is hereby condoned and that this matter is hereby heard on urgent basis in terms of Rule 6(12)(a) of the Uniform Rules
2. That pending the final determination of Part B hereof the respondent is hereby:
 - 2.1 interdicted from implementing the cancellation of applicant's appointment referred to in the respondent's letter dated 30 January 2024;
 - 2.2 interdicted from appointing alternative service providers to render the services set out in the applicant's letter of appointment and Service Level Agreement concluded by the parties;
 - 2.3 directed to permit the applicant to perform its obligations in terms of the letter of appointment read together with the Service Level Agreement concluded by the parties;
 - 2.4 interdicted from withdrawing the project registration from the Provincial Department of Co-Operative Governance.
3. The provisions of paragraph 2 above shall operate as an interim relief or mandamus pending the final determination of part B hereof.
4. Costs of this application shall be costs in the review application dealt with in Part B.

A.S. ZONO

ACTING JUDGE OF THE HIGH COURT

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Matter Heard on : 23 April 2024

Judgment

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- [1] See *Ngquma and Another v Staats President; Damons NO v State President; Jooste v State President* 1988
- (4) SA 224 at 243 D – E; *ENX Group Limited v Spilkin* (2296/2022) [2022] ZAECQBHC 42 (8 November 2022) at para 15.
- [2] *Nelson Mandela Metropolitan Municipality & Others v Greyvenouw CC & Others* 2004 (2) SA 81 (SE).
- [3] See *Cornerstone Logistics (Pty) Ltd and Another v Zacpak Cape Town Depot (Pty) Ltd* [2022] 2 All SA 13 (SCA) para 30; *Lubambo v Presbyterian Church of Africa* 1994 (3) SA 241 (SE) at 242 I – 243 H.
- [4] *ENX Group Limited v Spilkin* (2296/2022) [2022] ZAECQBHC 42 (8 November 2022) at para 16.
- [5] See Rule 6(5)(a)-(e) of the Uniform Rules.
- [6] *Lagoon Beach Hotel v Lehane* (2016 (3) SA 143 (SCA) at 152 G – H.
- [7] See *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) at para 17-18.
- [8] See *Nomandela And Another V Nyandeni Local Municipality And Others* 2021 (5) SA 619 at paras 9-11.
- [9] *Cools Ideas 1186 CC v Hubbard & Another* 2014
- (4) SA 474 (CC) at para 28.
- [10] See Rule 41A (2)(c) of the Uniform Rules.
- [11] See *Maxwele Royal Family & Another v Premier of the Eastern Cape Province & Others* (2970/2020) [2021] ZAECMHC 10 (23 March 2021) at paras 49-51.
- [12] See Rule 41A(3) of the Uniform Rules.
- [13] See *Trans-African Insurance Co Ltd v Maluleka* 1956
- (2) SA 273 at 277 A – B and 278 F-G.
- [14] See *Ncoweni v Bezuidenhout* 1927 CPD 130; *Viljoen v Federated Trust Ltd* 1971
- (1) SA 750 (O) at 754.
- [15] *D F Scott (EP) (Pty) Ltd v Golden Valley Supermarket* 2002 (6) SA 297 (SCA) at 301 G – H.
- [16] Rule 41A (2)(c) of the Uniform Rules.
- [17] See *My Vote Counts NPC v Speaker of the National Assembly and Others* 2016 (1) SA 132 (CC) at para 177.
- [18] *Makhuva & Others v Lukoto Bus Services (Pty) Ltd & Others* 1987

(3) SA 376 V at 386 E – F.

[19] See Wightman t/a JW Construction v Head Four (Pty) Ltd

[2008] ZASCA 6; 2008

(3) SA 371 (SCA) at 375-376.

[20] See Settopelo v Settopelo 1914 AD 221 at 227.

[21] See Webster v Mitchell 1948

(1) SA 1186 (W) at 1189.

[22] See Minister of Home Affairs & Others v Scalabrini Centre, Cape Town and Others 2013 (6) SA 421 SCA at paras 69-75.

[23] See Head of Department, Department of Education, Free State Province v Welkom High School & Another; Head of Department, Department of Education, Free State Province v Harmony High School & Another 2014

(2) SA 228 (CC) at para 86.

[24] See Chief Lesapo v North West Agricultural Bank & Another [1999] ZACC 16; 2000

(1) SA 409 CC at paras 17 – 18; Pharmaceutical Manufacturers Association of SA & Another: in re Ex Parte President of the Republic of South Africa & Others

[2000] ZACC 1; 2000

(2) SA 674 (CC) at paras 90-94.

[25] See section 33 of the Constitution.

[26] See Fischer v Ramehlele 2014 (4) SA 614 SCA at 620 C – 621 C at para 13.

[27] See Public Protector v South African Reserved Bank 2019 (6) SA 253 (CC) para 234; Damons v City of Cape Town 2022 (10) BCLR 1202 (CC) at para 117.

[28] See AAA Investment (Proprietary) Limited v Micro Finance Regulatory Council & Another

[2006] ZACC 9; 2007 (1) SA 343 CC at para 68; Lester v Ndlambe Municipality & Another 2015 (6) SA 283 (SCA) para 26.

[29] See Fedsure Life Insurance Ltd v Greater Johannesburg Transitional Metropolitan Council

[1998] ZACC 17; 1999

(1) SA 374 (CC) para 58.

[30] See Head of Department, Department of Education, Free State Province v Welkom High School & Another; Head of Department, Department of Education, Free State Province v Harmony High School & Another 2014

(2) SA 228 (CC) at para 1.

[31] See *SABC & Others v DA & Others* 2016 (2) SA 522 (SCA) para 15; *Ouderkraal Estates (Pty) Ltd v City of Cape Town & Others* 2004 (6) SA 222 (SCA) para 26.

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