

**IN THE HIGH COURT OF SOUTH AFRICA  
(WESTERN CAPE, CAPE TOWN)**

Case No: 7344/21

**WESTERN CAPE EDUCATION DEPARTMENT**

Applicant

and

**Z T MAKHOSIKAZI TRADING (PTY) LTD  
t/a STAR CATERING SERVICES**

First Respondent

**SCHOOL GOVERNING BODY, WESTERN CAPE  
SCHOOL SPORT**

Second Respondent

**WESTERN CAPE SPORT SCHOOL**      Third Respondent

Date of hearing: 13 June 2022

Date of judgment: 21 June 2022

**JUDGMENT**

SAVAGE J:

[1] In this matter the applicant, the Western Cape Education Department ('the department'), seeks a declaratory order that an agreement entered into between the second respondent, the School Governing Body of the Western Cape Sport School ('the SGB'), on 20 September 2019, with the first respondent, ZT Makhosikazi Trading (Pty) Ltd, trading as Star Catering ('Star Catering'), to provide catering services to learners of the third respondent, the Western Cape Sport School ('the school'), was unlawful and void *ab initio*. Alternatively, the department seeks to have the SGB's decision to appoint Star Catering reviewed and set aside.

[2] During August 2019 Ms Zukiswa Lali, a director of Star Catering, was informed that the school wanted to appoint a new service provider to render catering services at the school. After having provided the school with a resume of the company, Ms Lali was called, with other potential service providers, to make a presentation at the school. On 4 September 2019, the SGB held a special meeting, following which Star Catering received a letter on 5 September 2019 informing it that it had been appointed as “service provider of the food catering contract” to the school. Attached to that letter was an extract of the minute of the SGB meeting, which read verbatim as follows:

### **‘3. School kitchen**

**Star catering menu viewed copy with SGB members** - request for the copy to be attached on minutes. Query on VAT registration - small companies such as STAR Caters it is not required. Star catering prices match Fedics prices. Star catering to start 1 October 2019. Meeting to be arranged with Star catering Thursday 5<sup>th</sup> September 2019.

Mr Aries to look at other proposed catering companies.’

[3] On 20 September 2019 a contract was signed between Star Catering and the school, represented by Mr James Ketelo in his capacity as chairperson of the SGB. The contract recorded that the school was duly represented by Mr Ketelo as SGB chairperson, who warranted that he had the requisite authority to enter into the contract. Under the terms of the contract, Star Catering was appointed to provide food catering services to the school for a period of five years, with the commencement date of the contract being 1 October 2019.

[4] At the time that the contract was concluded, the SGB did not have a constitution, had not adopted a finance and procurement policy and was not properly constituted in that its membership did not comply with the provisions of the South African Schools Act 84 of 1996 (‘the SASA’). In addition, there was no evidence that the SGB had undertaken a fair, transparent, cost-effective, equitable and competitive procurement process prior to the award of the contract to Star Catering.

[5] Days after the conclusion of the contract with Star Catering, on 3 October 2019, the school principal, Mr Shaheed Khan, wrote to Ms Cherie Meyer-Williams, the WCED circuit manager of the Metro East Education District detailing the serious challenges he was experiencing with the SGB and seeking the urgent intervention of the WCED. This prompted an investigation into the matter. On 8 October 2019 Ms Meyer-Williams submitted a report to the Head of the WCED ('the HOD') which highlighted inter alia the dysfunctionality of the SGB and recommended that its functions be withdrawn after following due process.

[6] On 24 October 2019 the HOD notified the SGB of his intention to withdraw its financial and supply chain functions. He gave the SGB 14 days to respond. No response was received. In spite of this notice, in November 2019 Mr Ketelo transferred R150 000 to a firm of attorneys without the requisite permission having been granted. On 28 November 2019, relying on section 22 of the SASA, the HOD withdrew the SGB's supply chain functions and indicated that the district office would take over such functions. A school finance committee was tasked with making financial and procurement decisions.

[7] On 10 March 2020, the HOD informed the SGB that he had decided to dissolve that body because it had ceased to perform the functions allocated to it in terms of SASA and was dysfunctional. The SGB was then replaced with a committee in terms of section 25 of the SASA.<sup>1</sup>

[8] On 8 September 2020 Star Catering was informed that the contract concluded with the school was void *ab initio* due to non-compliance with internal procedures and applicable public finance prescripts. The letter recorded that the SGB had not been properly constituted; had failed to adopt a constitution; had not adopted a finance and/or procurement policy; there was no minute or a resolution which resolved to appoint Star Catering as service provide; the SGB had not adhered to section 217 of the Constitution which requires procurement by an organ of state to

---

<sup>1</sup> Section 25(1) of SASA reads: "If the Head of Department determines on reasonable grounds that a governing body has ceased to perform functions allocated to it in terms of this Act or has failed to perform one or more of such functions, he or she must appoint sufficient persons to perform all such functions or one or more of such functions, as the case may be, for a period not exceeding three months."

be fair, equitable, transparent, competitive and cost-effective; and that given the value of the contract with Star Catering, there should have been such an open and competitive procurement process undertaken, which there was not.

[9] On 23 October 2020 Ms Meyer-Williams, on behalf of the interim SGB, wrote to Star Catering to inform it that the contract entered into with the school had been terminated. Thereafter, Star Catering was locked out of the premises. In response, Star Catering instituted urgent court proceedings, which were withdrawn when it was agreed between the parties that the status quo ante would be restored. Star Catering's full access to the school's premises was therefore restored.

[10] On 30 October 2020 Star Catering was informed that the WCED had obtained legal advice to approach this Court to seek to have the award of the contract set aside. By agreement between the parties, Star Catering continued to provide services at the school pending the outcome of the current application.

#### Submissions of the parties

[11] In argument it was submitted for the WCED that the apparent decision of the SGB to enter into the contract with Star Catering constitutes administrative action and is therefore reviewable under the provisions of the Promotion of Administrative Justice Act 3 of 2000 ('PAJA'), alternatively that it is reviewable under the principle of legality. It was argued that the decision amounted to administrative action in that the SGB is an organ of state which exercises public power or performs a public function and its decision to award the contract has direct external legal effect, with the rights of those groups not properly represented on the SGB adversely affected by the conclusion of the contract. Even if the conclusion of the contract is not reviewable under PAJA, it was concluded without the approval of the SGB and with no procurement process followed and under the principle of legality is therefore unlawful.

[12] To the extent that the application is considered to fall outside the 180-day period prescribed in section 9 of PAJA, it was submitted that the reasons, as set out in the founding affidavit for such delay, were reasonable in that the delay was the

result of the investigation of the matter and the need to obtain legal advice. For the same reasons, for purposes of a legality review, it was stated that any delay in the launch of these proceedings was neither unreasonable nor undue.

[13] In its opposition to the application, Star Catering raised three preliminary issues. The first was that the deponent to the founding affidavit lacked the requisite locus standi to depose to the affidavit. The second was that the causa has been mischaracterised in that the application cannot be brought in terms of PAJA as the agreement was concluded between a representative of the SGB and Star Catering and that the WCED effectively seeks to review its own decision. The third preliminary point raised was that none of the members of the SGB were cited in the application.

[14] It was contended for Star Catering that the WCED did not argue that Mr Ketelo lacked the authority from the SGB to enter into the contract, with the absence of a specific resolution to that effect not having the result that he was not authorised to conclude the contract on behalf of the SGB. Furthermore, the fact that minutes to this effect could not be found does not mean that Mr Ketelo lacked authority to conclude the contract.

[15] As to whether a proper procurement process was conducted, it was argued that when Ms Lali attended at the school she met other bidders who were bidding to provide catering services to the school. On her second visit to the school, there were also other catering companies present who were being considered by the SGB; and the minutes of the SGB reflect that it ultimately had to decide between Fedics and Star Catering. The WCED's contention that there was not competitive bidding process, it was submitted, is therefore without merit. Consequently, Star Catering sought that the application be dismissed with a punitive costs order.

### Discussion

[16] There is no merit in each of the preliminary points raised by Star Catering. In relation to the first point, it is apparent from the confirmatory affidavit of Mr Brian Schreuder, the former HOD who served in that position at the time that the

application was instituted, that Ms Meyer-Williams was duly authorised to represent the WCED in this matter, including depose to the founding affidavit.

[17] In relation to the second preliminary point raised, it is apparent that the WCED seeks to have the award of the contract to Star Catering reviewed and set aside either in terms of a PAJA review or under the principle of legality. Even if the award of the contract is not reviewable under PAJA, it would in any event be capable of being reviewed under the principle of legality. This was so in that, as was made clear in *State Information Technology Agency SOC Limited v Gijima Holdings (Pty) Ltd (Gijima)*,<sup>2</sup> “the exercise of public power which is at variance with the principle of legality is inconsistent with the Constitution itself” and “(t)he principle of legality must be a vehicle for its review”.

[18] As to the third preliminary point raised, the SGB is cited as second respondent in the matter and chose not to oppose the application. The fact that none of the members of the SGB were cited individually as respondent parties to the application is by no means fatal to this application. The objection raised on this basis takes the matter no further when there is no obligation on the WCED to join individual SGB members as respondents to the proceedings.

[19] The decision to enter into the catering services contract with Star Catering constituted administrative action.<sup>3</sup> This is so in that ‘administrative action’ in accordance with section 1 of PAJA consists of seven elements: (a) a decision of an administrative nature; (b) by an organ of state or a natural or juristic person; (c) exercising a public power or performing a public function; (d) in terms of any legislation or an empowering provision; (e) that adversely affects rights; (f) that has a direct, external legal effect; and (g) that does not fall under any of the listed exclusions.’ A public school, along with its governing body, is an organ of state.<sup>4</sup> The purported decision of the SGB to award the contract to Star Catering and the conclusion of the contract with Star Catering involved the exercise of a public power

---

<sup>2</sup> 2018 (2) SA 23 (CC) at para 40.

<sup>3</sup> *School Governing Body Grey College, Bloemfontein v Scheepers and Another* [2020] ZASCA 82; [2020] 3 All SA 704 (SCA) at para 72.

<sup>4</sup> *Minister of Education, Western Cape, and Others v Governing Body, Mikro Primary School, and Another* [2005] ZASCA 66; 2006 (1) SA 1 (SCA) 3 All SA 436 (SCA) at para 20.

or the performance of a public function which adversely affected rights and had direct, external legal effect. As such, it constituted administrative action. In issue is whether and on what basis the WCED is entitled to seek the relief that it does related to the conclusion of the contract.

[20] In *Gijima*<sup>5</sup> the Constitutional Court held that section 33 of the Constitution creates rights enjoyed only by private persons, with the bearer of obligations under the section being the State; and that “(n)o choice is available to an organ of state wanting to have its own decision reviewed; PAJA is simply not available to it” on the basis of an interpretation of section 33 of the Constitution and PAJA.<sup>6</sup> The Constitutional Court distinguished the matter from *MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd*<sup>7</sup> in which it was Kirland that had instituted proceedings to ensure that an approval communicated to it, and in reliance on which it acted, prevailed. In that matter, the government respondents made no move to set aside the approval.

[21] If the SGB’s decision to enter into the contract with Star Catering on behalf of the school, despite falling within the definition of administrative action, is not reviewable by the State on the authority of *Gijima*, it is clearly open to the WCED in this case to seek the relief sought by it under the principle of legality.

[22] Section 217 of the Constitution requires that –

‘when an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective.’

[23] The Public Finance Management Act 1 of 1999 (‘the PFMA’) provides in section 1 that “irregular expenditure” includes “expenditure incurred in contravention of or is not in accordance with a requirement of any applicable legislation, including -

---

<sup>5</sup> [2017] ZACC 40; 2018 (2) BCLR 240 (CC); 2018 (2) SA 23 (CC) at para 29.

<sup>6</sup> Id. at para 37.

<sup>7</sup> [2014] ZACC 6; 2014 (5) BCLR 547 (CC); 2014 (3) SA 481 (CC).

...(c ) any provincial legislation providing for procurement procedures in that provincial government”. Section 38 obliges accounting officers to ensure that an appropriate procurement system which is fair, equitable, transparent, competitive and cost-effective is in place in a department and to report to the relevant treasury and tender board any such irregular expenditure in relation to the procurement of goods or services on such expenditure being discovered. There is no dispute that the WCED has such a procurement system in place.

[24] On the material before this Court there was nothing advanced to gainsay the WCED’s contention that the award of the contract to Star Catering by the school, represented by Mr Ketelo as chairperson of the SGB, amounted to conduct of an organ of state that involved the exercise of public power. The allocation of public funds through the exercise of a public power by an organ of state was central to the award of the contract.

[25] Equally, there was nothing put up to refute the WCED’s contention that the award of the contract to Star Catering did not conform to legal prescript. There is no evidence of a proper procurement process having been undertaken by either the school or the SGB in this matter. There is no evidence that a tender was advertised in order to ensure a fair, equitable, transparent, competitive and cost-effective process. There is no record of quotations received and considered by the SGB to ensure compliance with the relevant procurement procedures. There is no minute recording a clear and unequivocal decision taken by SGB to award the contract to Star Catering or the reasons why this decision was taken. There is no evidence that the decision taken was fair, equitable, transparent, competitive or cost-effective. The extract of the SGB minute provided to Star Catering recorded that Star Catering’s menu had been viewed, that it did not need to be VAT registered and that its prices matched those of Fedics. Importantly, the minute records, without a decision having been taken to award the contract, that Star Catering would start on 1 October 2019, with a meeting to be arranged with the company on 5 September 2019 despite the fact that it was agreed that “Mr Aries to look at other proposed catering companies.” The only meaning that can be attributed to this sentence is that other companies were being explored and that no decision to award the contract to Star Catering had been taken. Without any resolution that the contract had been awarded to Star



Catering, and with it made clear that Mr Aries was to look for other catering companies, the plain wording of the minute does not support a contention that it recorded a decision to award the contract to Star Catering.

[26] It follows that from the material before this Court that it is evident that even the most rudimentary requirements of a fair, equitable, transparent, competitive and cost-effective tender process were not complied with by the SGB. Without a decision to taken to award the contract to Star Catering following a proper procurement process, the chairperson of the SGB lacked the authority to conclude the contract on behalf of the school. His conduct in entering into the contract did not comply with section 217, existing procurement procedures and was one that was at odds with the principle of legality. For these reasons, the decision taken was unlawful and invalid.

### *Delay*

[27] Turning to the issue of delay, in both legality and PAJA reviews, the time within which to institute an application runs from the date the applicant becomes aware or reasonably ought to have become aware of the impugned action and the reasons for it. The legality delay rule, relevant to this application given the findings above, requires first that it be determined whether the delay was unreasonable. This is a factual enquiry on which a value judgment must be made. If the court finds the delay unreasonable, the second question is whether the court should overlook the delay. Unlike PAJA's s 9(1), this does not require an application for condonation.<sup>8</sup>

[28] To decide if a delay was unreasonable, the court must have regard to the explanation for the delay, which must cover the whole period. If a delay was not unreasonable, the court goes to the merits. The approach in deciding whether to overlook an unreasonable delay is a flexible one, grounded in the proven facts and objectively available considerations, taking into account factors such as the potential prejudice to affected parties, the possible consequences of setting aside the impugned decision, and the possible amelioration of prejudice through granting a just and equitable remedy; the nature of the impugned decision, the conduct of the

---

<sup>8</sup> *Central Energy Fund SOC Ltd and Another v Venus Rays Trade (Pty) Ltd and Others* [2020] ZAWCHC 164 at para 288.

applicant, including whether the functionary acted in good faith or with the intent to ensure clean governance; and whether, as was the case in *Gijima*, the unlawfulness of the impugned decision 'is clear and not disputed', in which case the court is compelled to declare the impugned decision unlawful on the basis that the court should be slow to allow procedural obstacles to prevent scrutiny of a challenge to the exercise of public power.<sup>9</sup>

[29] The delay in launching this application was clearly explained as having arisen due to the investigation and other processes embarked upon by the WCED, and as a result of the need to obtain the appropriate legal advice. These reasons on the facts of this matter are not unreasonable. Having regard to the merits, it is relevant that Star Catering was constrained in its opposition to this application to accept that there was no record of a decision of the SGB which recorded unequivocally that it had been awarded the contract to Star Catering after a transparent, fair, equitable, cost-effective competitive procurement process. In these circumstances, I am satisfied that the WCED has shown that the delay in launching this application was neither unreasonable nor undue.

#### *Appropriate remedy*

[30] The exercise of a remedial discretion both under s 172(1)(b) of the Constitution (and s 8(1) of PAJA), constitutes a discretion in the true sense. It is one that must be exercised judicially, must not be influenced by wrong principles or a misdirection of the facts, having regard to all the relevant facts and principles.<sup>10</sup>

[31] Following upon a declaration of invalidity, s 172(1)(b) empowers the court to –

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

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

---

<sup>9</sup> Id. at para 290.

<sup>10</sup> *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Limited and Another* [2015] ZACC 22; 2015 (10) BCLR 1199 (CC); 2015 (5) SA 245 (CC) para 88.

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

[32] The Constitutional Court has developed two guiding principles for crafting an appropriate remedy in cases that entail setting aside a contract.<sup>11</sup> The first is the corrective principle, which is aligned with the rule of restitution in contract, namely that neither contracting party should unduly benefit from what has been performed under a contract that no longer exists. In *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others (No 2)*<sup>12</sup> the Court described the rationale for the corrective principle as follows:

‘Logic, general legal principle, the Constitution and the binding authority of this court all point to a default position that requires the consequences of invalidity to be corrected or reversed when they can no longer be prevented. It is an approach that accords with the rule of law and the principle of legality.’

[33] It was stated further that:

‘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

---

<sup>11</sup> *Central Energy Fund SOC Ltd and Another v Venus Rays Trade (Pty) Ltd and Others* [2022] ZASCA 54; [2022] 2 All SA 626 (SCA) at para 39.

<sup>12</sup> [2014] ZACC 12; 2014 (4) SA 179 (CC) at para 30. See also paras 29 and 32.

between SASSA and Cash Paymaster but also in relation to the effect of the order on future procurement and social security matters.’<sup>13</sup>

[34] The second guiding principle is the “no-profit-no-loss” principle in the sense that the invalidation of the existing contract as a result of the invalid tender should not result in any loss to Star Catering, with the converse also true, namely that it has no right to benefit from an unlawful contract.<sup>14</sup>

[35] Whether a party has been complicit in maladministration, impropriety, or corruption, or not, has a significant impact on the appropriate just and equitable remedy that a court may grant.<sup>15</sup> Although there is no evidence in this matter that Star Catering has been complicit in such conduct in relation to what has been shown to the award of an unlawful tender, as was made clear in *Black Sash Trust v Minister of Social Development and Others*,<sup>16</sup> innocent parties are not entitled to benefit from an unlawful contract. Yet, at the same time they are not required to suffer any loss as a result of the invalidation of a contract.

[36] Since the default position is that where conduct is declared invalid, the consequences of invalidity must be reversed, this entails the setting aside of the implicated contract.<sup>17</sup> As to the prejudice that Star Catering would suffer, it is a relevant consideration that some of the harm is harm which became inevitable as soon as the impugned transaction was concluded. There is no evidence of harm which has been caused or exacerbated by the delay in this matter in the WCED seeking the relief that it does. While Star Catering appears to have been innocent, I accept that it was not proactive in taking steps to ensure that the contract concluded had been done so lawfully and validly. Its reliance on the SGB minute was misplaced when a plain wording of that minute did not prove a decision properly taken.

---

<sup>13</sup> *Allpay 2 (supra)* at para 32.

<sup>14</sup> *Id.* at para 67.

<sup>15</sup> CEF SCA at para 42.

<sup>16</sup> [2017] ZACC 8; 2017 (3) SA (CC) 335 at paras 40 and 50.

<sup>17</sup> *Allpay Consolidated Investments Holdings (Pty) Ltd & others v Chief Executive Officer, South African Social Security Agency & others* (2) [2014] ZASCA 12; 2014 (4) SA 179 (CC) paras 29-33.

[37] In *Allpay (2)*<sup>18</sup> it was stated:

‘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. And any benefit that it may derive should not be beyond public scrutiny. So the solution to this potential difficulty is relatively simple and lies in Cash Paymaster’s hands. It can provide the financial information to show when the break-even point arrived, or will arrive, and at which point it started making a profit in terms of the unlawful contract. As noted earlier, the disclosure of this information does not require disclosure of information relating to Cash Paymaster’s other private commercial interests. But its assumption of public power and functions in the execution of the contract means that, in respect of its gains and losses under that contract, Cash Paymaster ought to be publicly accountable.’

[38] Crafting an appropriate remedy requires that the interests of the public must remain paramount.<sup>19</sup> The enquiry cannot be one-dimensional. The rights, responsibilities, and obligations of all affected persons must be assessed.”<sup>20</sup> On the facts of this matter, the contract concluded was clearly and unlawful. There is no reason that a finding of invalidity should not follow. Although the WCED sought a declaration that the contract be declared void ab initio, on the facts and circumstances of this matter I consider it to be just and equitable to limit the retrospective effect of the declaration of invalidity, in the manner expressly permissible under section 172(1)(b)(i) of the Constitution, with the order to be declared invalid from the date of the order in this matter. Such an order is both corrective and amounts to a sensible approach to remediating the unlawfulness in this matter, having regard to all relevant facts and circumstances.

---

<sup>18</sup> Id at para 67. See too *Black Sash Trust v Minister of Social Development & others* [2017] ZACC 8; 2017 (3) SA 335 (CC) paras 40 and 50.

<sup>19</sup> *Department of Transport and Others v Tasima (Pty) Limited* [2016] ZACC 39; 2017 (1) BCLR 1 (CC); 2017 (2) SA 622 (CC) at 205.

<sup>20</sup> *All Pay 2 (supra)* at para 32.

[39] Insofar as the issue of costs is concerned, I do not consider this to be appropriate case in which to order costs given that the unlawful conduct was that of Mr Ketelo, purportedly acting for the SGB on behalf of the school, and not that of Star Catering. There is therefore no reason why Star Catering should be ordered to pay the costs of this application.

### Order

[40] The following order is made:

1. The contract for the provision of catering services entered into between the third respondent, the Western Cape Sports School, and the first respondent, ZT Makhosikazi Trading (Pty) Ltd, trading as Star Catering, is declared unlawful and invalid with effect from the date of this order.
2. There is no order as to costs.

KM SAVAGE  
Judge of the High Court

### Appearances:

Applicant:	Mr CS Bosch Instructed by the State Attorney
First Respondent:	Mr A Njeza Instructed by Venfolo Lingani Inc.