REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case number: 89732/2018
Heard on: 14 August 2019
Date of judgment: 5 September 2019

(1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO
(3) REVISED.

5 September 2019
DATE

SIGNATURE

In the matter between:

APPOLIS BUILDERS CC Applicant

and

THE MINISTER OF PUBLIC WORKS Respondent
THULAS NXUSI N.O.

JUDGMENT

KROMHOUT AJ:

[1] On 13 December 2018 the applicant, Appolis Builders CC, instituted application proceedings against the Minister of Public Works for:

[1.1] A declaratory order that the applicant has the right to fair and just

administrative action, as set out in the Promotion of Administrative Justice Act 3 of 2000 ("*PAJA*"), and that the respondent's non-compliance with a directive of parliament directing the respondent to investigate the termination of the contract between the applicant and the state amounts to an infringement on those rights and an unjustifiable impediment to the applicant's enforcement of those rights;

[1.2] That the respondent is interdicted, *alternatively* ordered to comply with the directive within 30 days of date of the order, *alternatively* within a time period as determined by the court;

[1.3] That the respondent is interdicted, *alternatively* ordered to investigate the termination of the applicant's contract within 30 days of date of the order, *alternatively* within a time period as determined by the court, and that the respondent provide a report of the investigation, any supporting documentation, and proof of the outcome of the said investigation to the applicant's attorneys of record within 7 days after the aforesaid time frames have elapsed;

[1.4] That the respondent is ordered to remove the applicant's name and/or details from any negative list and/or listing, which may prevent the allocation of further contracts and/or awards and/or tenders from the state;

[1.5] That the applicant may approach the court on the same papers, supplemented if required;

[1.6] Costs on the attorney and client scale;

[1.7] Further and/or alternative relief.

[2] The founding affidavit was deposed to by Mr Michael Marques Appolis ("*Mr Michael Appolis*"), a member of the applicant, who submits in paragraph 3.2 of the founding affidavit that he is "*duly authorised to depose to this affidavit*".

[3] The applicant's case is based on the following averments:

[3.1] The applicant was awarded a contract by the Department of Public Works ("*the department*") to attend to certain work in respect of the upgrade of the De Aar Magistrate's Courts ("*the contract*"), which contract was entered into on the 3rd of April 2001.

[3.2] During the course of 2001, the respondent unilaterally terminated the contract, as a result of the applicant's alleged breach of the contract, which is denied by the applicant.

[3.3] Following on the aforesaid, the respondent, during 2005, issued summons against the applicant out of the Northern Cape Provincial Division of the High Court for payment of damages in the amount of R601,603.85, which was subsequently amended to R1,785,750.23, with the applicant having instituted a counterclaim for payment of the amount of R19,855,172.06.

[3.4] The parties have sought to settle the aforesaid action.

[3.5] The above action still subsists and has yet to proceed to trial.

[3.6] Parliament, "through the parliamentary portfolio committee", provided a directive *alternatively* ordered, between July 2017 and September 2017, that the Department of Public Works, and accordingly the respondent, settle all old cases and to investigate the causes therefor.

[3.7] In this regard, the applicant relies on an email message by Mr. Michael Appolis dated 2 May 2018, which was addressed to one Nosizwe Waqu of the Ministry of the Department of Public Works and which provided *inter alia* as follows:

> *"The Public Protector of RSA instructed me Mr. Michael Appolis on the 24th of April 2018 to ask for a document regarding instruction by Parliament Portfolio Committee on Public Works to The Minister of Public Works and the D.G. to settle all old cases with merits.*
>
> *The instruction was given approximately July 2017 - Sept 2017 as told by Mr. F. Adams acting chair last year.*
>
> *Mr Mondli Qulu legal advisor confirms this.*
>
> *I hope you'll find the above in order."*

[3.8] On 2 May 2018 Nosixwe Waqu of the Ministry responded as follows:

> *"Good afternoon Mr Appolis*

I have received a response regarding your matter. I have been informed that the directive was not communicated in writing but verbally, therefore the department is not in a position to provide you with any documentation in this regard."

[3.9] The applicant contends further that the respondent has failed *alternatively* neglected *alternatively* refused to settle the matter, or to investigate the matter, being the unlawful and unjustified termination of the aforementioned contract.

[3.10] According to the applicant, as a result of the aforesaid failure and the lengthy court proceedings, it has been unable to procure and/or be awarded further contracts from the state, and it will continue to suffer damages, being unable to procure any work and/or obtain any form of income.

[3.11] The applicant further contends that it has been listed, *alternatively* blacklisted by the respondent and it relies on an excerpt attached to the founding affidavit as annexure "D".

[3.12] The applicant contends that it has suffered damages *alternatively* harm, "as per the aforesaid counterclaim", and that it will continue to suffer damages *alternatively* harm as a result of the respondent's conduct.

[3.13] The applicant submits that the balance of convenience favours the applicant, and that it is:

"*...left with no further recourse but to approach this Honourable Court,*

in an effort to halt the damages and prejudice suffered by the applicant, resultant of the respondent's non-compliance with its obligations."

[4] The answering affidavit was deposed to by Vuyane Edwin Mabe, a senior legal administration officer employed by the department, who avers that he was authorised to do so by the chief director: legal services.

[5] The answering affidavit contains a summary of the factual background to the matter, including *inter alia* the following averments:

[5.1] The applicant was awarded a tender for the renovation of the De Aar magistrates court building and a contract was awarded as per annexure "B" to the founding affidavit. The applicant duly commenced with the works.

[5.2] "It would appear that" the South African Revenue Services appointed the respondent's department as an agent in order to pay over taxes due by the applicant. The department duly fulfilled its role as agent.

[5.3] The applicant thereafter breached the contract in that it failed to proceed with the works with due diligence, it failed to comply with he provisions of the contract, it stopped the works and abandoned site before completion and it refused and/or neglected to comply with conditions of the contract and orders given under the contract.

[5.4] As a result, the department cancelled the contract on 30 October 2001.

[5.5] Another contractor was appointed to complete the works and the applicant is liable for the costs and/or damages to complete the works.

[5.6] The department instructed the state attorney to recover those costs from the applicant and summons was served on the applicant on 17 February 2006.

[5.7] On 27 August 2007 the applicant filed a counterclaim.

[5.8] The department formed the view that the applicant was a dormant entity with no prospect of recovering the debt and legal costs, and that it would be wasteful to pursue litigation further against the applicant. As a result, the litigation was left dormant and the applicant too did not take any steps to pursue its counterclaim.

[5.9] Mr Michael Appolis personally commenced approaching the department demanding payment of the counterclaim.

[5.10] Following investigations, it then transpired that the applicant had been deregistered, which fact is confirmed by a certificate dated 28 May 2012 which is attached to the answering affidavit as annexure "VEM2".

[5.11] The respondent indicated its displeasure to entertain Mr Michael Appolis's complaint due to the deregistration of the applicant, and a letter referring to the deregistration was written by the respondent to Mr Michael Appolis on 19 December 2014 (which is attached to the answering affidavit as annexure "VEM3").

[6] The bases of the respondent's opposition are as follows:

[6.1] The applicant lacks the necessary *locus standi* to bring the application.

[6.2] The deponent lacks the necessary authority to bring the application.

[6.3] The substance of the matter is *lis pendens* in the Northern Cape High Court.

[6.4] In light of the facts set out by the respondent, the respondent contends that the application lacks substance in that it is baseless, opportunistic, frivolous and vexatious.

[7] In the replying affidavit, the applicant similarly launched a challenged to the authority of the deponent to the answering affidavit, and it is further contended that it is not clear whether he has personal knowledge regarding the matter.

The applicant's *locus standi* to bring the application

[8] The respondent's challenge to the *locus standi* of the applicant is partly based on the fact that the applicant was deregistered.

[9] Whilst the facts reveal that the applicant was indeed previously deregistered for annual return non-compliance, it appears from an "Enterprise Enquiry" extracted from the eServices database of the Companies and Intellectual Property Commission, and attached to the founding affidavit as "A", that the applicant is "in business". This enterprise enquiry does not reflect the date of the enquiry, but it

does reflect a copyright date of 2018 at the foot of the page.

[10] It furthermore appears from a comprehensive company report dated 25 February 2019, which is attached to the replying affidavit as "E", that the applicant was reinstated to the register pursuant to an application dated 18 November 2017 and that it is "in business". These facts indicate that the annual return non-compliance, which was the cause of the deregistration, has been cured.

[11] In the circumstances, the respondent's point to the effect that the applicant close corporation has no *locus standi* or legal status due to its former deregistration, is not supported by the facts and is dismissed.

[12] The respondent's counsel contended further that the applicant is a legal *persona*, which acts through its representatives "by a resolution taken for that purpose." The argument proceeds to the effect that the applicant had not attached a resolution authorising a particular person to act on its behalf and that also for that reason the applicant has no *locus standi* and the application proceedings amount to a nullity.

[13] First, in determining the question whether a person has been authorised to institute and prosecute motion proceedings, it is irrelevant whether such person was authorised to depose to the founding affidavit. The deponent to an affidavit in motion proceedings need not be authorised by the party concerned to depose to the affidavit. It is the institution of the proceedings and the prosecution thereof that must

be authorised.[1]

[14] Furthermore, it was held in *Unlawful Occupiers, School Site v City of Johannesburg*[2] that the remedy of a respondent who wished to challenge the authority of a person allegedly acting on behalf of the purported applicant was provided for in Rule 7(1) of the Uniform Rules of Court. A party who wished to raise the issue of authority should not adopt the procedure of an argument based on no more than a textual analysis of the words used by the deponent in an attempt to prove his own authority. That method invariably resulted in a costly and wasteful investigation, which normally led to the conclusion that the applicant was indeed authorised. After all, there was rarely any motivation for deliberately launching an unauthorised application.

[15] Mr Michael Appolis specifically states in the founding affidavit that he is duly authorised to depose to the founding affidavit. The respondent has not challenged the authority of those acting on behalf of the applicant in terms of Rule 7(1) of the Uniform Rules of Court.

[16] Second, section 54(1)&(2) of the *Close Corporations Act* 69 of 1984 provides as follows:

> **54. Power of members to bind corporation.**—(1) Subject to the provisions of this section, any member of a corporation shall in relation to a person who is not a member

[1] Ganes v Telecom Namibia Ltd 2004 (3) SA 615 (SCA), paragraph [19] at 624G/H - 625A; Eskom v Soweto City Council 1992 (2) SA 703 (W) at 704 -706
[2] Unlawful Occupiers, School Site v City of Johannesburg 2005 (4) SA 199 (SCA), paragraphs [14] and [16] at 206H and 207F - I

and is dealing with the corporation, be an agent of the corporation.

(2) Any act of a member shall bind a corporation, whether or not such act is performed for the carrying on of business of the corporation unless the member so acting has in fact no power to act for the corporation in the particular matter and the person with whom the member deals has, or ought reasonably to have, knowledge of the fact that the member has no such power.

[17] Mr Michael Appolis is a member of the applicant and by virtue of section 54 he is an agent of the applicant when dealing with a person who is not a member. Mr Michael Appolis was therefore vested with the necessary authority to instruct the applicant's attorney to launch the present application on behalf of the applicant. Section 54 vests *any* member with the necessary authority, and no resolution authorising a particular person to act on the applicant's behalf is required.

[18] As a result, the respondent's point to the effect that the applicant has not attached a resolution authorising a particular person to act on its behalf and that it therefore has no *locus standi*, is similarly without merit and is dismissed.

The respective deponents' *locus standi* to bring the application

[19] Both parties challenged the authority of the deponent to the other party's affidavits.

[20] Neither party has in terms of Rule 7(1) of the Uniform Rules of Court challenged the authority of the attorney acting for the other party.

[21] When the above principles were raised during argument with Mr Sherman appearing for the applicant, he did not persist with the authority point. On the contrary, he

referred the Court to *inter alia Ganes*[3] and a judgment of Ranchod J in a liquidation application launched in this division under case number 51762/2016 between Cullinan Holdings Ltd and Lezmin 2768 CC.

[22] The respondent's counsel, Mr Jonase, persisted with the authority point and referred the Court to a judgment of Olivier AJ in an eviction application launched out of the Gauteng Local Division of this Court under case number 2532/2016 between *The Chris Hani Baragwanath Academic Hospital Board and Soul Food Services CC* and three others.

[23] However, the facts in *Chris Hani* are markedly different and distinguishable in that the applicant in that application was a hospital board where the members' term of office had allegedly expired and where the board was alleged not properly constituted at the time of launching of the application. These issues were specifically raised in the answering papers and they went to the core of the existence of the board and its ability to act. In the present matter, the facts reveal that the applicant close corporation was indeed in existence when the application was launched and that Mr Michael Appolis was one of its members.

[24] As a result, and in light of the principles referred to above, the reciprocal authority challenges are without merit. If the respective attorneys had been authorised to bring the application, and oppose the application, then the application and the opposing papers are those of the applicant and of the respondent respectively. This

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[3] *supra*

is so irrespective of whether the deponent to the supporting affidavit has also been specifically authorised to bring the application or oppose the application.

[25] The applicant furthermore contended in its replying affidavit that it is not clear whether the deponent to the answering affidavit has personal knowledge regarding the matter.

[26] Apart from the fact that the deponent to the answering affidavit specifically states that "the facts contained herein are within my personal knowledge", this contention by the applicant has no practical effect in the evaluation of the present matter since the matter can be disposed of on the basis of the uncontested facts.

Lis pendens

[27] The respondent:

[27.1.] relies on the fact that the respondent, during 2005, issued summons against the applicant out of the Northern Cape Provincial Division of the High Court for payment of damages in the amount of R601,603.85, which claim was subsequently amended to R1,785,750.23, with the applicant having instituted a substantial counterclaim (the amount of the counterclaim is in dispute: it is either R19,855,172.06 or R11,512.095.00 but this dispute need not be resolved in the present application); and

[27.2.] contends that the above facts give rise to a defence of *lis pendens*.

[28] *Lis alibi pendens* is a dilatory defence and if successful, would normally result in a stay of the proceedings in which the defence is raised, thereby precluding a determination of the merits of those proceedings.

[29] The underlying principle of this defence is that there should be finality in litigation. Once a suit had been commenced before a tribunal competent to adjudicate upon it, the suit should, generally, be brought to a conclusion before that tribunal and should not be replicated. The principle could be applied only where the same dispute, between the same parties, was sought to be placed before the same tribunal or before two tribunals with equal authority to end the dispute authoritatively. In the absence of those elements there was no potential for a duplication of actions.[4]

[30] The courts are also concerned to avoid a situation where different courts pronounce on the same issue with the risk that they may reach differing conclusions.[5]

[31] In my view there are substantial differences between the relief sought in the present application and the relief sought in the Northern Cape Provincial Division, to such an extent that it cannot be said that the same dispute is pending before the two Courts concerned.

[32] A determination of the relief presently sought in this Court, does not involve a decision as to whether the contract between the applicant and the respondent was validly cancelled or whether any party in fact suffered damages. In the present

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[4] Nestlé (SA) (Pty) Ltd v Mars Inc 2001 (4) SA 542 (SCA), para [16] – [18] at 548I/J - 549

application the applicant seeks a declaratory order and a number of mandatory interdicts.

[33] Although the fact of the pending action proceedings in the Northern Cape Provincial Division is a significant factor in the determination of the relief sought in the present application, such proceedings do not satisfy the requirements of the defence of *lis alibi pendens* and this defence can therefore not succeed.

Has the applicant made out a case for the relief sought?

[34] The applicant seeks:

[34.1.] declaratory relief; and

[34.2.] a number of mandatory interdicts.

The declaratory relief

[35] Section 21(1)(c) of the *Superior Courts Act* 10 of 2013 provides that a Division of the High Court has the power:

> "...in its discretion, and at the instance of any interested person, to enquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon the determination."

[5] Caesarstone Sdot-Yam Ltd v World of Marble & Granite 2000 CC 2013 (6) SA 499 (SCA), par [2] at 502G

[36] The wording of section 21(1)(c) is identical to that of its predecessor, section 19(1)(a)(iii) of the *Supreme Court Act* 59 of 1959.

[37] In *Durban City Council v Association of Building Societies*[6] Watermeyer JA, with reference to a section worded in identical terms, said at 32:

> "The question whether or not an order should be made under this section has to be examined in two stages. First the Court must be satisfied that the applicant is a person interested in an "existing, future or contingent right or obligation", and then, if satisfied on that point, the Court must decide whether the case is a proper one for the exercise of the discretion conferred on it."

[38] The two-stage approach was explained as follows by the Supreme Court of Appeal in *Cordiant Trading*[7]:

> "During the first leg of the enquiry the Court must be satisfied that the applicant has an interest in an 'existing, future or contingent right or obligation'. At this stage the focus is only upon establishing that the necessary conditions precedent for the exercise of the Court's discretion exist. If the Court is satisfied that the existence of such conditions has been proved, it has to exercise the discretion by deciding either to refuse or grant the order sought. The consideration of whether or not to grant the order constitutes the second leg of the enquiry."

[39] The declaratory relief sought by the applicant in prayer 1 of its notice of motion includes two parts:

[39.1.] that the applicant has the right to fair and just administrative action, as set

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[6] 1942 AD 27
[7] Cordiant Trading CC v Daimler Chrysler FS (Pty) Ltd 2005 (6) SA 205 (SCA), par [18] at 213F

out in PAJA;

[39.2.] that the respondent's non-compliance with a directive of parliament directing the respondent to investigate the termination of the contract between the applicant and the state amounts to an infringement on those rights and an unjustifiable impediment to the applicant's enforcement of those rights.

[40] Sections 33 (1) and (2) of the Constitution provides that everyone has the right to administrative action that is lawful, reasonable and procedurally fair and that everyone whose rights have been adversely affected by administrative action has the right to be given written reasons. PAJA was subsequently enacted to give effect to these rights.

[41] In the circumstances, the legal position in relation to the first part of the declarator has already been clearly defined by Statute. There is no dispute about the applicant's right to administrative action that is lawful, reasonable and procedurally fair, and it would not be competent to grant and order reiterating the legal position.[8]

[42] In support of the second part of the declarator the applicant relies on a verbal directive of a parliamentary portfolio committee, given approximately July 2017 to September 2017, "to settle all old cases with merits".

[43] The applicant contends that the respondent's non-compliance with the directive amounts to an infringement of the applicant's right to fair and just administrative action as set out in PAJA and an unjustified impediment to the applicant's enforcement of those rights. In prayer 2 of the notice of motion the applicant seeks

an interdict ordering the respondent to comply with the directive.

[44] In relation to the first leg of the enquiry referred to in *Cordiant Trading*[9], a declaratory order cannot be claimed merely because the rights of the claimant have been disputed, but that such a claim must be founded upon an actual infringement.[10]

[45] The applicant contends that its right to fair and just administrative action as set out in PAJA is being infringed due to the respondent's non-compliance with the directive to investigate the termination of the contract.

[46] The question that arises in relation to the first leg is whether there is an actual infringement of the applicant's rights.

[47] The second leg of the enquiry involves the exercising of a discretion by deciding either to refuse or grant the order sought.

[48] The founding papers reveal that the applicant is seeking orders relating to the respondent's failure to act and its infringement of the applicant's right to fair and just administrative action as set out in PAJA. It includes a declarator that the applicant's rights in terms of PAJA have been infringed and orders compelling the respondent to take action. Mr Sherman confirmed during argument that the application is aimed at ordering the respondent to take administrative action. He described the application

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[8] Ex parte Noriskin 1962 (1) SA 856 (D) at 857A
[9] Cordiant Trading CC v Daimler Chrysler FS (Pty) Ltd 2005 (6) SA 205 (SCA), par [18] at 213F
[10] Moto Health Care Medical Scheme v HMI Healthcare Corporation (Pty) Ltd and Others (341/18) [2019] ZASCA 87 (31 May 2019) at par 26

as a hybrid application: seeking an interdict under common law, read with PAJA.

[49] In *Pharmaceutical Manufacturers Association of SA and Another: In re Ex parte President of the Republic of South Africa and Others*,[11] the question of the relationship between the common-law grounds of review and the Constitution was considered by the Constitutional Court. A unanimous Court held that under the new constitutional order the control of public power is always a constitutional matter. There are not two systems of law regulating administrative action - the common law and the Constitution - but only one system of law grounded in the Constitution. The Courts' power to review administrative action no longer flows directly from the common law but from PAJA and the Constitution itself. The *grundnorm* of administrative law is now to be found in the first place not in the doctrine of ultra vires, nor in the doctrine of parliamentary sovereignty, nor in the common law itself, but in the principles of our Constitution.

[50] PAJA is the national legislation that was passed to give effect to the rights contained in section 33 of the Constitution. It was clearly intended to be, and in substance is, a codification of these rights. It was required to cover the field and purports to do so.[12]

[51] However, the applicant's application has not been brought in terms of PAJA and the applicant has not in its founding papers identified any provisions of PAJA upon which

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[11] Pharmaceutical Manufacturers Association of SA and Another: In re Ex parte President of the Republic of South Africa and Others 2000 (2) SA 674 (CC) at paras [33] - [45]
[12] Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd and Others (Treatment Action Campaign and Another as Amici Curiae) 2006 (2) SA 311 (CC) at par [95]; Mostert and Others v Nash

it relies.

[52] Furthermore, in terms of section 7 of PAJA, any proceedings for judicial review must be instituted without unreasonable delay and not later than 180 days after the applicant had become aware of the administrative action and the reasons for it or might reasonably have been expected to have become aware of the action and the reasons.

[53] The applicant does not state when it became aware of the directive. It is clear that it has been aware of the directive since 2017 and that since at least 2 May 2018, when the above mentioned email correspondence was exchanged, Mr Michael Appolis was aware that the directive was not communicated in writing but verbal. The period of 180 days therefore probably expired by middle 2018, and certainly by no later than early November 2018.

[54] The application was launched on 13 December 2018. It is out of time. The applicant has not sought condonation for the delay in launching the application.

[55] Furthermore, the applicant does not describe the legal nature or the source of legal force (if any) of the directive in its founding papers. No elucidation was forthcoming during argument either. The submission as made that the moment parliament issued the directive, a duty was imposed on the respondent to take administrative action.

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and Another 2018 (5) SA 409 (SCA) at para [121] to [128], p 450 – 453; Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs & Tourism 2004 (4) SA 490 (CC) at para [25] and [26] at 506I - 507B

[56] The directive does not pertain to the applicant's claim specifically. It refers to all old cases with merits. The applicant's counterclaim against the respondent is certainly an old case, but it is not possible for this court to determine whether it has any merit. According to the respondent it has no merit.

[57] Mr Jonase submitted that the directive is vague and asked the rhetorical question whether government can be run on the basis of oral directives.

[58] The directive does not instruct the respondent to settle the applicant's claim in a particular manner. Should the claim simply be conceded, should there be a compromise of some sort or should the applicant be invited to withdraw its counterclaim without having to pay costs? The options are endless. Even if the directive did have legal force, it does not seem possible to enforce it in any clear manner or terms. The applicant seems to acknowledge in paragraph 42.11 of the replying affidavit that a Court cannot order parties to settle a matter by agreement.

[59] Having regard to the wording of the second part of the declarator in prayer 1, it should be borne in mind further that the department has already investigated the termination of the contract. The respondent provided a factual overview in its answering affidavit (summarised above) where it set out that the applicant had breached the contract, as a result of which the respondent cancelled the contract and sued the applicant for damages. Due to the applicant's dormant state and its subsequent deregistration, the respondent did not pursue the pending action proceedings any further. In addition, as appears from paragraph 7.1 of the founding affidavit, both the parties have already sought to settle the matter, which was clearly

unsuccessful.

[60] The pleadings in the pending action proceedings would furthermore have informed the applicant what the respondent's case is. The applicant has already delivered a plea and a counterclaim. If insufficient information is contained in the respondent's pleadings, further particulars can be requested, enquiries can be directed at a pre-trial conference and better discovery can be called for (to name a few of the available remedies.)

[61] In my view it has not been proved that the directive has legal force or that it is of such a nature and ambit that it vested the applicant with a right to enforce the directive.

[62] In the above circumstances I find that the applicant has not shown that there has been an actual infringement of its rights.[13] That should be the end of the enquiry.

[63] Furthermore, in relation to the second leg of the enquiry, I am of the view that the applicant has not made out a case for the declaratory relief sought, that there are compelling circumstances against granting declaratory relief (which circumstances are set out above) and that the second part of the declaratory relief should similarly be dismissed.

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[13] Moto Health Care Medical Scheme v HMI Healthcare Corporation (Pty) Ltd and Others (341/18) [2019] ZASCA 87 (31 May 2019) at par 26

The interdicts

[64] The requirements for a final interdict were set out in *Setlogelo*[14]:

[64.1.] a clear right;

[64.2.] an injury actually committed or reasonably apprehended; and

[64.3.] the absence of similar protection by any other ordinary remedy.

[65] The interdict in prayer 2 is based on the directive.

[66] In my view the applicant has not clearly established its alleged right based on the directive. Neither has it proved an injury. The applicant, in any event, has an alternative remedy in the form of its counterclaim in the pending action proceedings which it can prosecute and in the context of which the applicant has procedural rights and remedies to obtain further particulars and all documents and records that may be relevant to the issues. In the replying affidavit the applicant indicated that the counter claim will be pursued in due course.

[67] The interdict in prayer 3 is also based on the directive. However, the applicant seeks a further order that it be provided with information: a report of the investigation, any supporting documentation and proof of the outcome of the investigation.

[14] Setlogelo v Setlogelo 1914 AD 221 at 227

[68] The *Promotion of Access to Information Act* 2 of 2000 ("*PAIA*") gives effect to the constitutional right of access to information held by the State and should be resorted to should a person require such access.

[69] However, section 7(1) of PAIA provides the act it does not apply to a record of a public body or a private body if —

(a) that record is requested for the purpose of criminal or civil proceedings;

(b) so requested after the commencement of such criminal or civil proceedings, as the case may be; and

(c) the production of or access to that record for the purpose referred to in paragraph (a) is provided for in any other law.

[70] It is therefore clear that the applicant's remedy to obtain information lies in the pending action and the procedural mechanisms created by the Uniform Rules of Court. The applicant has not established any right to approach this Court for the relief contained in prayer 3.

[71] The relief in prayer 4 seeks the removal of the applicant's name from a negative list or listing.

[72] The applicant relies on annexure "D". However, this document is a copy of the department's monthly report for case flow management purposes and not a blacklist.

[73] The applicant has not proved that its name is on any blacklist and it has not made out any cause of action for a removal of its name from any list.

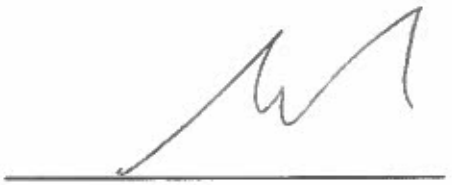
[74] In the circumstances, the applicant has not made out a case for any of the interdicts and this relief too falls to be dismissed.

Order:

[75] In the circumstances the following order is made:

[75.1] The application is dismissed;

[75.2] The applicant is ordered to pay the costs of the application.



E KROMHOUT

ACTING JUDGE OF THE HIGH COURT, PRETORIA

Appearances

For Applicant:	**Adv Sherman**
Instructed by:	**Elliott Attorneys**
For respondent:	**Adv SS Jonase**
Instructed by:	**The State Attorney**