



**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA**  
MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

**From:** The Registrar, Supreme Court of Appeal

**Date:** 19 April 2024

**Status:** Immediate

***The following summary is for the benefit of the media in the reporting of this case and does not form part of the judgments of the Supreme Court of Appeal***

*KET Civils CC v The Member of the Executive Committee: Police, Roads & Transport, Free State and Others (497/2022 & 820/2022) [2024] ZASCA 56*

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Today the Supreme Court of Appeal (SCA) handed down judgment upholding, with costs, an application for leave to appeal against the decision of the Free State Division of the High Court, Bloemfontein (the high court).

The background facts were as follows: KET Civils CC (KET) was a close corporation, involved in *inter alia* road construction. It was the applicant before the Free State Division of the High court (the high court). The first respondent was the MEC: Police, Roads and Transport in his capacity as the head of the Department (the MEC). In February and March 2019 KET was appointed by the Department as a member of the panel of contractors constituted under Panel PR&T/BID062018/19 together with the second to the sixth respondents for the upgrading, periodic routine and special maintenance of all Free State roads for the Department. On 4 November 2020, while the contracts were in existence, the Department wrote to KET and informed it that the Auditor General had discovered, in the course of its 2019/2020 financial year audit, that the panel had been irregularly constituted. Accordingly, it would have to be disbanded and a new panel constituted. The Department asked KET to consent to the termination of the panel. It also added that one of the consequences for the continuation of the use of the panel of contractors would be irregular payment. This led to some consternation on the part of KET, especially when it received no response from the Department to its many requests for clarification. Finally, KET consented to the termination of its contracts with the Department and suspended further work except that which related to traffic control and other safety measures. In February 2021, the Department informed KET that it considered that this conduct amounted to a breach of contract. In consequence, on 29 April 2021 KET approached the high court with a two-part application. Only Part A was relevant to this application for reconsideration. In Part A, KET sought a declaration that the Department initiated the termination of the contracts it had concluded with KET, and that KET was entitled to suspend further works. The Department, in a separate application under a different case number, filed a counter application for 'self-review', and sought an order declaring the constitution of the panel of the contractors, and the contracts pursuant thereto unlawful. This was coupled with a just and equitable remedy suspending such declaration of invalidity for the remaining duration of the contract so that they could be performed to their conclusion.

The two applications were enrolled to be heard simultaneously on an urgent basis. KET's application was struck from the roll for lack of urgency and there was a dispute as to whether Department's counter-application was struck of the roll or not. A settlement agreement between the contractors and the Department was made and it was made an order of court, which KET disputed. KET alleged that it was unaware of any merits that were argued and subsequently an order that was granted. However, upon assessment of the transcripts of 29 April 2021 hearing, it appeared that indeed an order of the court was made despite objections made by KET. To further obfuscate things, KET stated that it became aware that the Department and the contractors were not satisfied with the order which was granted by the high court and sought this order (the first merits order) to be corrected. A revised order (the second

merits order), was sent to KET on 13 September 2021. Both the first and second merit orders were dated 29 April 2021. As a result, on 4 October 2021, KET filed its application for leave to appeal against the orders of the high court. In November 2021 KET was informed that the high court would not entertain the application for leave to appeal without an application for condonation. Accordingly, KET applied for condonation for the late filing of its leave to appeal. On 5 May 2022, the high court delivered its judgment and dismissed the application for leave to appeal on the basis that it was out of time and that KET did not explain the delay to the satisfaction of the court. It further held that, there were no prospects of success. Both the application for condonation and the application for leave to appeal were dismissed with costs. KET then petitioned the SCA for leave to appeal, however, the petition was dismissed.

Aggrieved by the outcome, KET brought an application before this Court in terms of s 17(2)(f) of the Superior Courts Act 10 of 2013 (the Superior Courts Act) for the reconsideration of this Court's order dismissing KET's petition for leave to appeal. The President referred the reconsideration application for oral argument in terms of s 17(2)(d) of the Superior Courts Act.

The SCA held that the two merits orders made by the high court were incompetent. First, the counter-application had been struck from the roll due to lack of urgency, only as far as KET was concerned. There was no basis, according to the SCA, for differentiating between KET and the contractors in that regard. Second, the orders were *in rem* and therefore could not be granted without the consent of KET which was cited in the counter-application and in the order. The second merits order quoted above applied to all the parties including KET, despite KET not being a party to the settlement agreement between the Department and the contractors. The SCA further held that no order *in rem* should have been granted without hearing all the parties involved. The court should have only given its sanction to the agreement being made an order of court after it satisfied itself on the merits of the case. It should have carefully scrutinised the settlement agreement and thereafter given its reasons for granting such an order. The Court also found that the purported second merits order, bound KET and had the potential to cause it prejudice and yet it had not consented to it. It was therefore not competent for the high court to grant the Department and the contractors the order which affected KET's rights. In addition, the SCA further held that, when a court was presented with a settlement agreement which was sought to be made an order of court, it should have satisfied itself before doing so that all the parties that were purported to have concluded the agreement of settlement, had in fact agreed to settle. This was not done in this matter. Had the two judges who considered the petition been aware of these circumstances they would most likely have granted leave to appeal. Consequently, KET had succeeded to show the existence of exceptional circumstances justifying this Court to set aside its earlier decision and vary it and thus, KET's leave to appeal was granted.

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