



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

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Govan Mbeki Municipality v New Integrated Credit Solutions (Pty) Ltd (121/2020) [2021] ZASCA 34 (7 April 2021)

Today, the Supreme Court of Appeal (SCA) upheld an appeal and cross-appeal only to the extent reflected in the substituted order of the SCA for that of the Mpumalanga Division of the High Court, Middelburg (the court below). No order was made as to costs.

The case concerned the validity of a debt management services agreement concluded between the appellant, the Govan Mbeki Municipality (the GMM), and the respondent, New Integrated Credit Solutions (Pty) Ltd (NICS). The appeal and cross-appeal were directed against an order of the high court, in terms of which only a part of that agreement was declared invalid, unconstitutional and void ab initio. The GMM sought to have the entire agreement declared invalid, whilst NICS contended that the entire agreement was valid and enforceable.

The SCA, notably, made the point that the case was part of an ever growing, and disturbing, long line of cases where municipalities and organs of state sought to have their own decisions, upon which contracts with service providers were predicated, reviewed and overturned, for want of legality, more often than not after the contracts had run their course and services had been rendered thereunder, and after having failed in their duty to ensure that they complied with constitutional norms and statutory prescripts. The background to the appeal is set out in brief hereafter.

During 2014, the Newcastle Municipality issued a tender notice that invited bids from service providers for debt management services. It was made clear that tenders were invited only in respect of the management of debts older than 60 days and the contract duration was 36 months. On 30 April 2015, a written agreement was concluded between the Newcastle Municipality and NICS for the provision of debt management services. The agreement, notably, included a clause that NICS was entitled to commission of 2.5 percent on amounts collected on debts younger than 60 days.

On 12 September 2015, the GMM and NICS concluded a written agreement for the provision of debt management services for a period of three years, until 31 August 2018 – from the effective date, 1 September 2015. It essentially adopted the Newcastle Municipality's contract regime. The GMM acted in terms of reg 32 of the Municipal Supply Chain Management Regulations (the Regulations), whereby the GMM procured goods or services under a contract secured by another organ of state. Notably, the remuneration for the provision of the debt management services set out in the agreement between the GMM and NICS was in identical terms to the agreement between the Newcastle Municipality and NICS, namely commission

of 16.5 percent of collected debts exceeding 60 days and 2.5 percent of collected debts younger than 60 days.

In February 2017, the GMM purported to terminate its agreement with NICS by reliance on s 217 of the Constitution, on reg 32, and on the allegation that NICS had failed to fulfil its contractual obligations. Notably, it asserted that the clause in the agreement with regard to commission of 2.5 percent on amounts collected on debts younger than 60 days was not subjected to a competitive bidding process provided for in reg 32(1)(a) of the Regulations. The GMM professed ignorance of the Newcastle Municipality's failure to adhere to these statutory prescripts. On 1 March 2017, NICS approached the high court for urgent relief, seeking an interdict against the purported cancellation. On 6 March 2017, the GMM launched a conditional counter-application for an order that the contract for the provision for debt management services entered into on 12 September 2015 be declared unconstitutional, invalid and unlawful, and void ab initio. The urgent application by NICS was settled by agreement between the parties, on the basis that the issues raised be referred to arbitration. The counter-application remained in abeyance, until it was eventually withdrawn. The arbitration proceedings were finalised, and an award, dated 23 August 2017, was made in favour of NICS. The arbitrator held that the GMM's purported cancellation of the agreement on the basis of the alleged breaches of the agreement in question was invalid and of no force and effect. The arbitrator held that he had jurisdiction to deal with the termination of the agreement, other than on the basis of its constitutional validity.

On 21 June 2017, approximately 22 months after the effective date, whilst the arbitration was being conducted, the GMM instituted the action in the court below, seeking a declarator that the entire agreement between it and NICS be declared unconstitutional, invalid, unlawful and void ab initio; alternatively, that the part of the agreement relating to the additional 2.5 percent for managing debts younger than 60 days be reviewed, declared unconstitutional and set aside, because it had not been subject to a competitive bidding process and there were no demonstrable discounts or benefits in respect thereof. The stated bases for the action were that the agreement was in conflict with s 217 of the Constitution, reg 32, reg 51, and the provisions of the Local Government Municipal Finance Management Act 56 of 2013 (LGMFMA), including s 116(3). The GMM stated that the delay in seeking relief was justified and prayed that it be overlooked. NICS, in defending the action, insisted that the delay in seeking relief, which essentially was a legality review, was inordinate and that it should not be entertained and that the claim by the GMM be dismissed with costs. In relation to the merits of the legality challenge, NICS denied that the agreement was invalid and that it did not comply with s 217 of the Constitution, or was in contravention of any of the applicable statutory prescripts. In the alternative, NICS pleaded that in the event that the court held that it was compelled to declare the contract invalid, justice and equity dictated that the court preserve the rights already accrued by NICS. The trial in the court below commenced on 4 November 2019, more than a full year after the contract period had run its course.

On appeal, the SCA found, firstly, that the challenge by the GMM was not reactive or collateral, and that this characterisation had been resorted to by the GMM expediently. The SCA held that there was undue and unreasonable delay, both in initiating and finalising the review proceedings, and that there was, effectively, no explanation for the delay. This, on the grounds that the GMM ought reasonably to have known or have been aware from inception, at the time that it received requested documents from the Newcastle Municipality, and certainly at the time of the conclusion of the agreement in September 2015, that the agreement was of questionable validity. The SCA held, further, that there was no reason to overlook the delay. This, on the grounds that the prescripts of both reg 32 and reg 51 were not adhered to and no consideration was given to the constitutional imperatives of fair, equitable, transparent, competitive and cost-effective procurement of services. Moreover, it was clear that there was a most serious and egregious breach by the GMM of its constitutional duties. Notwithstanding, in accordance with precedent, the SCA held that the agreement in this case was clearly

unlawful and there was a duty to declare it so. Nevertheless, a just and equitable order in terms of s 172(1)(b) of the Constitution, including relief to be afforded to NICS, was appropriate. The SCA held that the GMM should not be permitted, because of its own unreasonable delay, to unduly benefit at the expense of NICS in respect of work done and services rendered in relation to debts older than 60 days. Accordingly, the SCA held that a just and equitable result would be to not deprive NICS of the benefits that accrued under the agreement in relation to commission earned on debts older than 60 days, but to do so in relation to all the commission in relation to debts younger than 60 days.

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