THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 1235/2019

In the matter between:

BW BRIGHTWATER WAY PROPS (PTY) LTD **APPELLANT**

and

EASTERN CAPE DEVELOPMENT CORPORATION **RESPONDENT**

Neutral citation: *BW Brightwater Way Props (Pty) Ltd v Eastern Cape Development Corporation* (1235/2019) [2021] ZASCA 47 (19 April 2021)

Coram: ZONDI, MOLEMELA and SCHIPPERS JJA and KGOELE and EKSTEEN AJJA

Heard: 24 February 2021

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down is deemed to be 09h45 on 19 April 2021.

Summary: Legality review of a lease agreement in respect of immovable property concluded contrary to the legislative prescripts relating to Procurement Policy – such agreement is constitutionally invalid – whether the court can in the exercise of its discretion under s 172(1)*(b)* of the Constitution extend the duration of a lease agreement in order to preserve accrued rights.

ORDER

On appeal from: Eastern Cape Division of the High Court, East London (Stretch J sitting as court of first instance): judgment reported *sub nom BW Bright Water Way Props (Pty) Ltd v Eastern Cape Development Corporation* 2019 (6) SA 443 (ECG)

1 The cross-appeal succeeds.

2 The appellant is directed to pay the respondent's costs in the appeal and the cross-appeal, such costs to include:

2.1 The costs of two counsel where so employed; and

2.2 The costs of the application for leave to appeal in the court a quo.

3 The orders of the court a quo in case number EL848/2016 and EDC2148/2017 are set aside and replaced with the following order:

'(a) The main application is dismissed.

(b) The counter-application succeeds.

(c) The lease agreement concluded between the parties on 20 December 2016 in respect of Portions A and B of the Remainder of the Farm 31 Coffee Bay, Mqanduli, is declared constitutionally invalid and of no force and effect.

(d) The respondent is directed to pay the costs of the main application and the appellant shall pay the costs of the counter-application.'

JUDGMENT

Kgoele AJA (Zondi, Molemela and Schippers JJA and Eksteen AJA concurring)

[1] This matter concerns the validity of a lease agreement concluded on 20 December 2016 between the appellant, BW Brightwater Way Props (Pty) Ltd (Brightwater) and the respondent, Eastern Cape Development Corporation (the ECDC), hereafter referred to as 'the lease agreement'. In terms of the lease agreement Brightwater hired Portions A and B of the Remainder of Farm 31, Coffee Bay, Mqanduli, commonly known as Ocean View Hotel (the property), from the ECDC for a period of 20 years at a rental of R32 000 per month.

[2] In July 2017, Brightwater launched proceedings in the Eastern Cape Division of the High Court, East London, against the ECDC seeking the following relief:

'1. [D]eclaring that the lease agreement concluded by the [parties] on 20 December 2016, is valid, and of force and effect;

2. [D]irecting the respondent to provide it with vacant possession of portions A and B of the remainder of Farm 31 Coffee Bay, Mqanduli by *inter alia* evicting from the property any unlawful occupiers;

3. [D]irecting the respondent to take all steps necessary to assist the applicant in causing the lease agreement to be embodied in a notarial deed and registered against the title deeds of the property. . . .'

[3] On 26 July 2019 the high court (Stretch J) dismissed the main application. It upheld the counter-application and made an order declaring the lease agreement

constitutionally invalid, because the ECDC failed to follow a transparent procedure of public and competitive participation when concluding the lease agreement. It concluded that the argument that the rental was not market- related, was unpersuasive, yet found that the ECDC's conduct in concluding the lease agreement 'without referring to market-related rental', was invalid. The ECDC was directed to pay the costs of both the main application and the counter-application.

[4] On 19 August 2019 Brightwater brought an application in the high court that its order of 26 July 2019 be supplemented to read that it 'does not have the effect of divesting the applicant of any rights to which it is entitled under the lease contract'. The high court granted this order. Subsequently it granted Brightwater leave to appeal to this Court against the order dismissing the main application. The ECDC was also granted leave to appeal the order in terms of which the constitutional invalidity of the lease agreement does not have the effect of divesting Brightwater of any rights under that agreement. Brightwater has however abandoned its appeal. Consequently, the only issue before us is the cross-appeal, more specifically whether the order declaring the lease agreement constitutionally invalid whilst preserving all of Brightwater's rights under that agreement, was competent.

[5] The basic facts are these. Between 2012 and 2016, Brightwater occupied the property as a sublessee. It acquired the entire shareholding of Wild Coast Holdings, which was subletting the property from South African College of Tourism Limited (the College of Tourism), which leased it from Transkei Development Corporation. The Transkei Development Corporation was dissolved by the Premier of the Eastern Cape and its obligations and assets were transferred to the ECDC.

[6] Mr Leon Botha and his wife, who operated a lodge on the property, were already in occupation of Portion B thereof when Brightwater became a sublessee after acquiring Wild Coast Holdings' shareholding. The lease agreement between the College of Tourism and the ECDC expired in 2016.

[7] When the lease agreement was concluded, Mr Sentwa, in his capacity as the ECDC's Chief Financial Officer, signed the lease. As stated earlier, the tenure of the lease agreement was 20 years. It would have expired on 31 October 2036. The lease imposed an obligation on the ECDC to give Brightwater vacant possession and to evict any illegal occupant. Brightwater contended that in breach of the lease agreement, the ECDC failed to give it vacant and undisturbed possession by not evicting the Bothas from the premises.

[8] When Brightwater demanded that the ECDC act against the Bothas, it refused contending that there was no obligation to do so, because the lease agreement was void by reason of non-fulfilment of a suspensive condition to which it was subject. In consequence, Brightwater brought the application in the high court, seeking relief as set out in paragraph 2 above. Apart from opposing the main application on its merits, the ECDC brought a counter-application to review and set aside its own action in concluding the lease agreement on the basis that it had failed to comply with certain legislative prescripts, namely the Preferential Procurement Framework Act 5 of 2000 and the Public Finance Management Act 1 of 1999 relating to property disposal / letting of its property (not that the lease agreement was invalid due to non-fulfilment of a suspensive condition as initially contended by the ECDC). It also contended that the lease agreement was concluded contrary to its Procurement Policy because Mr Sentwa, who signed the lease agreement on its behalf, did not have authority to do so. The counter-application was founded on the Promotion of Administrative Justice Act 3 of 2000 (PAJA).

[9] In a further affidavit deposed to on its behalf on 4 July 2018, the ECDC disavowed reliance on PAJA in its counter-application for the review and setting aside of the lease agreement. It relied on the principle of legality as expounded in *State Information Agency v Gijima*,[1] a judgment of the Constitutional Court.

The high court's judgment

[10] The high court found that the conclusion of the agreement was contrary to Regulation 16A.3.2 of the Treasury Regulations,[2] which requires the supply chain management system to be fair, equitable, transparent, competitive and cost-effective.

[11] The high court held that, once it is found that the lease agreement lacked the makings of being transparent and competitive (even if the rental was market- related), the agreement falls foul of being constitutionally valid. It accordingly declared it invalid.

[12] Despite this finding, the high court did not, order the setting aside of the lease agreement. The high court stated that 'the application of justice and equity to the circumstances before [it], does not dictate both invalidating and entirely setting aside the impugned lease agreement', and that Brightwater had been 'in a manner, misled into believing that the respondent had the power to enter into an agreement with it, without any transparent and open recourse to public participation'. The court invoked s 172(1)(*b*) of the Constitution and went on to say:

'It is evident that I am constrained to declare the conduct embarked upon by the respondent, (in concluding a lease agreement with the applicant without setting a reserve price of

[1] *State Information Technology Agency SOC Limited v Gijima Holdings (Pty) Ltd* [2017] ZACC 40; 2018 (2) SA 23 (CC).
[2] 'Treasury Regulations, GNR225, *GG* 27388*,* 15 March 2005.'

market- related rental, and/or without referring to market-related rental, and without following a transparent procedure of public and competitive participation in agreeing on the terms, conditions and price of the lease) invalid. However, I have a discretion not to set the agreement aside in an attempt to preserve the rights which have accrued to the applicant in terms of the lease as stated in *Asla*, such an award is intended to preserve rights which have already accrued to the applicant in terms of the agreement, but [does] not permit the applicant to obtain further rights under the invalid agreement.'[3]

[13] The high court accordingly made the following order:

'(a) The main application is dismissed.

(b) The counter application succeeds only to the extent that the lease agreement concluded between the parties on 20 December 2016 with respect to portions A and B of the remainder of Farm 31 Coffee Bay, Mqanduli, is declared constitutionally invalid.

(c) The respondent is directed to pay costs of both the main application and the counter application.'

[14] On 5 September 2019 the high court supplemented its order by adding a further paragraph after para (b) which reads:

'The order of constitutional invalidity in paragraph (b) above does not have the effect of divesting the Applicant of any rights to which it is entitled under the lease contract, but for the declaration of invalidity.'

The cross-appeal

[15] The issue in the cross-appeal is whether the lease agreement which was declared to be invalid by virtue of a lack of compliance with constitutionally imposed procurement procedures may, notwithstanding the declaration of invalidity, allow Brightwater to remain in occupation for the remainder of the lease period (the lease period was 20 years). The cross-appeal is mainly directed

[3] *Asla* referred to is *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd* [2019] ZACC 15; 2019 (4) SA 331 (CC).

at para (c) of the supplemented order embodying a remedy granted in terms of s 172(1)*(b)* of the Constitution.

[16] Section 172(1) of the Constitution provides:

'(1) When deciding a constitutional matter within its power, a court-

(a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and

(b) may make any order that is just and equitable, including—

(i) an order limiting the retrospective effect of the declaration of invalidity; and

(ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.'

[17] The Constitutional Court emphasised in *Allpay 1*[4] that:

'Once a ground of review under PAJA has been established there is no room for shying away from it. Section 172(1)*(a)* of the Constitution requires the decision to be declared invalid. The consequences of the declaration of unlawfulness must then be dealt with in a just and equitable order under section 172(1)*(b)*. Section 8 of PAJA gives detailed legislative content to the Constitution's "just and equitable" remedy.' (Footnotes omitted.)

[18] Section 172(1)*(b)* of the Constitution empowers a court when deciding a matter, to make any order which it deems just and equitable with reference to the circumstances of a particular matter. This simply means that the effects of the declaration of invalidity may be ameliorated by the court in the exercise of its just and equitable discretion at the remedy stage.

[19] It was submitted by counsel on behalf of the ECDC that the amended order handed down by the high court regarding the invalid lease agreement was unsound and contradictory. He pointed out that on the one hand the high court found that it was unable to grant Brightwater the order for specific performance

[4] *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others* [2013] ZACC 42; 2014 (1) SA 604 (CC) para 25 (*Allpay* 1).

by virtue of the invalidity of the lease agreement, but on the other, it found that Brightwater is entitled, purportedly pursuant to the provisions of s 172 of the Constitution, to equitable relief which is to the effect that Brightwater is not divested of any rights under the lease agreement, whether such rights accrued prior to the declaration of invalidity or thereafter. He argued that the logical consequence of the high court's finding is that Brightwater, notwithstanding the declaration of invalidity, may remain in occupation of the premises for the full duration of the agreement of lease, ie 20 years.

[20] Arguing in support of para (c) of the high court's amended order, counsel for Brightwater submitted, citing *Gijima* para 54, that the high court's power to make that order, is sourced in s 172(1)*(b)* of the Constitution in terms of which it is empowered to make 'any order that is just and equitable' and that it was entitled to make an order that sought to preserve Brightwater's accrued rights. He argued that under s 172(1)*(b)* of the Constitution, a court has a wide remedial discretion.

[21] It must be accepted that the discretion that is exercised by a court under 172(1)*(b)* is a discretion in the true sense which therefore means that it would ordinarily be inappropriate for this Court sitting as an appellate court to interfere, unless it is satisfied that the discretion was not exercised judicially, or that it had been influenced by wrong principle or a misdirection on the facts or that it had reached a decision which in the result could not reasonably have been made by a court properly directing itself to all the relevant facts and principles.[5]

[22] In view of the considerable reliance placed by Brightwater's counsel on para 54 of the *Gijima* judgment, it is appropriate to analyse that judgment in some detail. The State Information Technology Agency (SITA), which provides

[5] *Trencon Construction (Pty) Ltd v Industrial Corporation of South Africa Limited and Another* [2015] ZACC 22; 2015 (5) SA 245 (CC) para 88.

information technology services to State departments, had contracted Gijima, a private company, to fulfil some of those services for it. Throughout, Gijima, had been concerned whether SITA had complied properly with its procurement processes. SITA had assured Gijima that it had the authority to enter into the settlement agreement. Once Gijima had performed under the contract, it sought an outstanding payment of about R9.6 million. SITA took the view that the contract was invalid, because it had been concluded in contravention of its own procurement procedures, even though it had assured Gijima, and warranted contractually, that the agreement had been concluded in conformity with its procurement procedures.

[23] SITA approached the high court, some 22 months after the contract was concluded for an order seeking the setting aside of the contract. SITA had not justified the delay. The high court dismissed the application on the ground that the PAJA review had been brought out of the 180-day period stipulated in s 7(1) of PAJA and that SITA had not sought an extension of this period. The appeal in this Court was dismissed.

[24] SITA successfully appealed to the Constitutional Court. It concluded that in awarding the contract SITA had acted contrary to the dictates of the Constitution, and in terms of s 172(1)*(a)* of the Constitution, declared it invalid. This was, however, not the end of the matter. It went on to consider the just and equitable remedy under s 172(1)*(b)*. The Constitutional Court had this to say at paras 53 and 54 of the judgment:

'However, under section 172(1)(b) of the Constitution, a court deciding a constitutional matter has a wide remedial power. It is empowered to make "any order that is just and equitable". So wide is that power that it is bounded only by considerations of justice and equity. Here it must count for quite a lot that SITA has delayed for just under 22 months before seeking to have the decision reviewed. Also, from the outset, Gijima was concerned whether the award of the

contract complied with legal prescripts. As a result, it raised the issue with SITA repeatedly. SITA assured it that a proper procurement process had been followed.

Overall, it seems to us that justice and equity dictate that, despite the invalidity of the award of the DoD agreement, SITA must not benefit from having given Gijima false assurances and from its own undue delay in instituting proceedings. Gijima may well have performed in terms of the contract, while SITA sat idly by and only raised the question of the invalidity of the contract when Gijima instituted arbitration proceedings. In the circumstances, a just and equitable remedy is that the award of the contract and the subsequent decisions to extend it be declared invalid, with a rider that the declaration of invalidity must not have the effect of divesting Gijima of rights to which – but for the declaration of invalidity – it might have been entitled. Whether any such rights did accrue remains a contested issue in the arbitration, the merits of which were never determined because of the arbitrator's holding on jurisdiction.' (Footnote omitted.)

[25] It is apparent from what is stated in para 54 of the judgment that the Constitutional Court invoked s 172(1)*(b)* to preserve the rights to which Gijima might have been entitled. The right that was preserved was the right to be paid for the work it had performed. A similar approach was adopted by the Constitutional Court in the *Asla* judgment[6] in which the Municipality had sought to review and set aside the contract it contended had been concluded in contravention of the constitutional and statutory prescripts applicable to the procurement of goods and services. The Constitutional Court, having been satisfied that the contract was unlawful, declared it invalid in terms of s 172(1)*(a)*. But in the exercise of its powers under s 172(1)*(b)* the Constitutional Court did not set aside the contract. Again, what was preserved through the invocation of s 172(1)*(b)* was Asla's rights to receive payment for the work it had already done.

[26] The Constitutional Court took into account the fact that when the Municipality took the view that the Reeston contract was invalid, the implementation of the contract had commenced and was continuing. The

[6] See footnote 3.

Municipality was content for the respondent to complete the contract to the benefit of the Municipality and residents of Reeston. It also took into account the fact that the work had been practically completed.

[27] Regarding Asla's entitlement to payment for work done, the Constitutional Court said at para 105:

'In these circumstances, justice and equity dictate that the Municipality should not benefit from its own undue delay and in allowing the respondent to proceed to perform in terms of the contract. I therefore make an order declaring the Reeston contract invalid, but not setting it aside so as to preserve the rights to [which] the respondent might have been entitled. It should be noted that such an award preserves rights which have already accrued but does not permit a party to obtain further rights under the invalid agreement.'

[28] Returning to the submissions of the parties, I did not understand Brightwater's counsel to disagree with the proposition that was put to him that para (c) of the high court's amended order cannot exist side by side with para (a) of the order dismissing Brightwater's application to enforce the terms of the lease agreement. His submission was that it was competent for the high court to make the order that it did in the exercise of its discretion under s 172(1)*(b)* of the Constitution. The high court however misdirected itself by making the order which, in effect, nullifies the declaration of invalidity by effectively upholding the contract in all respects, including future rights. The right to occupy the premises post a declaration of invalidity constitutes future rights in favor of Brightwater, which is something that goes beyond what may be preserved under s 172(1)*(b)* of the Constitution.

[29] A contract or transaction which has no force and effect is necessarily void *ab initio*, and can under no circumstances confer any right of action.[7] On the same

[7] *Wilken v Kohler* 1913 AD 135 at 143.

breath, our jurisprudence has long recognised that courts generally have no power to enforce a term of or a contract which it declared unlawful or void. What the law also recognises in both instances is performance or part performance in terms of a claim for unjust enrichment. The court has a discretion to permit a party to recover what was performed where a contract has been declared invalid.[8] I did not understand counsel for Brightwater to disagree with this proposition. I would be surprised if he did because that would be inconsistent with Brightwater's case as pleaded in the answering affidavit in response to the counter application in which it alleged:

'In these circumstances, it cannot be seriously disputed that Brightwater stands to be compensated by ECDC. Brightwater is not now in a position to quantify what is just and equitable compensation. It is, in any event, inappropriate to seek to do so in these proceedings. This must, with respect, be the subject of further proceedings.'

[30] In the circumstances the cross-appeal should succeed.

Costs

[31] One of the grounds of the cross-appeal is that the high court erred in ordering the ECDC to pay for the costs of the counter-application in circumstances where it was the successful party in the counter-application. It is apparent from this ground of appeal that the ECDC is only attacking part of the costs order granted against it, because the high court directed that the ECDC should pay costs of both the main application and the counter-application.

[32] The reasoning of the high court in coming to the above decision regarding costs is expressed in these terms:

'The fact that the respondent [ECDC] will achieve nominal success to the extent that a declaration of constitutional invalidity is bound to follow, should not affect the question of costs. Substantially, and not unlike the position in *Gijima*, it is the applicant [Brightwater] that

[8] *Jajbhay v Cassim* 1939 AD 537; *Wilken v Kohler* above.

succeeds. . .To the extent that the applicant [Brightwater] at the very least is not to be divested of its accrued benefits of the contract, the applicant [Brightwater] has been successful.'

[33] This finding cannot be supported. Brightwater lost the main application to declare the contract valid which was the genesis of all the litigation that culminated in the cross-appeal. Brightwater also failed to obtain the relief sought in paras 2 and 3 of the notice of motion. The counter-application succeeded. The finding that Brightwater succeeded substantially seems to be against the general rule that costs follow the result. Although the award of costs is discretionary, it is my view that the high court failed to exercise its discretion judicially. The appeal on this ground also must succeed. The ECDC is furthermore entitled to its costs in relation to the appeal and the costs occasioned by the application for leave to appeal, because it achieved substantial success before us. These costs should include the costs tendered by Brightwater occasioned by the withdrawal of its appeal.

[34] The following order is thus made:

1 The cross-appeal succeeds.

2 The appellant is directed to pay the respondent's costs in the appeal and the cross-appeal, such costs to include:

2.1 The costs of two counsel where so employed; and

2.2 The costs of the application for leave to appeal in the court a quo.

3 The orders of the court a quo in case number EL848/2016 and EDC2148/2017 is set aside and replaced with the following order:

'(a) The main application is dismissed.

(b) The counter-application succeeds.

(c) The lease agreement concluded between the parties on 20 December 2016 with respect of Portions A and B of the Remainder of the Farm 31 Coffee Bay, Mqanduli, is declared constitutionally invalid and of no force and effect.

(d) The respondent is directed to pay the costs of the main application and the appellant shall pay the costs of the counter-application.'

KGOELE A M

ACTING JUDGE OF APPEAL

APPEARANCES

For the appellant:	R P Quinn SC and C J Quinn Instructed by: Russel Linde Attorneys, Cape Town Honey Attorneys, Bloemfontein
For the respondent:	A Beyleveld SC and V Madokwe Instructed by: BNI Attorneys, Port Elizabeth Van der Merwe Sorour Inc, Bloemfontein