THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Not reportable

Case no: 497/2022 & 820/2022

In the matter between

KET CIVILS CC	**APPLICANT**
and	
THE MEC: POLICE, ROADS & TRANSPORT, FREE STATE	**FIRST RESPONDENT**
NWETI CONSTRUCTION (PTY) LTD	**SECOND RESPONDENT**
DOWN TOUCH (PTY) LTD	**THIRD RESPONDENT**
RAUBEX NODOLI CONSTRUCTION JV	**FOURTH RESPONDENT**
TAU PELE CONSTRUCTION (PTY) LTD	**FIFTH RESPONDENT**
SEDTRADE (PTY) LTD	**SIXTH RESPONDENT**

Neutral citation: *KET Civils CC v The Member of the Executive Committee: Police, Roads & Transport, Free State and Others* (497/2022 & 820/2022) [2024] ZASCA 56 (19 April 2024)

Coram: MOCUMIE ADP, ZONDI and NICHOLLS JJA

Heard: 15 February 2024

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, published on the Supreme Court of Appeal website, and released to SAFLII. The date and time for hand-down is deemed to be 11h00 on 19 April 2024

Summary: Civil procedure – Section 17(2)*(f)* of the Superior Courts Act 10 of 2013 – whether a proper case for reconsideration in terms of s 17(2)*(f)* is made out – a court may not make a settlement agreement an order of court without hearing an interested party.

ORDER

On appeal from: Free State Division of the High Court, Bloemfontein (Mhlambi J, sitting as a court of first instance):

1 Leave to appeal is granted.

2 The appeal against the order of the high court dismissing the application for leave to appeal is set aside and substituted with the following order:

'(a) Leave to appeal is granted.

(b) Paragraphs 1 to 5 of the second merits order are set aside and replaced with the following order:

(i) An order reviewing and setting aside the decision of the first respondent, acting in his capacity as the accounting officer of the Department of Police, Roads & Transport, Free State, in appointing KET Civils CC and second to sixth respondents on the 21st of February 2019 in the panel PR&T/BID06/2018/19 for the upgrading, periodic routine and special maintenance of all the Free State roads for the Department of Police, Roads & Transport for the duration of 36 (thirty six) months and any contract made under this panel.

(ii) An order in terms of s 172(1)(*a*) of the Constitution of the Republic of South Africa, 1996 declaring that the conduct of the first respondent in constituting the panel as set out above is inconsistent with the provisions of s 217 of the Constitution and is invalid to the extent of its inconsistency.

(iii) An order in terms of s 172(1)(*b*)(ii) of the Constitution, suspending the declaration of invalidity of the contracts of the second to sixth respondents and emanating from the panel and any extensions thereunder until the said contracts are completed.

(iv) An order in terms of s 172(1)(*b*)(ii) of the Constitution, that the orders granted in paragraphs (i) and (ii) above shall not affect the rights of KET Civils CC to pursue any claims for payment emanating from its contract/s and any extensions thereunder. For

the avoidance of any doubt, the dispute resolution mechanisms under the contracts shall endure post any termination of the contracts.'

3 The orders set out above are with effect from 29 April 2021.

4 The first respondent to pay the costs of the appeal, including the costs of the third to the fifth respondents up until 23 June 2023.

5 In relation to the costs which were incurred after 23 June 2023, each party is ordered to pay its own costs.

JUDGMENT

Mocumie ADP (Zondi and Nicholls JJA concurring)

[1] This is an application brought by KET Civils CC (KET) 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. Thereafter, KET applied to the President of this Court, in terms of s 17(2)(*f*) of the Superior Courts Act for her reconsideration of their dismissal of its application. The President referred the reconsideration application for oral argument in terms of s 17(2)(*d*) of the Superior Courts Act.

[2] KET is 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 is the Member of the Executive: Police, Roads and Transport in his capacity as the head of the Department (the MEC). 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. The third to fifth respondents (the contractors) oppose the appeal insofar as KET alleges that they were directly implicated in what occurred before the high court which led to the granting of the second merits order. The MEC filed a notice to abide the decision of this Court on 23 June 2023.

[3] Before dealing with the application for reconsideration, two applications for condonation are before this Court. First, KET sought condonation for the late filing of this application. In terms of the rules of this Court, the application must be filed within one month of the decision. The Registrar of this Court was of the view that the application was brought out of time. This is incorrect as the order of this Court dismissing leave to appeal was only sent to the parties by the Registrar on 25 July 2022 although it was issued on 21 July 2022. It is clear that KET cannot be blamed for the delay which was the fault of the office of the Registrar of this Court. Consequently, the application for condonation for the late filing of the application is granted.

[4] The contractors sought leave to file a supplementary record, and condonation for the late filing of their heads of argument. KET does not oppose the combined application. Although it does not introduce new material, the supplementary record provides a far more coherent account of what actually transpired before the high court, rather than the haphazard record which was filed by KET. Consequently, leave is granted for the late filing of the supplementary record and condonation is granted for the late filing of the heads of argument.

[5] In an application of this nature (in terms of s 17(2)(*f*))) the question to be answered is whether there are exceptional circumstances militating in favour of the reconsideration sought and whether a grave injustice will result if the order dismissing the application for leave to appeal is not reconsidered and varied. The section provides:

> 'The decision of the majority of the judges considering an application referred to in paragraph *(b)*, or the decision of the court, as the case may be, to grant or refuse the application is final: Provided that the President of the Supreme Court of Appeal may in *exceptional circumstances*, whether of his or her own accord or on application filed within one month of the decision, refer the decision to the court for reconsideration and, if necessary, variation.' (Emphasis added.)

[6] The phrase 'exceptional circumstances' is not defined in the Superior Courts Act. In *Liesching v S*[1] the Constitutional Court held that the proviso in s 17(2)(*f*) is very broad. It keeps the door of justice ajar in order to cure errors or mistakes and for the consideration of a circumstance, which, if it was known at the time of the consideration of the petition, might have yielded a different outcome. It is therefore a means of preventing an injustice. The President is given a discretion, to be exercised judiciously, to decide whether there are exceptional circumstances that warrant referral of the matter to the Court for reconsideration or, if necessary, variation. Whether exceptional circumstances exist will vary on the facts and circumstances of each case. The overall interests of justice will be the final determinative feature for the exercise of the President's discretion.[2]

[7] Returning to the facts of this case, in February and March 2019, the Department appointed KET and other construction firms to build various roads in the Free State. While the contracts were in existence, and on 4 November 2020, the Department wrote to KET to inform 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.

[8] 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. Although the Department had undertaken that it would approach the high court for the review and setting aside of the composition of the panel of the contractors, it delayed in doing so. In consequence, on 29 April 2021 KET approached the high court with a two-part application. Only Part A is relevant to this application for reconsideration. In Part A, KET sought a declaration that the Department

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[1] *Liesching and Others v S and Another* [2016] ZACC 41; 2017 (4) BCLR 454 (CC); 2017 (2) SACR 193 (CC).
[2] Ibid paras 55-56.

initiate the termination of the contracts it had concluded with KET, and that KET was entitled to suspend further works. The basis of this application was the report of the Auditor General which found that the tender process was irregular and unlawful as it did not comply with s 217 of the Constitution. The Department, in a separate application under a different case number, filed a counter-application for 'self-review', seeking an order declaring the constitution of the panel of the contractors, and the contracts concluded pursuant thereto, unlawful.[3] 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.

[9] The two applications were enrolled to be heard simultaneously. Both applications (of KET and the counter-application of the Department) served before the high court as urgent applications. There is a dispute as to what occurred in court. It is common cause that KET's application was struck from the roll for lack of urgency. KET submits that the Department's counter-application was similarly struck from the roll. The contractors contend that the counter-application was struck from the roll only in respect of KET and the Department. But, insofar as the counter-application concerned them, it was settled and the settlement agreement between the contractors and the Department was made an order of court. This is disputed by KET.

[10] Based on the transcript of the court proceedings on 29 April 2021 KET's denial that the *lis* between the contractors and the Department was settled, cannot be correct. Mr Luthuli appeared for KET both in the main application and counter-application. Messrs Snellenburg, Pienaar and Grobler appeared for the contractors in both the main application and counter-application. In respect of the counter-application a transcript of the hearing reflects the following exchange:

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[3] See *Department of Transport and Others v Tasima (Pty) Limited* [2016] ZACC 39; 2017 (1) BCLR 1 (CC); 2017 (2) SA 622 (CC) (9 November 2016), *Khumalo and Another v Member of the Executive Council for Education: KwaZulu Natal [2013] ZACC 49; 2014 (3) BCLR 333 (CC); (2014) 35 ILJ 613 (CC); 2014 (5) SA 579 (CC)* para 73 , *MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd* [2014] ZACC 6; 2014 (5) BCLR 547 (CC); 2014 (3) SA 481 (CC) para 83, *City of Cape Town v Aurecon South Africa (Pty) Ltd* [2017] ZACC 5; 2017 (6) BCLR 730 (CC); 2017 (4) SA 223 (CC) para 37 and *State Information Technology Agency SOC Limited v Gijima Holdings (Pty) Limited State Information Technology Agency SOC Limited v Gijima Holdings (Pty) Limited* [2017] ZACC 40; 2018 (2) BCLR 240 (CC); 2018 (2) SA 23 (CC) para 41.

'ADV SNELLENBERG ADDRESSES COURT: M'Lord, it is quite simple. The third and fourth and fifth respondents in the reactive challenge. So, the MEC of Roads, Police and Roads is counter application, have reached an agreement, with regards to the MEC, as applicant in that application. With regards to an order that we concede to, that he can take subject to two very minor amendments.

And the first is then, paragraph 3 of that notice of motion. The words in terms of section 6 of the Promotion of Administrative Justice Act 3/2000…[interventions]

COURT: Just bear with me.

ADV SNELLENBERG: Yes, it is the back of your file, I would presume, of these papers.

COURT: You say in terms of the notice of motion?

ADV SNELLENBERG: Prayer 3, the words: in terms of section 6 of the Promotion of Administrative Justice Act 3/2000…

That is now the reactive counter application. That is taken out, deleted. So, it will simply read: an order reviewing, setting aside the decision of the applicant, acting in his capacity as the accounting officer of the applicant, in appointing the first to six respondents and then it goes on.

COURT: So the words, an order up to PAJA, should be…[intervenes]?

ADV SNELLENBERG: Yes, that is removed and then prayer 6, paragraph 6. To read that the: an order directing the applicant to pay the third, fourth and fifth respondents costs.

COURT: That is prayer 6?

ADV SNELLENBERG: Ja

COURT: It should read: an order directing?

ADV SNELLENBERG: The applicant to pay the third, fourth and fifth respondents costs. That is now in terms of our agreement.

And we concede to an order on those terms and if you do that, it will of course lessen any…[intervenes]

COURT: To pay third, fourth and fifth?

ADV SNELLENBERG: Because of the other respondents, if they still want to oppose that application, but that is with regards to these three.

That will, M'Lord limit the disputes that remain in your main application. Obviously, it will drastically alter that.

We respectfully submit, obviously we will not be entertaining you with arguments on urgency of that matter.

COURT: You say, you will not be entertaining?

ADV SNELLENBERG: We will not be entertaining you then, with arguments with regards to urgency and so forth.

So, this settles the lis between the third, the fourth and the fifth respondents, in the counter application and the MEC of Roads'.

[11] The terms of settlement as set out by Mr Snellenburg were confirmed by counsel for the Department and two other contractors. Thereafter Mr Luthuli stood up to address the court. As he began his address, Mr Grobler intervened as follows:

'ADV GROBLER ADDRESSES COURT: My Lord, I am terribly sorry. My apologies to my learned friend as well. I was just discussing with my colleagues now,

Has your Lordship made our agreement an order of the court or …[intervenes]

Court: I have not, as yet

Advocate Grobler: Have you not as yet? May we ask for such an order?

Court: The agreement between the applicant and the third, fourth and fifth respondent, in case number… [intervenes]

Advocate Grobler: 1640

Court: 1640/2021, Is presented by Mr. Snellenburg, he has made an order…[intervenes]

Advocate Grobler: As the court pleases.

Advocate Pienaar: As the court pleases.

Court: Thank you, Mr. Grobler.

Advocate Lethuli [for KET] addresses court: Thank you M'Lord.

M'Lord, before I start, If I may just understand the order that the court has just made.

Court: Yes?

Advocate Lethuli: I understand that to obviously be provisional, dependant on what the court ultimately decides. In so far as the disputes between my client and the department goes.

So, *that can only become a final order if Your Lordship dismisses my client's application and grants the departments application.*

Otherwise, the agreement that has been reached, cannot be made an order of, until such time, as Your Lordship has granted the department's application.

Court: The order is actually in respect of what is…[indistinct] the counter claim.

Advocate Lethuli: It is what is called the counter claim?

Court: Yes. So, you are saying as between the parties is… [indistinct]. Between the applicant and the respondents.

Advocate Lethuli: *It is not all the respondents, M'Lord. It is the third, fourth and…* [intervenes]

Court: [indistinct]… *and that is third, fourth and fifth*.

Advocate Lethuli: *And fifth respondent*.' (Emphasis added.)

[12] KET alleges that it was unaware of any merits being argued and subsequently an order being granted. And that the record of the proceedings of 29 April 2021 quoted above, bears this out. Although the transcript is a not model of clarity, it seems that the

settlement agreement was indeed made an order of court, notwithstanding the objection by KET's counsel. KET stated that to further obfuscate things, 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.

[13] In September 2021 KET wrote to the Judge President of the Division complaining that three different orders had been issued which caused great confusion. The Judge President advised that if KET was aggrieved by the second merits order, it should pursue its available legal remedies. This led to KET filing its application for leave to appeal against the orders of Mhlambi J on 4 October 2021. In November 2021 KET was informed that Mhlambi J 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.

[14] On 5 May 2022, Mhlambi J delivered his judgment. He 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. In his judgment, Mhlambi J stated that the settlement agreement between the Department and the contractors had been made an order of court on 29 April 2021. He did not refer to the existence of the two orders both dated 29 April 2021. He merely stated that he had received a letter from one of the contractors' attorneys in August 2021 stating that KET was disputing the existence of the court order. He confirmed that the second merits order had been made an order of the court. He also stated that later in September he was presented with another letter from the State Attorney requesting him to vary the order in terms of rule 42(1)(*b*).[4] He did not accede to this request.

[15] Mhlambi J found that KET's application for leave was 'based on the incorrect fact that the consent order was not granted on 29 April 2021'. He held that, in light of the above, there were no prospects of success that another court would come to another

[4] Rule 42(1)*(b)* empowers a court to amend/correct its order *mero motu* or if approached by any party on a patent error which does not affect the substance of the order and or judgment.

conclusion that such order was not granted on that day. Both the application for condonation and the application for leave to appeal were dismissed with costs.

[16] It is clear that two merits orders issued by the high court both dated 29 April 2021. The first order set aside the decision of the Department to appoint the contractors (including KET as the first respondent in that application). This first merits order, according to the contractors, did not reflect all the terms of the compromise, particularly those relating to the just and equitable remedy that there be a suspension of invalidity until the contracts had been completed. That is why the Department approached Mhlambi J in chambers to rectify the error to include those paragraphs which were omitted from the first merits order. This led to what the parties called the second merits order which was dated 29 April 2021. It reads as follows:

'1. The non-compliance with the Uniform Rules of court be condoned and the matter be heard as an urgent application in terms of Rule 6(12) (a)

2. The application be heard simultaneously with the application under case number 1510/2021 as the facts and parties [are] substantially the same.

3. An order reviewing and setting the decision of the applicant, acting in his capacity as the accounting officer of the applicant in appointing the [first] respondent on the 21st February 2019 in the Panel PR&T/BID062018/19 for the upgrading, periodic routine and special maintenance of all Free State roads for the Department of Police, Roads & Transport for the duration of thirty-six (36) months and any contract made under this panel is reviewed and set aside.

4. An order in terms of section 172(1)(a) of the Constitution of the Republic of South Africa,1996, declaring that the conduct of the applicant in constituting the panel as set out hereinabove is inconsistent with the provisions of section 217 of the Constitution and is invalid to the extent of its inconsistency.

5. An order in terms of section 172(1)(b)(ii) of the Constitution, suspending the declaration of invalidity of the contracts emanating from the panel and any extensions thereunder until the said contracts [are] completed

6. An order directing the applicant to pay the 3rd, 4th and 5th respondents' costs.'

[17] In the light of what is set out above, the two merits orders made by Mhlambi J 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 is no basis for differentiating between KET and the contractors in this 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 applies to all the parties including KET, when KET was not a party to the settlement agreement between the Department and the contractors.

[18] The approach adopted by the high court is contrary to what the Constitutional Court stated in *Airports Company South Africa v Big Five Duty Free (Pty) Ltd*) (ACSA)[5] The Court held that no order *in rem* should be granted without hearing all the parties involved. The court should only give its sanction to the agreement being made an order of court after satisfying itself on the merits of the case. It must carefully scrutinise the settlement agreement and thereafter give its reasons for granting such an order.[6]

[19] Besides the above misdirections, the purported second merits order, binds KET and has the potential to cause it prejudice and yet it did not consent 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 *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Limited*[7] the Constitutional Court, referencing *Eke v Parsons*[8] stated the following:
'There are sound reasons why a court should carefully scrutinise a settlement agreement before making it an order of court. Once a settlement agreement is made an order of court, it is interpreted in the same way as any judgment or order and affects parties' rights in the same way. Madlanga J in *Eke* puts the matter thus:
'The effect of a settlement order is to change the status of the rights and obligations between the parties. Save for litigation that may be consequent upon the nature of the particular order, the order brings finality to the *lis* between the parties; the *lis* becomes *res judicata* (literally, 'a matter judged'). It changes the terms of a settlement agreement to an enforceable court order.'

[20] When a court is presented with a settlement agreement which is sought to be made an order of court, it must satisfy itself before doing so that all the parties that are 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.

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[5] *Airports Company South Africa v Big Five Duty Free (Pty) Limited and Others* [2018] ZACC 33; 2019 (2) BCLR 165 (CC); 2019 (5) SA 1 (CC) para 2.
[6] *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Limited* [2019] ZACC 15; 2019 (6) BCLR 661 (CC); 2019 (4) SA 331 (CC) para 25.
[7] Ibid para 25.
[8] *Eke v Parsons* [2015] ZACC 30;2015(11) BCLR 1319 (CC);2016 (3) SA 37 (CC).

Consequently, KET has succeeded to show the existence of exceptional circumstances justifying this Court to set aside its earlier decision and vary it.

[21] In conclusion, both KET and the contractors agreed on what ultimately fell to be contained in the order of this Court which follows hereafter, except for costs. Although not participating in this appeal, we were informed that a representative of the Department was present at court and was in full agreement with what was finally incorporated into the order of this Court.

[22] As regards costs, the general rule is that the successful party is entitled to its costs. KET is the successful litigant. It is appropriate that the Department pays the costs of KET and the contractors up until 23 June 2023 when the Department filed a notice to abide the decision of this Court. In view of the confusion that accompanied this matter to which all parties contributed to some extent, including KET, the most equitable way to deal with the issue of costs after 23 June 2023 is that each party must pay its own costs.

[23] In the result, the following order is made.

3 Leave to appeal is granted.

4 The appeal against the order of the high court dismissing the application for leave to appeal is set aside and substituted with the following order:

'(a) Leave to appeal is granted.

(b) Paragraphs 1 to 5 of the second merits order are set aside and replaced with the following order:

(i) An order reviewing and setting aside the decision of the first respondent, acting in his capacity as the accounting officer of the Department of Police, Roads & Transport, Free State, in appointing KET Civils CC and second to sixth respondents on the 21st of February 2019 in the panel PR&T/BID06/2018/19 for the upgrading, periodic routine and special maintenance of all the Free State roads for the Department of Police, Roads & Transport for the duration of 36 (thirty six) months and any contract made under this panel.

(ii) An order in terms of s 172(1)(*a*) of the Constitution of the Republic of South Africa, 1996 declaring that the conduct of the first respondent in constituting the panel as set out above is inconsistent with the provisions of s 217 of the Constitution and is invalid to the extent of its inconsistency.

(iii) An order in terms of s 172(1)(*b*)(ii) of the Constitution, suspending the declaration of invalidity of the contracts of the second to sixth respondents and emanating from the panel and any extensions thereunder until the said contracts are completed.

(iv) An order in terms of s 172(1)(*b*)(ii) of the Constitution, that the orders granted in paragraphs (i) and (ii) above shall not affect the rights of KET Civils CC to pursue any claims for payment emanating from its contract/s and any extensions thereunder. For the avoidance of any doubt, the dispute resolution mechanisms under the contracts shall endure post any termination of the contracts.'

3 The orders set out above are with effect from 29 April 2021.

4 The first respondent to pay the costs of the appeal, including the costs of the third to the fifth respondents up until 23 June 2023.

5 In relation to the costs which were incurred after 23 June 2023, each party is ordered to pay its own costs.

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B C MOCUMIE

ACTING DEPUTY PRESIDENT

Appearances

For the Appellant:	N Luthuli
Instructed by:	Webber Wentzel, Johannesburg Symington De Kok, Bloemfontein
For the Third to Fifth Respondents:	N Snellenburg SC & W A Van Aswegen
Instructed by:	Peyper Attorneys, Bloemfontein