REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

DATE: _____

CASE NO: 69620/18

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ~~YES~~/NO
(2) OF INTEREST TO OTHERS JUDGES: ~~YES~~/NO
(3) REVISED

26/08/2019 .....

DATE SIGNATURE

In the matter between:

SOUTH AFRICAN EXPRESS AIRWAYS SOC LIMITED APPLICANT

and

FLYFOFA (PTY) LIMITED RESPONDENT

JUDGMENT

VLOK, AJ

Relief claimed:

[1] This is an application seeking a declaratory order that the-

"*second written agreement of lease of 26 July 2017*"

between the parties be declared invalid for contravening the procurement systems contemplated in section 217 of the Constitution of South Africa (i.e. Act 108 of 1996, ["the Constitution"]) and for contravening the provisions of section 49 read with section 66(3) of the Public Finance Management Act, 1 of 1999 as amended (hereinafter "the PFMA").

[2] On the procedural aspect: Four separate declarators were sought; one in each of the four sub-paragraphs of prayer 1 of the notice of motion. Concerning the content of the order, this merits some attention, but will be dealt with below.

Background:

[3] As the applicant's citation implies, it is an airline and a State-owned company. The respondent is involved in the airways industry in that it leases aircraft to interested parties and in the instant case it leased 2 EMB aircraft and provided personnel to man the aircraft, to the applicant.

[4] The applicant and respondent concluded two aircraft lease agreements during 2017. The first lease agreement was terminated on 28 April 2017. The second lease agreement was concluded on 26 July 2017. The second agreement merely "replaced" the first agreement. It is the second lease agreement and payments made by the applicant to the respondent in terms thereof which is in issue in this application.

[5] It is appropriate, at this juncture, to mention that the respondent's name is "Flyfofa Airways (Pty) Limited". The citation of "Flyfofa (Pty) Limited" is accordingly incorrect. Nothing turns hereon.

[6] It was the applicant which initiated the first lease agreement. The first lease agreement's validity has never been impeached by the applicant (also not in the founding papers). Payments were made to the respondent in terms of this first lease agreement. The first lease agreement was cancelled on 28 April 2017. It appears that the cancellation was competent.

[7] Despite the cancellation of the first lease agreement there was no break in the provision by the respondent of leased aircraft to the applicant nor the use thereof by the applicant.

[8] Despite the cancellation of the first lease agreement practice between the parties continued concerning the provision of the aircraft and personnel.

[9] It appears the second lease agreement was concluded with a view to reduce the applicant's economic obligations which it had under the first lease agreement. There were certain differences between the first and the second lease agreements, *inter alia*, the number of personnel to be provided by the respondent to the applicant, which number would incrementally decrease over time when the applicant's personnel could be substituted. There were further differences. The differences are irrelevant in this application.

[10] Until the launch of the present application, the applicant did not contend that the second lease agreement was invalid, nor did it raise a dispute about the terms thereof.

[11] The crux of the application is whether the coming into existence of the second agreement, conformed to legal prescripts. The applicant would have the onus to provide facts in support of a contention that the award did not conform to legal prescripts.

[12] The necessity to make a finding on whether the legal prescripts were complied with became unnecessary for the reason set out below.

[13] At the proceedings on 14 May 2019, counsel for the respondent, Mr T.A.L.L. Potgieter SC ("Mr Potgieter") commenced. He pointed out that he had come across the (then) unreported Constitutional Court decision of *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd* [2019] ZACC15 (Constitutional case: CCT91/17) decided on 16 April 2019 ("*the Buffalo City judgment*"/"*Buffalo City*"). Mr Potgieter handed up a copy of the judgment from the bar and a further set of supplementary heads of argument in which the facts of the *Buffalo City* judgment are conveniently summarised.

(The *Buffalo City* judgment has since been reported in the Butterworths Constitutional Law Reports under reference 2019(6) BCLR 661 (CC))

[14] Mr Potgieter stated that on the strength of the *Buffalo City* judgment the relief which the applicant seeks is in principle conceded by the respondent.

[15] In view of the concession by the respondent, on the strength of the *Buffalo City* judgment, it is apt that the essence thereof be summarised.

The Buffalo City judgment:

[16] The *Buffalo City Metropolitan Municipality* ("*the Municipality*"), whilst following a proper and lawful procurement process had awarded a so-called turn-key contract to a successful tenderer for the construction of low-cost housing.

[17] After awarding the afore-mentioned contract, a further contract was allocated to Asla Construction (Pty) Ltd ("*Asla*"), without any further procurement process having been followed.

[18] After having paid some payment certificates, the Municipality stopped paying subsequent payment certificates and Asla applied for provisional sentence in the High Court against the Municipality.

[19] The High Court refused the provisional sentence by upholding the Municipality's contention that the subsequent contract awarded to Asla did not comply with section 217 of the Constitution. The High Court came to this finding on the basis of a review application launched by the Municipality, which review application had been launched out of time, due regard being had to the Promotion of Administrative Justice Act, Act 3 of 2000 ("PAJA"). The High Court found that the Municipality's delay should be condoned.

[20] Asla appealed to the Supreme Court of Appeal and succeeded because the Supreme Court of Appeal found that the Municipality had not made a proper case for condonation in terms of PAJA. The Supreme Court of Appeal declined to make any definitive findings with regard to the underlying legality or illegality of the contract.

[21] The Municipality applied to the Constitutional Court to appeal against the judgment of the Supreme Court of Appeal. The Constitutional Court first had to decide whether or not to grant leave to appeal. The question was whether or not the delay by the Municipality in seeking to review its own awarding of the contract to Asla should result in the refusal of leave to appeal. A majority of six Judges (judgment by Theron J, with Mhlantla J, Goliath AJ, Dlodlo AJ, Basson AJ and Petse AJ concurring) to three (Cameron J and Froneman J, with Khampepe J concurring) in the Constitutional Court granted leave to appeal. The minority refused leave to appeal.

[22] The dispute between the majority and the minority in the Constitutional Court had nothing to do with the dispute about the inadequacy of the Municipality's explanation for its delay in launching review proceedings. The majority and the minority were *ad idem* that there was no proper explanation for the Municipality's delay.

[23] The dispute between the majority and the minority pertained to whether or not the inexcusable delay should be overlooked where it was obvious that section 217 of the Constitution pertaining to open and competitive procurement processes had been thwarted. The majority found that:

> "*even where there is no basis for a court to overlook an unreasonable delay the court may nevertheless be constitutionally compelled to declare the state's conduct unlawful*"

and did so because

> *"... where the unlawfulness of the impugned decision is clear and not disputed, then the court must declare it as unlawful. This is notwithstanding an unreasonable delay in bringing the application for review for which there was no basis for overlooking."*
>
> (Paragraph [63] of the judgment)

[24] In disagreement the minority reasoned that:

> *"... there are no compelling reasons to entertain the review given the Municipality's unreasonable delay in bringing its application."* The reason for the finding of the minority was stated to be "*in coming to this conclusion, we show that this court's jurisprudence, with the deep constitutional imperatives that underly it, provide for instances where a public authority's delay in bringing 'self-review' – legal proceedings to set aside its own decision – is so prodigiously and lamentably inexcusable that there is no public interest or constitutional necessity for pronouncing on its legality*".
> (Paragraph [111] of the judgment)

[25] The judgment by Theron J extensively iterates *State Information Technology Agency SOC Ltd v Gijima Holdings* (Pty) Ltd [2017] ZACC 40; 2018 (2) SA 23 (CC). It is unnecessary to reiterate the Constitutional Court's reasoning and application of the principles set out in *Gijima*. Suffice it to say the constitutional imperative principle is applied. That which is unlawful may not be exculpated by undue delays.

[26] Mr Potgieter contended that the facts *in casu* are hardly distinguishable from the facts in *Buffalo City*. In the latter case the Municipality had taken

14 months to approach a Court to review its own awarding of the contract in question. In this case the applicant had taken even longer.

[27] The respondent raised precisely the issues which were deemed of crucial importance by both the majority and the minority judgments in the Constitutional Court in *Buffalo City* matter, namely that there was no explanation for the delay and no affidavits by the persons involved. In this case, as was the case in *Buffalo City*, relevant witnesses did not depose to affidavits on behalf of the applicant as part of the founding affidavit. Also as in *Buffalo City*, no explanation was forthcoming why this was not done.

[28] What prevails is the so-called constitutional imperative. If the award of the contract did not comply with the legal prescripts, as provided for in section 217 of the Constitution and as provided for in the PFMA, the awarding of the relevant contract is unlawful.

[29] The Constitutional Court's conclusion by the majority was that in the circumstances an order is made-

> "*declaring the Reeston contract invalid, but not setting it aside so as to preserve the rights to that the respondent might have been entitled*".
> (Paragraph [105] of the judgment)

[30] Mr Potgieter contended that because *Buffalo City* is virtually on all fours with the present matter, that judgment is binding. I agree.

[31] The concession is dispositive of the main issue. The question of costs remains.

[32] At this juncture it is apposite to point out what Mr V.T. Ngutshana ("Mr Ngutshana") on behalf of the applicant submitted in respect of distinguishing the present case from *Buffalo City* for purposes of costs. He referred to paragraphs [8], [10], [14], [15], [16], [17] and [18] of the opposing affidavit. The points were:

[32.1.] Internal corrective measures to deal with the issues had been initiated, although not finalised.

[32.2.] The letter of 17 August 2017 required that the applicant should have signed it at the bottom thereof. This letter was never signed and prior to the production thereof the applicant had no prior knowledge or record of the letter.

[32.3.] The existence of the so-called second written agreement of lease was largely unknown to the other relevant divisions within the applicant, and which were responsible for the implementation of the agreement. In ignorance of the existence of the second written agreement of lease, these key divisions within the applicant had continued dealing with the respondent beyond 25 July 2017, under the belief that the first written agreement of lease was still in existence and thus regulated the contractual relationship between the applicant and the respondent. The circumstances why the second written agreement of lease was not disclosed are the subject of continuing investigations.

[32.4.] The agreements were initiated by the applicant's commercial division under whose exclusive responsibility the subject of the lease fell. The assistance was sought from the procurement office through the chief procurement officer. The involvement of the procurement officers are matters under investigation. It is not known whether the documents ever existed but during August 2018 when the relevant documents were sought it was discovered that all the relevant documents pertaining to the second written agreement had mysteriously gone missing.

[32.5.] The documents referred to aforesaid could neither be located nor found on the applicant's servers. The contract compliance form, a very important document in the later determination of compliance issues, could also not be found nor located on the applicant's server.

[33] It was reiterated that Mr Thembikele Cola, head of the commercial division of the applicant was requested for an explanation, but denied any knowledge of existence of the second written agreement.

[34] With respect I cannot see how the above submissions by Mr Ngutshana can impact on a discretion concerning a costs award. I set out other cost award considerations below.

[35] Mr Potgieter contended that the exact wording of the Constitutional Court judgment in *Buffalo City*, as set out in paragraph [105] be applied to the present instance:-

> "*I therefore make an order declaring the Reeston contract invalid, but not setting it aside as to preserve the rights to that the respondent might have been entitled*." (own emphasis)

This, in my view, is to the effect that even though the contract is invalid, any rights to which any of the parties might have been entitled remain unaffected. The present instance is a commercial transaction necessarily entailing facts (and legal facts) from which a miscellany of legal consequences can arise. It is not for this court to interrogate what the possible permutations are, each with a multiplicity of possible mutual rights and obligations. As such parties to a situation as the present shall each have its opportunity to consider and pursue remedies it may have which arose out of the factual matrix. The determining of the factual matrix, including preceding and succeeding events in themselves may be the subject of litigation.

The relief sought:

[36] The relief sought in [1] above is set out in paragraph 1.4 of prayer 1 of the notice of motion. The said paragraph 1.4 is preceded by a paragraph 1.1, 1.2 and 1.3 in which ancillary relief is sought.

[37] Paragraph 1.1 relates to a letter dated 17 August 2017 sought to be declared as not forming part of nor introducing further terms and conditions to the second agreement of lease.

[38] In paragraph 1.2 a declaration is sought that a certain document named Annexure "B" to the second agreement of lease between the applicant and the respondent also does not form part of the second written agreement of lease.

[39] In paragraph 1.3 the applicant seeks declaration that rate charges of USD 1700,00 per block hours flown, and as a minimum guaranteed hours, having been determined by the respondent in terms of the letter of 17 August 2017, constitute irregular payments and unlawful payments.

[40] The relief sought in paragraphs 1.1, 1.2 and 1.3 of prayer 1 are ancillary to the relief sought in paragraph 1.4.

[41] Concerning paragraphs 1.1 and 1.2:

Whereas the second written agreement of lease of 26 July 2017 is invalid for contravening the procurement systems contemplated in section 217 of the Constitution of South Africa and in that it contravenes the provisions of section 49 read with section 66(3) of the PFMA, I find it unnecessary to issue a separate order in respect of the 17 August 2017 letter. In my view the invalidity of the second written agreement of lease necessarily renders the 17 August 2017 letter, being an adjunct thereto, of no force and effect. The same applies to the said annexure "B" to the second written agreement of lease.

[42] Concerning the relief sought in prayer 1.3:

In my view the factual matrix and possible remedies emerging therefrom may be the subject of the pursuing of further litigation between the parties, subject obviously to how the respective parties are advised.

[43] Often times contracts with State-owned companies and/or with organs of State are identified with specific names and numbers. In the present case

I do not see such reference numbers. However, the second agreement is adequately identified as that contained in annexure "SAE2" to the founding affidavit.

[44] I therefore make an order declaring the second written agreement of lease of 26 July 2017 invalid but not setting it aside so as to preserve the rights to that the respondent might have been entitled.

Costs:

[45] The concession on behalf of the respondent, as a general proposition, essentially renders the applicant successful. Here from it does not necessarily follow that costs in this instance follows success.

[46] A number of submissions were made in the first heads of argument of the respondent. In my consideration concerning an order for costs I have taken into account these submissions. These entail *inter alia* that:

[46.1] The applicant's deponent had no personal knowledge of what was being deposed to. Insofar as the applicant's deponent could rely on records by virtue of her position she could not indicate what records she was allegedly relying on, and why the records could be relied upon.

[46.2] The applicant failed to call witnesses involved in the events which *prima facie* indicate that there was a valid and binding second lease agreement.

[46.3] No explanation was adduced as to the absence of affidavits by the involved employees of the applicant.

[47] Also, without pronouncing thereon, material disputes of fact could have arisen.

[48] Where hearsay evidence was relied on, no basis was laid for reliance on such hearsay evidence in terms of section 3 of the Law of Evidence Amendment Act, Act 45 of 1988.

[49] I add that the applicant was in the main the author of the irregular situation. It then relied on self-review, belatedly, to remedy its own non compliance with legal prescripts. In the words of Mr Potgieter for the respondent, the innocent respondent was being strung along.

[50] The aforesaid militates against a costs award in favour of the applicant.

It is ordered:

(1) The second written agreement of lease of 26 July 2017 is declared invalid.

(2) There is no order as to costs.

J. VLOK

ACTING JUDGE OF THE GAUTENG DIVISION, PRETORIA

Heard on:	14/5/2019
For the Appellant:	Mr T.A.L.L. Potgieter SC
Instructed by:	VZLR Inc
For the Respondent:	Mr V.T. Ngutshana
Instructed by:	Werksmans Attorneys
Date of Judgment:	26/8/2019