THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG

Not Reportable
Case no: AR 156/2020

In the matter between:

KZN ONCOLOGY INC **APPELLANT**

and

KZN PROVINCE MEC FOR HEALTH **FIRST RESPONDENT**
TECMED (PTY) LTD **SECOND RESPONDENT**

Coram: **MOODLEY J, MNGUNI J and MOSSOP AJ**

Heard: 12 March 2021
Delivered: 19 March 2021

This judgment will be handed down in open court and delivered electronically by circulation to the parties' legal representatives by email publication. The date and time for hand-down is deemed to be 09h30 on 19 March 2021.

ORDER

On appeal from: KwaZulu-Natal Division of the High Court, Pietermaritzburg (Bezuidenhout J sitting as court of first instance):

(a) The appeal is dismissed with costs, such to include those costs arising out of the employment of two counsel;

(b) As regards the relief adjourned sine die in the court a quo:

(i) the appellant is directed to deliver an affidavit setting out in detail all the expenditure that it incurred in terms of the contract, supported by vouchers, by close of business on 16 April 2021;

(ii) the first respondent is directed to deliver its answering affidavit by close of business on 14 May 2021; and

(iii) the appellant is directed to deliver its replying affidavit by close of business on 15 June 2021.

JUDGMENT

Mossop AJ (Moodley J and Mnguni J concurring)

[1] This is an appeal against a judgment of the high court in which a rule nisi obtained by the appellant was discharged, with the first respondent directed to pay the appellant's costs, a counter-application brought by the first respondent was granted, in part, with the appellant ordered to pay the costs, and with certain relief claimed therein adjourned sine die with directions.

[2] The facts of the matter are not complex. On 11 December 2015, a contract was concluded between the appellant and the first respondent ('the

contract') in terms of which the appellant was contracted to repair two Varian Rapidarc Oncology machines ('the machines') located at Addington Hospital, Durban and to maintain them for a period of five years. It appears that after the conclusion of the contract only one of the machines was repaired to the extent that it was brought online and rendered operative. The other machine, whilst brought online, was not rendered operative as it required an expensive part that the appellant was financially incapable of acquiring, and in respect of which the first respondent was unwilling, or unable, to pay. The appellant was paid a substantial sum of money for the repair work that it did perform. The appellant claims that it thereafter allegedly maintained the machines for a number of months, and submitted invoices each month for such maintenance services to the first respondent for payment but was never paid. Eventually, the monthly maintenance stopped and the inevitable occurred: the operative machine ceased to function.

[3] On 21 July 2017, the appellant was alerted by a news report that the first respondent intended concluding an agreement with an entity, namely Tecmed (Pty) Ltd ('Tecmed'), the second respondent in this application. Tecmed was apparently to be contracted by the first respondent to perform the services which the first respondent had already agreed would be provided by the appellant arising out of the contract. In a series of letters directed to the first respondent before launching its application, the appellant sought, inter alia, confirmation from the first respondent that it still regarded the contract as being binding upon it. None of the appellant's letters, of which there were four in total, received a substantive response from the first respondent.

[4] As a consequence, the appellant launched an urgent application in which it sought, in part A thereof, the following relief:

'2. That the Honourable Court condone non-compliance, if any, with Section 35 of the General Law Amendment Act 62 of 1955 and that the period prescribed be to [sic] reduced, the necessary, to enable a hearing of this application on 01 August 2017.

3. That a Rule Nisi be issued, returnable on a date and time to be determined by the Honourable Court, operative immediately, calling upon the KwaZulu-Natal Provincial Department of Health and, the First and Second Respondent(s) and/or any other interested party, to show cause why the following order should not be made final:

3.1 That the KwaZulu Natal Provincial Department of Health, First and Second Respondent(s) and/or any other interested party or entity, be interdicted and restrained from concluding an agreement for the Service, Repair and Maintenance of Oncology machines named Linac 1 and Linac 2 at Addington Hospital, in Durban, within the KwaZulu-Natal province, whilst the contract between applicant and KwaZulu-Natal Provincial Department of Health remains of full force and legal effect.

3.2 *In the alternative*, in the event that the First and Second Respondent, and/or any other entity have concluded a contract for the Service, Repair and Maintenance of Oncology machines named Linac 1 and Linac 2 at Addington Hospital, in Durban, within the KwaZulu-Natal province, that the First, Second and/or any such entity, be interdicted and restrained from implementing the terms of the purported contract pending the final determination of the proceedings for the judicial review and setting aside of contract, as outlined in part B of this application.

3.3 That the KwaZulu-Natal Provincial Department of Health *alternatively* the First Respondent be directed to pay the costs of the application.'

[5] Part B of the notice of motion read as follows:

'**KINDLY TAKE NOTICE THAT**, in the event that the first and second respondents, and a/or any other entity have concluded a contract for the Service, Repair and Maintenance of Oncology machines named Linac 1 and Linac 2 at Addington Hospital, in Durban, within the KwaZulu-Natal province, the above named Applicant intends to make an application, to the above Honourable Court, on a date to be determined by the Registrar, at 10h00 hours or so soon thereafter as Counsel for the Applicant may be heard, for an order in the following terms:

1. That the contract concluded on behalf of the KwaZulu-Natal Provincial Department of Health, between the First and Second Respondent be declared unlawful and void *ab initio*.

2. That the contract concluded on behalf of the KwaZulu-Natal Provincial Department of Health, between the First and Second Respondents be reviewed and set aside.

3. That the KwaZulu-Natal Provincial Department of Health alternatively, the First Respondent be directed to pay the costs of the application, on the scale as between Attorney and Client.'

[6] The application was opposed by the first respondent. On 4 August 2017, Chetty J granted a rule nisi in favour of the appellant and also granted the appellant leave to withdraw its application against Tecmed, it being accepted by the appellant that there was no prospect of the first respondent concluding a contract with Tecmed. Subsequently, the first respondent delivered a counter-application seeking the review of the decision to contract with the appellant, the setting aside of the contract, and the repayment of the amount of approximately R5,7 million from the appellant which at the time the first respondent had already paid to the appellant pursuant to the disputed contract. The basis of the review sought was that the first respondent, in concluding the agreement, had not followed certain prescripts of the KwaZulu-Natal Provincial Treasury Regulations and Practice Notes, and National Treasury Practice Notes, and that the contract was thus illegal.

[7] On 12 December 2017, Chetty J granted an application to amend the first respondent's notice of counter-application in two respects:

(a) Firstly, the following paragraph was inserted in the notice of counter-application (the first amendment):

'(b)bis That insofar as it may be necessary the First Respondent is granted an extension of time in terms of section 9(1)(b) of the Promotion of Administrative Justice Act 3 of 2000, until the filing and service of this counter application in which to seek the relief sought in terms of paragraph (a) and (b) above;'

(b) Secondly, a further paragraph was inserted to include a demand for the repayment of an amount of approximately R3,4 million in addition to the amount of R5,7 million already claimed.

[8] The matter ultimately came before Bezuidenhout J who, correctly in my view, saw the resolution of the counter-application as being potentially

determinative of the fate of the appellant's application: if the counter-application was granted, the rule granted in favour of the appellant could not be confirmed, although the issue of costs would still need to be determined. If the counter-application was refused, the issue of whether the rule should be confirmed would then need to be considered.

[9] Bezuidenhout J heard argument, and in his judgment delivered on 29 May 2019, he:

(a) discharged the rule nisi granted to the appellant and directed the first respondent to pay the costs of the appellant's application;

(b) granted the relief sought by the first respondent in its counter-application in the following terms:

(i) reviewing and setting aside the decision of the head of the first respondent to conclude the contract with the appellant for the repair and maintenance of the machines situated at Addington Hospital;

(ii) declaring the contract concluded between the appellant and the first respondent on 17 December 2015 to be invalid and of no force and effect; and

(iii) ordering the appellant to pay the costs of the counter-application.

(c) directed that the claim for the repayment of the amounts sought in the first respondent's counter-application be adjourned sine die and gave directions concerning the delivery of further affidavits in relation thereto.

[10] The appellant thereafter sought leave to appeal against the judgment of Bezuidenhout J. In summary, the issues upon which leave to appeal was sought can be broadly stated to fall into three grounds:

(a) the learned Judge erred in finding that the counter-application was not based on the provisions of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) and could proceed on the basis of a legality review;

(b) the learned Judge erred in not determining whether a delay of 20 months in bringing the review application could be condoned or was reasonable; and

(c) the learned Judge erred in directing that it was just and equitable that further affidavits be delivered before deciding the issue of the repayment of the monies claimed by the first respondent.

[11] No leave to cross appeal was sought by the first respondent. The learned Judge granted the application for leave to appeal. The wording of paragraph 4 of the learned Judge's judgment on the application for leave to appeal is instructive, where he stated as follows:

'In my view there is no reasonable prospect that another court will find that it was not a legality review and that the filing of further affidavits were not justified. Although the contract was contrary to the provisions of section 217 of the Constitution I accept that another court may find that I erred by not making a specific ruling as to the delay in bringing the counter application.'

[12] What is now before us? Is the entire order granted in respect of the counter-application before us or is it simply a discrete part thereof relating only to the issue of the delay in bring the counter-application?

[13] The correct approach to interpreting a judgment of a court was discussed in *Firestone South Africa (Pty) Ltd v Genticuro AG*[1] where it was held that:

'[t]he basic principles applicable to construing documents also apply to the construction of a court's judgment or order: the court's intention is to be ascertained primarily from the language of the judgment or order as construed according to the usual, well-known rules. See *Garlick v Smartt and Another*, 1928 AD 82 at p. 87; *West Rand Estates Ltd*. v *New Zealand Insurance Co. Ltd*., 1926 AD 173 at p. 188. Thus, as in the case of a document, the judgment or order and the court's reasons for giving it must be read as a whole in order to ascertain its intention. If, on such a reading, the meaning of the judgment or order is clear and unambiguous, no extrinsic fact or evidence is admissible to contradict, vary, qualify, or supplement it. Indeed, it was common cause that in such a case not even the court that gave the judgment or order can be asked to state what is subjective intention was in giving it (cf. *Postmasburg Motors (Edms.) Bpk*. v *Peens en*

[1] *Firestone South Africa (Pty) Ltd v Genticuro AG* 1977 (4) SA 298 (A) at 304D-H.

Andere, 1970 (2) SA 35 (NC) at p. 39F - H). Of course, different considerations apply when, not the construction, but the correction of a judgment or order is sought by way of an appeal against it or otherwise - see *infra*. But if any uncertainty in meaning does emerge, the extrinsic circumstances surrounding or leading up to the court's granting the judgment or order may be investigated and regarded in order to clarify it; for example, if the meaning of a judgment or order granted on an appeal is uncertain, the judgment or order of the court *a quo* and its reasons therefor, can be used to elucidate it. If, despite that, the uncertainty still persists, other relevant extrinsic facts or evidence are admissible to resolve it. See *Garlick's* case, *supra*, 1928 AD at p. 87, read with *Delmas Milling Co. Ltd*. v *Du Plessis*, 1955 (3) SA 447 (AD) at pp. 454F - 455A; *Thomson v Belco (Pvt.) Ltd. and Another*, 1960 (3) SA 809 (D).'

[14] Applying *Firestone* to the facts of the matter, it appears to me that the judgment of the learned Judge is clear and unambiguous in its meaning. He regarded his judgment on the issues identified in sub-paragraphs (a) and (c) of paragraph 10 above as being unassailable, hence his conclusion that no other court would come to a different conclusion on those points. Had the judgment ended at that point, I would be constrained to conclude that leave to appeal had been refused. But the judgment did not end there. The learned Judge went on to acknowledge that another court might conclude that because he had not specifically addressed the issue of the delay by the first respondent in bringing the review proceedings, being the ground identified in paragraph 10(b) above, such omission could have amounted to an error on his part. That acknowledgement by the learned Judge invites one to conclude that this issue, to the exclusion of all others, is the issue in respect of which leave to appeal was actually granted. The wording of the order ultimately granted is simply that leave to appeal was granted, without specifying in respect of which issue or issues leave had been granted. But the wording of the judgment leaves the reader in no doubt that it was granted on a narrow issue, as the learned Judge was entitled to do in terms of the provisions of section 17(5)*(a)* of the Superior Courts Act 10 of 2013. That issue is whether the delay in bringing the review application vitiated the application. In my view, this is the only issue before us.

[15] In his heads of argument, Mr Sithole posits what he terms an 'unusual and unique' issue, namely whether this court can grant condonation in respect of the first respondent's application for condonation, when this was allegedly not addressed by the learned Judge in his judgment in the court a quo. Counsel submitted that the court erred in not adjudicating on the 'condonation, extension of time or undue delay application' contained in the first respondent's notice of counter-application. It appears to me that this point is taken in respect of the first amendment to the notice of counter-application that was granted by Chetty J. The notice of counter-application prior to its amendment made no reference to any of these issues. Subsequent to its amendment, the notice of counter-application sought an extension of the time limits imposed in terms of PAJA 'insofar as it may be necessary'. In evaluating this submission, it is necessary to firstly consider whether the first respondent was required to initially, and separately, seek condonation.

[16] Bezuidenhout J correctly found that an organ of state cannot utilise the provisions of PAJA to review its own conduct.[2] On the facts pleaded, he concluded that the review application was capable of being construed as a legality review and dealt with it on that basis. By virtue of this finding, the learned Judge was not required to consider condonation in terms of, or the extension of time limits contemplated by, PAJA. Having found that the review was a legality review, the learned Judge would have been guided by the judgment of Theron J in *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Limited,*[3] where Theron J found that when

'assessing [an allegation of delay] under the principle of legality no explicit condonation application is required. A court can simply consider the delay, and then apply the two-step *Khumalo* test to ascertain whether the delay is undue and, if so, whether it should be overlooked.'[4] (Footnote omitted.)

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[2] *State Information Technology Agency SOC Limited v Gijima Holdings (Pty) Limited* 2018 (2) SA 23 (CC).
[3] *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Limited* 2019 (4) SA 331 (CC).
[4] Ibid para 51.

What appeared in the first respondent's papers was not an application for condonation, but an explanation for the delay in bringing its review application. This is perfectly in keeping with the judgment in *Buffalo City*.

[17] One of the principal points raised by the appellant in its affidavit marked 'replying affidavit', which appears to have served both as its replying affidavit in its own application, and its answering affidavit in the counter-application, was the question of delay. In this regard, the appellant stated:

'The application was initiated almost 2 years after the parties had concluded the contract hopelessly out of time and as such the first respondent is obliged to obtain condonation for the inordinate delay in initiating the review proceedings.'

[18] The issue of delay was thus conspicuous on the papers, and the learned Judge would have been alive to it. In granting the counter-application, the learned Judge implicitly found that the delay had been satisfactorily explained. In fact, in his judgment on the application for leave to appeal, he stated that the only issue before him was the counter-application and in finding as he did:

'[i]t does imply that the time delay was considered to be reasonable in the circumstances.'

[19] It seems to me that where one of the principal issues in a matter is the question of delay, but the relief sought is nonetheless granted, it must follow implicitly that the question of delay was either ignored or not found to be an impediment to the relief being granted. There is nothing to suggest that the learned Judge ignored the question of delay. Perhaps he ought to have said something explicit in this regard. But as was pointed out by Mr Pammenter SC, who appeared for the first respondent together with Ms Nako, in *R v Dhlumayo*[5] it was held that it is not the function of an appeal court to seek 'reasons adverse to the conclusion' of the judge in the court a quo, as '[n]o judgment can ever be

[5] *R v Dhlumayo and another* 1948 (2) SA 677 (A).

perfect' and it does not 'follow that, because something has not been mentioned' in a judgment it has not been considered.[6]

[20] I am of the view that the learned Judge did consider the question of delay and found it to not to be undue. Was he however correct in this regard?

[21] The reason for requiring reviews to be instituted without undue delay is to ensure certainty and promote legality: time is of utmost importance. In *Merafong City v AngloGold Ashanti Limited*,[7] Cameron J held that:

'The rule against delay in instituting review exists for good reason: to curb the potential prejudice that would ensue if the lawfulness of the decision remains uncertain. Protracted delays could give rise to calamitous effects. Not just for those who rely upon the decision but also for the efficient functioning of the decision-making body itself.'[8]

[22] In *Khumalo*,[9] Skweyiya J, making reference to section 237 of the Constitution,[10] held that:

'Section 237 acknowledges the significance of timeous compliance with constitutional prescripts. It elevates expeditious and diligent compliance with constitutional duties to an obligation in itself. The principle is thus a requirement of legality.'[11] (Footnote omitted.)

[23] In both its founding affidavit and in its replying affidavit in its counter-application, the first respondent addressed the issue of delay. The contract was concluded on 11 December 2015. During June 2017, Deloitte and Touche completed a forensic investigation into, inter alia, the conclusion of the contract in question. On 26 July 2017, the appellant launched its application. On 4 August 2017 the first respondent delivered its answering affidavit. The report of Deloitte and Touche was received by the MEC for Finance on 13 August 2017 ('the

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[6] Ibid at 706, point 12.
[7] *Merafong City v AngloGold Ashanti Limited* [2016] ZACC 35; 2017 (2) SA 211 (CC).
[8] Ibid para 73.
[9] *Khumalo and another v MEC for Education, KwaZulu-Natal* [2013] ZACC 49; 2014 (5) SA 579 (CC).
[10] The section provides as follows: 'All constitutional obligations must be performed diligently and without delay.'
[11] *Khumalo* para 46.

forensic report'), and a decision was taken to bring proceedings to set aside the contract. This was done on 4 September 2017 when the first respondent delivered its counter-application.

[24] It was explained in some detail by the first respondent that the person who signed the contract with the appellant, being the head of the department, was the person who ought to have brought the review proceedings. However, that person had been implicated in the forensic report with specific reference to wrongdoing in respect of the contract in question in this application and disciplinary steps were recommended to be taken against him. Before this could occur, he resigned. The next two most senior persons, who might have taken the contract on review, were also implicated with regard to the same contract in the same forensic report. Given their apparent wrongdoing, there was no incentive for any of these three persons to have taken any steps to review the contract. However, once the forensic report was received, the first respondent acted expeditiously, and the review was brought collaterally as a counter-application.

[25] What is an organ of state required to do if the very person who ought to bring the review proceedings setting aside an unlawful contract is in fact the person who concluded the contract? The obvious answer is that such official could not have been the only person to have known of the existence of the contract, and accordingly others with such knowledge should take that step. But what if the other people who ought to have taken the matter on review were also implicated in the awarding and conclusion of the unlawful contract? In this case, none of the persons involved in the awarding of the contract in question had any incentive to review it because their personal shortcomings would have been revealed as a consequence. It appears to me that in these circumstances, a forensic investigation was a reasonable step to take on the part of the first respondent. I acknowledge that in *Asla Construction*, Swain JA said that:

'The only explanation provided by the respondent for the delay, namely that it only became aware of the alleged irregularities relating to the award of the Reeston contract,

when a forensic report was presented to it on 28 October 2015, was no explanation at all.'[12]

[26] However, given the specific facts of this matter, the explanation of the first respondent that the outcome of a forensic investigation was awaited is, in my view, an explanation worthy of consideration. Once the forensic report had been received, there can be no dispute that the first respondent acted without undue delay. The learned Judge obviously considered these factors and granted the counter-application. In my view, he was correct in doing so.

[27] At the conclusion of argument, Mr Pammenter SC requested that we consider fixing fresh time periods for the filing of the further affidavits in respect of the relief adjourned sine die by Bezuidenhout J. He proposed that each party be given a month within which to file its affidavit. This request will be reflected in the order granted.

[28] I would accordingly propose the following order:

(a) The appeal be dismissed with costs, such to include those costs arising out of the employment of two counsel;

(b) As regards the relief adjourned sine die in the court a quo:

(i) the appellant is directed to deliver an affidavit setting out in detail all the expenditure that it incurred in terms of the contract, supported by vouchers, by close of business on 16 April 2021;

(ii) the first respondent is directed to deliver its answering affidavit by close of business on 14 May 2021; and

(iii) the appellant is directed to deliver its replying affidavit by close of business on 15 June 2021.

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[12] *Asla Construction (Pty) Limited v Buffalo City Municipality and another* [2017] 2 All SA 677 (SCA) para 15.

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MOSSOP AJ

I agree.

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MOODLEY J

I agree.

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MNGUNI J

APPEARANCES

Date of Hearing	:	12 March 2021
Date of Judgment	:	19 March 2021
Counsel for Appellant	:	Mr E Sithole and Mr P I Shai
Instructed by	:	Austen Smith Attorneys 033 3920 500 Ref: Mr. Mchunu/Jolene
Counsel for Respondent	:	Mr C Pammenter SC and Ms N Nako
Instructed by	:	PKX Attorneys 033 347 5354 Ref: M Potgieter