# THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

## JUDGMENT

**Not Reportable**

Case no: 921/19

In the matter between:

**UMGUNGUNDLOVU DISTRICT MUNICIPALITY** **APPELLANT**

and

**AMARAKA INVESTMENTS 37 (PTY) LTD** **RESPONDENT**

**Neutral citation:** *Umgungundlovu District Municipality v Amaraka Investments 37 (Pty) Ltd* (Case no 921/19) [2020] ZASCA 52 (15 May 2020)

**Coram:** CACHALIA, DAMBUZA, MOCUMIE AND NICHOLLS JJA AND BOQWANA AJA

**Heard**: 6 May 2020

**Delivered**: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down is deemed to be 10h00 on 15 May 2020.

**Summary:** Contract concluded between private service provider and municipality – contract declared unconstitutional for failure to comply with constitutionally required procurement provisions – whether order suspending

declaration of invalidity retrospective in effect – proper approach to interpreting court order.

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**ORDER**

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

The appeal is dismissed with costs.

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**JUDGMENT**

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**Cachalia JA (Dambuza, Mocumie and Nicholls JJA and Boqwana AJA concurring)**

[1] The Umgungundlovu Municipality (the appellant) appeals against a decision of the KwaZulu-Natal Division of the High Court (Seegobin J) granting summary judgment against it. The learned judge held that the respondent (the plaintiff a quo) was entitled to enforce payment of a contract for the provision of sewerage services concluded between it and the Umgungundlovu Municipality (the defendant a quo). The same division of the High Court (Nkosi J) had declared the contract invalid earlier, but suspended its invalidity. The court a quo concluded that the suspension was retrospective in effect.

[2] This finding meant that despite the declaration of invalidity, the contract was enforceable in its past (the status quo) for the services the respondent had rendered in the carting of sewerage, but not for any future services it may render after the date of the Order (11 April 2018). The appellant was therefore liable for payment covering the entire period from the date the contract was concluded on 31 October 2011 until 11 April 2018. The appellant takes issue with this finding. This narrow issue – whether or not the suspension of the invalidity of the contract operated retrospectively – is now before this court with leave of the court a quo.

[3] It is unnecessary to delve into the facts in any detail. They are canvassed fully in the judgments of both Nkosi J and of the court a quo. For present purposes it is common cause that the respondent had performed its contractual obligations by providing the required services to the appellant. The amount of money it claimed from the appellant in the summary judgment proceedings for its performance was R13 050 776.55 together with interest at the rate of 2 per cent per month.

[4] The appellant did not dispute the quantum of the claim in the court a quo. It raised only one defence to resist an order of summary judgment against it. It contended that Nkosi J's Order suspending the invalidity of the contract did not explicitly say that the contract was suspended retrospectively. The Order was thus unclear and the court a quo could not read this implication into it. Once that was accepted, the argument went, the respondent was not entitled to enforce payment for its contractual services from the date of its inception on 31 October 2011 until the date of the Order declaring the contract invalid on 11 April 2018.

[5] The dispute before the court a quo thus concerned the interpretation of the judgment and Order of Nkosi J, which was granted following the appellant having instituted review proceedings to declare the contract invalid. In response the respondent brought a counter-application seeking an order declaring the contract valid and concomitantly that the appellant was obliged to pay to it the amount for which it was sued.

[6] Nkosi J's Order read as follows:

'(a) The contract . . . [is] declared constitutionally invalid.

(b) The order of constitutional invalidity in paragraph (a) is suspended pending [the Municipality] complying with the requirements of sections 76 and 78 of the Municipal Systems Act 32 of 2000 and subjecting the provision of the service to a competitive procurement process.

(c) From the date of this order [11 April 2018] and pending compliance alluded to in paragraph (b) the first respondent may continue to provide the service and bear the costs thereof itself.

(d) The respondents' counter-application is dismissed.

(e) The applicant must pay the respondents' costs . . . .'

[7] The finding that the Order operated retrospectively, the court a quo said, followed from the logic of the reasoning underpinning order. In this regard it pointed out that Nkosi J was acutely aware that he was exercising the court's just and equitable jurisdiction under s 172(1)*(b)* of the Constitution,[1] which

[1] '**Powers of courts in constitutional matters**
(1) When deciding a constitutional matter within its power, a court–
*(a)* . . .
*(b)* may make any order that is just and equitable, including–
(i) an order limiting the retrospective effect of the declaration of invalidity; and
(ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.'

the courts have increasingly used to ameliorate the harsh effects of declaring a contract invalid where the party contracting with the State is blameless.[2] It therefore concluded that 'justice and equity' dictated that, despite the contract's invalidity, the appellant should not benefit therefrom by trying to evade its obligation – and thus its liability – under the terms of the contract by escaping from the consequences of its self-created predicament.

[8] It was evident from Nkosi J's judgment, the court a quo continued, that the appellant had irrationally abdicated its powers and responsibilities to the respondent and had also misconstrued its powers by concluding the contract. The predicament in which it now found itself was, therefore, self-created. On the other hand, the respondent had acted bona fide and there was no suggestion of any impropriety on its part. It had carted the loads of effluent under its contractual obligations that the appellant's Full Council had approved. It therefore could not but have believed that the appellant would honour the contract.

[9] It therefore made perfect sense, the court a quo said, that Nkosi J had underlined his judgment by stating that the 'declaration on invalidity must not have the effect of divesting the respondent of rights to which – but for the invalidity – it might be entitled to'. This was consistent with the meaning that the court a quo had ascribed to the Order as intending to operate retrospectively.

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[2] *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v The Chief Executive Officer, South African Social Security Agency and Others* [2013] ZACC 42; 2014 (1) SA 604 (CC); *Allpay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer, South African Social Security Agency and Others* [2014] ZACC 12; 2014 (4) SA 179 (CC); *Dykema v Malebane* [2019] ZACC 33; 2019 (11) BCLR 1299 (CC).

[10] Mr Pillemer, who appeared on behalf of the appellant before us, contended that the court a quo's interpretation of Nkosi J's Order was wrong. The language did not support this interpretation and it could not be fashioned to mean what the court a quo found it to mean, he insisted. The proper way to interpret the Order, he continued, was that para (a) invalidated the contract. Paragraph (b) then suspended it pending compliance with provisions of the Municipal Systems Act and a competitive bidding process. Paragraph (b) was qualified in para (c), which provided that from the date of the Order and pending the compliance alluded to in para (b) the plaintiff (respondent) may continue to provide the service, but at its own cost. The result, so he contended, was that the suspension went no further than permitting the respondent to go on providing the service, but that the right to be reimbursed would be removed until the suspension came to an end. Properly understood, therefore, there was no warrant for the finding that the suspension applied retrospectively.

[11] It was also contended that the retention of the respondent's contractual rights for a limited period was not reconcilable with para (d) of the Order dismissing the respondent's counter-application to declare the contract valid and consequently for payment of the amount due in terms of contract. If Nkosi J had intended to allow such a right, the argument continued, there would have been no need for him to have dismissed the counter-application.

[12] It is convenient to dispose of the argument pertaining to the counter- application, first. In the proceedings before Nkosi J, the respondent sought this relief – to declare the contract valid and for payment – in response to the appellant's prayer for the contract to be declared invalid. It was thus the

mirror image of the relief sought by the appellant. Once the court had granted the appellant's prayer – apart from the suspension – it followed that the primary relief sought by the respondent – that the contract be declared valid – fell away. But the fact that he had dismissed the counter-application was not itself indicative of the learned judge's intention to have divested the respondent of all its contractual rights through the order of invalidity.

[13] It therefore takes the argument no further. It is also significant that despite having dismissed the counter-application the learned judge made no adverse costs order against the respondent. On the contrary the Order made the appellant liable for all the costs incurred in this matter, including the counter-application. Implicitly, therefore, the learned judge had accepted that the respondent could enforce its contractual claim even though the contract was invalid.

[14] The nub of the interpretation dispute issue thus lies in understanding what was intended by paras (a) (b) and (c) of the Order. It is evident that the focus of the appellant's argument – that the Order was not intended to operate retrospectively – was directed principally at its language. Because, if one reads the Order in isolation, Mr Pillemer's submissions appears to have some force. But as lawyers we know that when interpreting legal texts 'context is everything'. This is why in ascertaining the meaning of a court order, one must have regard not only to its language but the context in which it arises. That context is found in the court's reasoning preceding the order, which not only explains it but ultimately gives it its true meaning and force.[3]

[3] *Eke v Parsons* [2015] ZACC 30; 2016 (3) SA 37 (CC) para 29.

[15] In my view the court a quo properly approached its interpretative task by not fixating only on the words of the Order but by giving it meaning by analysing the judgment, the key aspects of which are alluded to above. It bears mentioning that the court a quo emphasised what Nkosi J had said in the penultimate paragraph of his judgment, before dealing with the question of costs that:

'The declaration of invalidity must not have the effect of divesting the respondent of rights to which – but for the declaration of invalidity – it might be entitled to.'

[16] The rights mentioned here could only be understood to refer to the right to claim and receive payment for services rendered in accordance with the terms of the contract. Mr Pillemer candidly accepted that this part of the reasoning posed an obstacle to his contention that the Order was not retrospective in effect. But he insisted, nonetheless, that we must give effect to the meaning of the Order if it was clear. And what was clear in the Order – which is really the nub of the argument – that in the absence of any reference to the Order applying retrospectively the suspension could only have applied to the respondent's right to claim for carting off sewerage in the future as contemplated in para (c).

[17] Apart from Mr Pillemer's concession that the fact that Nkosi J was emphatic in wanting to avoid divesting the respondent of any rights posed a problem for the appellant's interpretation of the Order, it is apparent that the thrust of his judgment on this aspect was aimed at protecting the contractual rights that it had already acquired but for the declaration of invalidity. Conversely, he was also very critical – for good reason – of the appellant's conduct to which I have referred in para 7 above. The appellant's

interpretation – that the suspension had the effect of divesting the respondent of its contractual rights – has precisely the consequence that Nkosi J had made clear he wished to avoid.

[18] It also makes little sense that he would have intended only to suspend appellant's right to claim payment after the declaration of invalidity until compliance with proper procurement processes. Because, this would have meant that apart from the respondent perhaps having a right to participate in a future procurement process it would have no other rights arising from the conclusion of the existing contract. In other words the appellant would have us accept that the 'just and equitable' relief that Nkosi J envisaged was the evisceration of all the respondent's contractual rights. That flies against the logic of his judgment and against what was obviously the just and equitable remedy in this dispute.

[19] I thus conclude that court a quo properly interpreted Nkosi J's Order as applying retrospectively to the date the contract was concluded until the declaration of its invalidity. It therefore correctly dismissed the appellant's opposition to the claim for summary judgment.

[20] In the result the following order is made:
'The appeal is dismissed with costs.'

A CACHALIA
JUDGE OF APPEAL

Appearances

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| For appellant: | M Pillemer SC (with him S Kuboni) |
| Instructed by: | Mhlanga Inc, Durban |
| | Honey Attorneys, Bloemfontein |
| For respondent: | A J Dickson SC |
| Instructed by: | Hay and Scott Attorneys, Pietermaritzburg |
| | Phatshoane Henney Attorneys, Bloemfontein |