



**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT**

Not Reportable
Case No: 428/2021

In the matter between:

GREATER TZANEEN MUNICIPALITY

APPELLANT

and

BRAVOSPAN 252 CC

RESPONDENT

Neutral citation: *Greater Tzaneen Municipality v Bravospan 252 CC* (Case no. 428/2021) [2022] ZASCA 155 (7 November 2022)

Coram: ZONDI, VAN DER MERWE and HUGHES JJA and MOLEFE and CHETTY AJJA

Heard: 1 September 2022

Delivered: 7 November 2022

Summary: Constitutional law – enrichment claim not ‘debt’ as defined in Institution of Legal Proceedings against Certain Organs of the State Act 40 of 2002 – no notice in terms thereof required – no general enrichment action recognised in our law – appropriate remedy available to the respondent – court’s discretionary power in terms of s 172(1)(b) of the Constitution to grant a just and equitable remedy.

ORDER

On appeal from: Limpopo Division of the High Court, Polokwane (Makgoba JP, sitting as court of first instance):

1 The appeal is upheld with no order as to costs.

2 The order of the high court is set aside and replaced with the following:

‘(a) It is declared that the plaintiff is entitled to compensation for the services rendered to the defendant during the period from 1 November 2014 to 31 October 2016 as a just and equitable remedy under s 172(1)(b) of the Constitution;

(b) Costs of the hearing on the merits are reserved.’

3 The matter is referred back to the high court to determine the quantum of that compensation in accordance with the applicable law.

JUDGMENT

Molefe AJA (Zondi, Van der Merwe and Hughes JJA and Chetty AJA concurring):

[1] This is an appeal against the judgment of the Limpopo Division of the High Court, Polokwane (the high court) granting the respondent’s enrichment claim against the appellant in an amount to be determined. The appeal is with the leave of the high court.

[2] The appellant, Greater Tzaneen Municipality (the municipality), a municipality established in terms of s 1 of the Local Government: Municipality Structures Act 117 of 1998, and the respondent, Bravospan 252 CC (Bravospan) concluded a Service Level Agreement (SLA) on 20 November 2013, pursuant to a competitive tender process. In terms of the SLA, Bravospan would render security services to the municipality for a period of 12 months from 1 November 2013 to 31 October 2014.

[3] Towards the end of the term of the SLA, and without any tender process, the municipality and Bravospan concluded an addendum to the SLA (the extension agreement) in terms of which it was agreed that the SLA would be extended for a further 24 months from 1 November 2014 to 31 October 2016. Prior to the signing of the extension agreement, Bravospan enquired from the municipality as to the validity of an extension agreement without a bidding process. The municipality assured Bravospan that it had obtained a legal opinion that confirmed that the parties could legally enter into the extension agreement without an additional tender process.

[4] The extension agreement had the effect that the SLA became a long-term contract as defined in the Municipal Supply Chain Management Regulations (the regulations).¹ One of the significant differences between a long term contract and a contract with a duration of one year or less is that a long term contract has to be advertised for a period of not less than 30 days and the agreement of a period of one year or less can be advertised for a period of 14 days.²

[5] On 9 February 2015, the municipality launched an application in which it sought a declaratory order that the extension agreement be declared null and void, alternatively that the extension agreement be reviewed and set aside. Bravospan launched a counter-application for payment of R2 005 000 for the security services rendered for the period November 2014 to March 2015. Even after the municipality had commenced with litigation it requested Bravospan to continue rendering services 'until such a time that a new service

¹ 'Municipal Supply Chain Management Regulations, GN R868, GG 40553, 20 January 2017'. The Regulations Supply defines a 'Long term contract' defined as 'a contract with a duration period exceeding one year.'

² Regulation 22 provide as follows:

'(1) A supply chain management policy must determine the procedure for the invitation of competitive bids, and must stipulate –

(a) . . .

(b) the information a public advertisement must contain, which must include –

(i) the closure date for the submission of bids, which may not be less than 30 days in the case of transactions over R10 million (VAT) included), or which are of a long term nature, or 14 days in any other case, from the date on which the advertisement is placed in the newspaper, subject to a sub-regulation (3).'

provider was secured'. The municipality continued to accept and enjoyed the benefit of the services without any payment to Bravospan.

[6] The municipality's application and counter-application were argued before Mokgohloa DJP, and the extension agreement was declared null and void for want of constitutionality and the counter-application was dismissed with costs. In her judgment, Mokgohloa DJP concluded:

'The present case falls into the first category for the simple reasons that the applicant's authority to extend the Service Level Agreement must be sought in the provisions of the Statute. Section 217 of the Constitution requires contract for goods or services by an organ of State such as the applicant, to be in accordance with a system which is fair, equitable, transparent, competitive and cost effective. Therefore, failure by the applicant to comply with s 217 renders the extension of the Service Level Agreement unlawful. Consequently, an unlawful transaction cannot be remedied by estoppel because that would give validity to a transaction which is unlawful and therefore ultra vires.'

[7] Bravospan unsuccessfully applied for leave to appeal Mokgohloa DJP's judgment and its subsequent application for leave to appeal in this Court failed. It is undisputed that throughout the 24 months' period after the extension agreement was declared null and void, the municipality, at its request, enjoyed the benefit of security services provided by Bravospan without payment and without engaging another service provider. During January 2018, Bravospan instituted an action against the municipality for payment of R9 624 000, which amount was the sum total of invoices submitted to the municipality for the duration of the extension agreement. It relied on four alternative causes of action, namely delict, fraud, constitutional damages and unjust enrichment. The issues were separated and quantum stood over for later determination. On 2 February 2021, Makgoba JP ruled that Bravospan had made out a case against the municipality based on unjust enrichment. He declared the municipality liable to pay an amount to be determined.

[8] The municipality raised only two issues on appeal, namely:

(a) Bravospan failed to comply with the provisions of s 3(2) of the Institution of Legal Proceedings against Certain Organs of State Act 40 of 2002; and

(b) Alternatively, a portion of Bravospan's enrichment claim had prescribed.

Failure to comply with section (3)2 of the Institution of Legal Proceedings against Certain Organs of State Act 40 of 2002 (the Act)

[9] The municipality contended that Bravospan's notice in terms of s 3(2) of the Act does not comply with all the requirements set out in the Act, in that, the said notice was not served on the municipality within a period of 6 months from the date on which the debt became due in accordance with s 4(1) of the Act. The notice that was served on 8 September 2017 was late; that the municipality had not consented to the late service of the notice; and that there was no condonation application for the late service. It was argued that the debt became due at the latest on 1 November 2016 therefore, the 6-month period consequently expired on 1 May 2017.

[10] The question is whether compensation for unjust enrichment is damages within the definition of 'debt' in s 1 of the Act. In this section 'debt' is defined as any debt arising from delictual, contractual or other act or omission under any law, for which an organ of the state is liable to pay damages whether the debt became due before or after the fixed date.

[11] At the hearing of this matter, counsel for the municipality conceded that the claim for unjust enrichment was not a 'debt' as defined in s (1) of the Act and/or at least because it was not a claim for damages. Thus, it was rightly conceded by the municipality that the Act was not applicable to the enrichment claim, and the absence of a notice in terms of the Act did not therefore bar the enrichment claim. This defence therefore has to fail.

Whether a portion of Bravospan's claim for unjust enrichment has prescribed

[12] It is trite that the party who raises a plea of prescription bears the onus of proof. Rule 22 of the Uniform Rules of Court, provides that a party who raises a plea shall, in his plea, 'clearly and concisely state all material facts upon which he relies'. In *Hurst*,

Gunson, Cooper, Taber Ltd v Agricultural Supply Association (Pty) Ltd,³ the court held that in order to found a plea of prescription based on a 3-year period, it is essential and material to expressly allege the facts on which the plea is based.⁴ The defendant must prove the facts that the plaintiff was required to know before prescription could commence and must allege that the plaintiff had knowledge of those facts on or before the date upon prescription is alleged to commence.⁵ In *MEC for Health, Western Cape v Coboza*, Van der Merwe JA held that the appellant in that case failed to allege the facts that were necessary to determine when the respondent knew of the primary facts or should have reasonably have known them. Therefore, the court held that the determination of the 'plea of prescription was an exercise in futility'.⁶

[13] This Court in *Gericke v Sack*⁷ held that:

'It was the respondent who challenged the appellant on the issue that the claim of damages was prescribed - this he did by way of special plea five months after the plea on the merits had been filed. The onus was clearly on the respondent to establish this defence. He could not succeed if he could not prove both the date of the inception and the date of completion of the period of prescription. . . . It follows that if the debtor is to succeed in proving the date on which prescription begins to run he must allege and prove that the creditor had the requisite knowledge on that date'.

[14] The summons was issued on 19 January 2018 and the municipality accepted for purposes of argument that it was served on that date. In this Court, the municipality argued that the debt became due on a month-to-month basis from the end of November 2014. Therefore, so it contended, the portion of Bravospan's claim that arose before 19 January 2015 (for services rendered during November and December 2014) had prescribed. However, that was not what it pleaded. It pleaded that prescription had commenced on 9 February 2015, being the date on which the application to invalidate the

³ *Hurst, Gunson, Cooper, Taber Ltd v Agricultural Supply Association (Pty) Ltd* 1965 (1) SA 48 (W) at 52.

⁴ *Hurst* *ibid*.

⁵ See *Links v Member of the Executive Council, Department of Health, Northern Cape Province* [2016] ZACC 10; 2016 (4) SA 414 (CC); 2016 (5) BCLR 656 (CC) para 24.

⁶ *MEC for Health, Western Cape v Coboza* 2020 ZASCA 165 para 13.

⁷ *Gericke v Sack* 1978 (1) SA 821 (A) at 827H–828B.

extension agreement had been launched. At the hearing before this Court, the municipality correctly conceded that it failed to prove that prescription had commenced on that date. On the principles that I have referred to, the municipality could not be permitted to advance a different case on appeal. The alternative reliance on prescription of a (small) part of the debt therefore had to fail.

[15] This, however, is not the end of the matter. South Africa is yet to recognise a general claim for unjustified enrichment. In *Nortje en 'n Ander v Pool, NO*,⁸ Botha JA, writing on behalf of the majority, held that 'there is nowhere in what we have shown an express recognition of the existence in our law of a general enrichment action.'⁹ The judgment of Botha JA is described as having delivered the final deathblow to a general unjustified enrichment action in South Africa. However, Botha JA did note that there might be instances where an unjustified enrichment claim may be available to a party in order to counteract unfairness and to come to the rescue of an impoverished person.¹⁰ More than 30 years after *Nortje*, this Court in *McCarthy Retail Ltd v Shortdistance Carriers CC*,¹¹ reiterated that our law had yet to recognise a general enrichment action. The court explained that this non-recognition stems from the fact that the Roman law also did not make provision for a general enrichment action. Makgoba DJP's order granting Bravospan's claim for unjust enrichment was therefore not sustainable in law.

Section 172 of the Constitution - appropriate remedy

[16] On the facts, however, it would be manifestly unjust for Bravospan to be afforded no compensation for the services that it had rendered to the municipality. For the reasons that follow, Bravospan should in the exceptional circumstances of this case be afforded compensation for the services rendered under the extension agreement as a just and equitable remedy under s 172(1)(b) of the Constitution.

⁸ *Nortje en 'n Ander v Pool, NO* [1966] 3 ALL SA 359 (A).

⁹ *Nortje* at 394.

¹⁰ *Nortje* at 395.

¹¹ *McCarthy v Shortdistance Carriers CC* [2001] ZASCA 14; [2001] 3 All SA 236 (A).

[17] Section 172(1)(a) of the Constitution provides that when deciding a constitutional matter, a court must declare any law or act that is inconsistent with the Constitution invalid. Section 172(1)(b) of the Constitution empowers the court, in respect of an order of invalidity, to make any order that is just and equitable. In *Central Energy Fund SOC Ltd and Another v Venus Rays Trade (Pty) Ltd and Others*,¹² this Court held that the power to grant an appropriate remedy applies in review proceedings, whether under the principle of legality or in terms of the provisions of Promotion of Administrative Justice Act 3 of 2000 (PAJA).¹³ This is a wide discretionary power granted to the court to make *any* order.¹⁴ In *Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others*, Froneman J held that this discretionary power follows upon an order of invalidity in terms of PAJA or the principle of legality.¹⁵ It is normally triggered under circumstances where parties have altered their position on the basis that the administrative action was valid and would be prejudiced if the administrative action is set aside.¹⁶ This power must be exercised judicially; the court must be convinced to either exercise its discretion to grant a remedy or to refuse it.

[18] In *Steenkamp N O v Provincial Tender Board, Eastern Cape*, Moseneke DCJ held: 'It goes without saying that *every improper performance of an administrative function would implicate the Constitution and entitle the aggrieved party to appropriate relief*. In each case the remedy must fit the injury. The remedy must be fair to those affected by it and yet vindicate effectively the right violated. It must be just and equitable in the light of the facts, the implicated constitutional principles, if any, and the controlling law. *It is nonetheless appropriate to note that ordinarily a breach of administrative justice attracts public law remedies and not private law remedies*. The purpose of a public law remedy is to pre-empt or correct or reverse an improper administrative function. . . Ultimately the purpose of a public remedy is to afford the prejudiced

¹² *Central Energy Fund SOC Ltd and Another v Venus Rays Trade (Pty) Ltd and Others* [2022] ZASCA 54.

¹³ *Ibid* para 36.

¹⁴ *Ibid*.

¹⁵ *Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others* [2010] ZACC 26; 2011 (4) SA 113 (CC) para 84.

¹⁶ *Ibid* para 84.

party administrative justice, to advance efficient and effective public administration compelled by constitutional precepts and at a broader level, to entrench the rule of law.’¹⁷ (My emphasis.)

[19] In *Electoral Commission v Mhlope & Others* the Constitutional Court held:

‘Section 172(1)(b) clothes our courts with remedial powers so extensive that they ought to be able to craft an appropriate or just remedy, even for exceptional, complex or apparently irresolvable situations. And the operative words in the section are “any order that is just and equitable”. *This means that whatever considerations of justice and equity point to as the appropriate solution for a particular problem, may justifiably be used to remedy that problem.* If justice and equity would best be served or advanced by that remedy, then it ought to prevail as a constitutionally sanctioned order contemplated in section 172(1)(b).’¹⁸ (My emphasis.)

[20] In *AllPay Consolidated Investment Holdings (Pty) Ltd and others v Chief Executive Officer of the South African Social Security Agency and others (Corruption Watch and another as amici curiae)* (*Allpay 2*), the Constitutional Court developed two guiding principles to assist courts in crafting an appropriate remedy. These are the corrective and ‘no-profit-no-loss’ principle. It explained the corrective principle as thus:

‘This corrective principle operates at different levels. First, it must be applied to correct the wrongs that led to the declaration of invalidity in the particular case. This must be done by having due regard to the constitutional principles governing public procurement, as well as the more specific purposes of the Agency Act. Second, in the context of public procurement matters generally, priority should be given to the public good. This means that the public interest must be assessed not only in relation to the immediate consequences of invalidity – in this case the setting aside of the contract between SASSA and Cash Paymaster – but also in relation to the effect of the order on future procurement and social security matters.’¹⁹

In respect of the ‘no-profit-no-loss’ principle, it held:

¹⁷ *Steenkamp N O v Provincial Tender Board, Eastern Cape* 2007 (3) BCLR 300; 2007 (3) SA 121 (CC) para 29.

¹⁸ *Electoral Commission v Mhlope and Others* [2016] ZACC 15; 2016 (8) BCLR 987 (CC) para 132.

¹⁹ *AllPay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others (Corruption Watch and Another as amici curiae)* (*Allpay 2*) para 32.

'It is true that any invalidation of the existing contract as a result of the invalid tender should not result in any loss to Cash Paymaster. The converse, however, is also true. It has no right to benefit from an unlawful contract.'²⁰

[21] The effect of Mokgohloa DJP's order was to declare the extension agreement unconstitutional under s 172(1)(a) of the Constitution because proper procurement processes had not been followed in respect thereof. That court was not called upon to determine a just and equitable remedy under s 172(1)(b). Ordinarily a declaration of unconstitutionality and a just and equitable remedy would be claimed in the same proceedings, but I can see no reason in principle why relief under s 172(1)(a) and s 172(1)(b) may not be claimed in separate consecutive legal proceedings. One can, for example, envisage a case where a declaration of unconstitutionality may be obtained on motion because of the absence of factual disputes in respect thereof, but where the nature of the disputes in respect of remedy would require their determination at a trial. Counsel for the municipality conceded that all the facts relevant to whether Bravospan should in principle be compensated under s 172(1)(b) are before us and that the municipality would not be prejudiced by an order referring the matter back to the court a quo for the determination of the quantum of just and equitable compensation.

[22] Bravospan was not responsible for the unconstitutionality of the extension agreement. On the contrary, the municipality in this regard allayed its concerns. The municipality had the benefit of Bravospan's services for the full period from 1 November 2014 to 31 October 2016. Even after the municipality had launched its review application on 9 February 2015, it persuaded Bravospan to continue to perform services in terms of the extension agreement. At some stage, Bravospan sent invoices to the municipality for services rendered, and the municipality, in a letter dated 8 July 2015, undertook to make payment of those invoices. The municipality also sought and obtained a legal opinion from its own attorneys that stated that the municipality had been enriched at the expense of Bravospan and that the municipality should pay. Given the role played by the

²⁰ Ibid para 41.

municipality in the breach of the Constitution, Bravospan should be afforded compensation for the services it rendered as a just and equitable remedy under s 172(1)(b).

[23] In the particular circumstances of the case, the order of the court a quo must be set aside and replaced with an order declaring that Bravospan is entitled to compensation for the services rendered to the municipality from 1 November 2014 to 31 October 2016, as a just and equitable remedy under s 172(1)(b) of the Constitution. The matter must be referred back to the high court to determine the quantum of that compensation in accordance with the applicable law.

[24] The following order is made:

1 The appeal is upheld with no order as to costs.

2 The order of the high court is set aside and replaced with the following:

‘(a) It is declared that the plaintiff is entitled to compensation for the services rendered to the defendant during the period from 1 November 2014 to 31 October 2016 as a just and equitable remedy under s 172(1)(b) of the Constitution;

(b) Costs of the hearing on the merits are reserved.’

3 The matter is referred back to the high court to determine the quantum of that compensation in accordance with the applicable law.

D S MOLEFE
ACTING JUDGE OF APPEAL

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