IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE CCT 54/22

In the matter between:

AFROCENTRICS PROJECTS AND SERVICES (PTY) LTD t/a INNOVATIVE DISTRIBUTION
(Registration No: 2012/119655/07) Applicant

and

STATE INFORMATION TECHNOLOGY AGENCY (SITA) SOC LIMITED
(Registration No: 1999/001899/30) First Respondent

MICRO FOCUS SOFTWARE (IRELAND) LIMITED
(Registration No: IE223694) Second Respondent

AXIZ (PTY) LIMITED Third Respondent

XUMA TECHNOLOGIES T/A X TELECOMS
(Registration No: 2004/006551/07) Fourth Respondent

DEPUTY MINISTER OF COMMUNICATIONS AND DIGITAL TECHNOLOGIES
Fifth Respondent

MINISTER OF FINANCE Sixth Respondent

THE DIRECTOR-GENERAL
DEPARTMENT OF NATIONAL TREASURY Seventh Respondent

APPLICANT'S WRITTEN SUBMISSIONS – 6 OCTOBER 2022

A. INTRODUCTION

1. On 27 September 2022, the Chief Justice issued a directive calling upon the applicant to file written submissions by 6 October 2022 on the following issues:

    1.1. Did the High Court, in its order of 29 January 2021, set aside the main application or can it be said that it failed to decide the Rule 30 application by not explicitly ordering whether and to what extent the alleged irregular proceeding was set aside?

    1.2. If the High Court failed to decide the Rule 30 application, can it be said that it acted outside its powers, with the consequence that its order of 29 January 2021 falls to be set aside? If so, does this court have jurisdiction to intervene?

    1.3. If the High Court set aside the main application, did it do so on the grounds going to the merits of the main application? If so, what were those grounds and was it permissible for the High Court to determine those grounds in proceedings in terms of Rule 30? If it was not permissible to do so in proceedings in terms of Rule 30, does this court have jurisdiction to intervene?

2. The order of the High Court, of 29 January 2021, provides as follows:

    "1) The applicant's main application is irregular and improper;

    2) The applicant to pay the costs of the application inclusive of the costs of two counsel."

3. These written submissions are accordingly filed pursuant to the above directive.

4. We address each of the questions raised.

B. ISSUE 1:

DID THE HIGH COURT, IN ITS ORDER OF 29 JANUARY 2021, SET ASIDE THE MAIN APPLICATION OR CAN IT BE SAID THAT IT FAILED TO DECIDE THE RULE 30 APPLICATION BY NOT EXPLICITLY ORDERING WHETHER AND TO WHAT EXTENT THE ALLEGED IRREGULAR PROCEEDING WAS SET ASIDE?

5. We submit that the High Court, in its order of 29 January 2021, (1) set aside the main application and (2) decided the rule 30 application in circumstances where it could not do so. We elaborate on the reasons for this submission below.

6. The basic principles applicable to construing documents also apply to the construction of a court's judgment or order: the court's intention is to be ascertained primarily from the language of the judgment or order as construed according to the usual, well-known rules.[1]

7. In *Eke v Parsons* 2016 (3) SA 37 (CC) at para [29] this Honourable Court held that:

> *"[29] Once a settlement agreement has been made an order of court, it is an order like any other. It will be interpreted like all court orders. Here is the well-established test on the interpretation of court orders:*
>
> *'The starting point is to determine the manifest purpose of the order. In interpreting a judgment or order, the court's intention is to be ascertained primarily from the language of the judgment or order in accordance with*

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[1] *Firestone South Africa (Pty) Ltd v Gentiruco AG* 1977 (4) SA 298 (A) at 304 E

the usual well-known rules relating to the interpretation of documents. As in the case of a document, the judgment or order and the court's reasons for giving it must be read as a whole in order to ascertain its intention.'"

8. In the matter at hand, the High Court made the following findings which we submit demonstrate that the order set aside the main application:

8.1. that the termination of the applicant by the second respondent does not amount to administrative action -- (paragraph 58);

8.2. that the applicant cannot utilise Rule 53 to review and set aside the decision of the second respondent to terminate the applicant's appointment -- (paragraph 58);

8.3. that the applicant's review application is not one brought in terms of the Promotion of Administrative Justice Act, 2000 -- (paragraph 59);

8.4. that the applicant's claim for damages is in fact based on the notion of what it would have earned had its appointment not been terminated -- (paragraph 60);

8.5. that the applicant does not satisfy the elements of the declaratory relief it seeks in the main application -- (paragraph 67);

8.6. that there is no basis for the contention that the termination of the Fulfilment Agreement entered into between the parties violates section 217 of the Constitution and undermines the Broad Based Black Economic Empowerment Act 53 of 2003 -- (paragraph 67); and

8.7. that there is no basis for the contention that the second respondent's conduct amounts to collusive behaviour and abuse of dominance, and that the collusive conduct allegation is best suited for the competition commission -- (paragraph 67).

9. When one considers the effect of the order on the substance of what is in dispute and the reasoning of the Court (which is definitive of the issues raised in the main application), it is clear that the intention of the Court was to set aside or dismiss the main application.

10. The High Court specifically decided the Rule 30 application on the sole basis that:

"[40] …Rule 30 makes it clear in no uncertain terms that any irregular proceedings may be attacked under Rule 30 and that the court is empowered to set aside such irregular proceeding including the complaint that goes to the heart of the application."[2]

(emphasis supplied)

11. Not only is this legal basis for the High Court's judgment, with respect, wrong in law; it is also an affront to the *stare decisis* principle that is intended to avoid chaos in the application of law.

12. In this regard, the High Court cited as authority the decision of a single Judge in *Deputy Minister of Tribal Authorities and Another v Kekana* 1983 (3) SA 492 (B). But the dictum on which the High Court relies as authority was specifically

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[2] Para [40] of the judgment of the High Court

rejected by the Full Bench in *Cochrane v City of Johannesburg* 2011 (1) SA 553 (GSJ) which said:

"[20] . . . Ms Goedhart argued that when the matter came before Tsoka J, a defect going to the root of her claim could be attacked under rule 30. Ms Goedhart relied on the judgment of Van der Merwe J in Deputy Minister of Tribal Authorities and Another v Kekana 1983 (3) SA 492 (B) at 495H – 496B, where it states:

> *'According to the clear wording of the Rule, any irregular proceeding may be attacked under this Rule and the Court is empowered to set aside such irregular proceeding. I can think of no reason in principle why a defect going to the root of the claim cannot be attacked under this Rule. . . .'*

[21] In my view, the portion relied on by Ms Goedhart was obiter. The authors in Erasmus Superior Court Practice Service 23 (2005) at B1-191 indicate in a footnote to the commentary as follows:

> *'In view of the provisions of Rule 18(12) which were inserted on 27 November 1987, it is doubtful whether the obiter judgment is still applicable.'*

[22] I am of the view that the learned authors are correct in this regard and that the use of rule 30, in dealing with the defect going to the root of the claim, is not apposite, since the introduction of the provisions of rule 18(2) of the Uniform Rules of Court on 27 November 1987."

13. This Full Court judgment was binding on the High Court at the time it rendered its impugned judgment, whether the High Court agrees with the Full Court or not. This was pointed out to the High Court. It ignored the submission.

14. We submit with respect that the High Court erred in law by making a finding of law that is contrary to a decision of the Full Bench. It is in the interests of justice for this Honourable Court to intervene and set things right when the High Court (and the SCA) ignore legal and binding precedent.

15. The High Court further erred by failing to take into account the plain commentary of the learned authors on Rule 30 in *Erasmus Superior Court Practice Service 23 (2005) at B1-191* which specifically questions the application of Rule 30 as an apposite procedure to address alleged irregular proceedings that go to the heart of the claim.

16. The result is that Afrocentrics is now left in a position where findings have been made on matters of substance which findings dispose of a substantial portion of the relief Afrocentrics seeks in the review.

17. We further submit that since

    17.1 there is doubt whether Rule 30 applies in motion proceedings in light of the provision in Rule 6(14) of the High Court rules;

    17.2 there is doubt whether Rule 30 applies to a notice of motion;

    17.3 assuming (without accepting) that Rule 30 applies in motion proceedings or to a notice of motion, there is doubt whether Rule 30 avails a litigant for an attack on substance and not form;

the High Court cannot, with respect, be the final arbiter of these issues.

C. ISSUE 2:

IF THE HIGH COURT FAILED TO DECIDE THE RULE 30 APPLICATION, CAN IT BE SAID THAT IT ACTED OUTSIDE ITS POWERS, WITH THE CONSEQUENCE THAT ITS ORDER OF 29 JANUARY 2021 FALLS TO BE SET ASIDE? IF SO, DOES THIS COURT HAVE JURISDICTION TO INTERVENE?

18. For the reasons already advanced, the High Court did decide the rule 30 application in circumstances where it could not do so.

19. The High Court acted outside its powers by finding that it had the power in rule 30 proceedings to set aside the main application (that is, to determine a complaint that goes to the heart of the application). In doing this, the High Court violated or ignored the *stare decisis* principle.

20. Effectively what the second respondent sought to raise, impermissibly, was an exception by way of a Rule 30 procedure. This it did because an exception procedure is not available in motion proceedings. So, it sought to introduce an exception through a Rule 30 application.

21. However, in application proceedings there is no recognised procedure for raising an exception on the grounds that a notice of motion and accompanying affidavit are vague and embarrassing or lack averments necessary to sustain an action. The only avenues that are open to the respondents are either filing a notice of opposition followed by an answering affidavit in which these defences are pleaded, or the filing of a notice in terms Rule 6(5)(d)(iii) within the prescribed period.

D. ISSUE 3:

IF THE HIGH COURT SET ASIDE THE MAIN APPLICATION, DID IT DO SO ON THE GROUNDS GOING TO THE MERITS OF THE MAIN APPLICATION? IF SO, WHAT WERE THOSE GROUNDS AND WAS IT PERMISSIBLE FOR THE HIGH COURT TO DETERMINE THOSE GROUNDS IN PROCEEDINGS IN TERMS OF RULE 30? IF IT WAS NOT PERMISSIBLE TO DO SO IN PROCEEDINGS IN TERMS OF RULE 30, DOES THIS COURT HAVE JURISDICTION TO INTERVENE?

22. As stated above,

22.1. The High Court set aside the main application on grounds going to the merits of the main application.

22.2. The High Court erred in determining these grounds which is definitive of the issues raised in the main application.

22.3. It was not permissible for the High Court to do so in Rule 30 proceedings. Rule 30 deals with issues of form and not substance.

23. The High Court erred in determining the following grounds which is definitive of the issues raised in the main application:

23.1. *That the termination of the applicant by the second respondent does not amount to administrative action.* It is clear from the papers that what the applicant alleges is that the first respondent is an organ of state, and the second respondent is a juristic person exercising public power at the behest of an organ of state in terms of national legislation. It is further

clear from the papers that allegations are made of the second respondent usurping the first respondent's mandate to procure IT services for organs of state, or the first respondent abdicating its public procurement mandate to the second respondent. The application was brought under the Promotion of Justice Act 3 of 2000 ("PAJA") and in the alternative under the principle of legality.

23.2. *That since the second respondent is a private company, the applicant cannot utilise Rule 53 to review and set aside the decision of the second respondent to terminate the applicant's appointment.* The applicant's claim does not lie in breach of contract but rather in the unlawfulness and unconstitutionality of the contract clause itself. The claim lies not in private law but in public law. Rule 53 is a perfectly proper means of scrutinising the legality and rationality of the exercise of public power even by a private entity. The High Court is bound by this Court's jurisprudence in this regard and cannot validly carve its own path by dismissing these issues in a rule 30 application.

23.3. *That the applicant's claim for damages is in fact based on the notion of what it would have earned had its appointment not been terminated.* But the applicant's claim is <u>not</u> a contractual damages claim. It is a claim for compensation that is consequential upon an unlawful and unconstitutional termination.

23.4. *That the applicant does not satisfy the elements of the declaratory relief it seeks in the main application.* This is a matter of substance that ought to be addressed by the second respondent in its answering affidavit/s. It

cannot raise these issues in a Rule 30 application. The application is brought on the basis that both the Partner Agreement and the Fulfilment Agent Agreement are unconstitutional to the extent that they permit for termination of the agreement with an intended beneficiary of the country's preferential procurement laws without just cause, and to the extent that they have the effect of the first respondent abdicating its procurement mandate.

23.5. *That there is no basis for the contention that the termination of the Fulfilment Agreement entered into between the parties violates section 217 of the Constitution and undermines the Broad Based Black Economic Empowerment Act 53 of 2003.* A court cannot validly in law find that conduct does not amount to administrative action as the High Court did without embarking on a proper interpretation of *"administrative action"* and/or *"decision"* in PAJA. A court can also not validly in law find that there has been no violation of section 217 of the Constitution without embarking on a proper interpretation of the empowering legislation enacted to give effect to section 217.

23.6. *That there is no basis for the contention that the second respondent's conduct amounts to collusive behaviour and abuse of dominance, and that the collusive conduct allegation is best suited for the competition commission.* The relief is sought because the agreements (to the extent specified) are unfair, arbitrary, capricious and in violation of section 217(1) of the Constitution and frustrate the achievement of the objects of the Broad-Based Black Economic Empowerment Act, 53 of 2003

which was enacted specifically to give effect to sections 9(2) and 217(3) [read together with section 217(2)] of the Constitution.

24. The result is that the applicant is now left in a position where findings have been made on matters of substance which findings dispose of the main application or a substantial portion of the relief the applicant seeks in the main application.

25. We submit that this Court has the necessary jurisdiction and power to intervene. It is in the interests of justice for this Court to intervene, hear argument also on the merits of the applicant's case (as the High Court has now dismissed them) and make decision on those merits too. This Court is in as good a position as was the High Court.

26. It is trite that a matter that relates to the interpretation and application of legislation – which the High Court was duty-bound to do in order to arrive at the conclusion that the impugned conduct does not constitute *"administrative action"* and that there has been no violation of constitutional preferential procurement provisions – is, *per ipsum*, a constitutional matter.

27. We respectfully submit that the High Court cannot be the final arbiter on this.

E. CONCLUSION

28. We submit that it is in the interests of justice for this Court to intervene and set things right.

VUYANI NGALWANA SC
FARZANAH KARACHI
Chambers: Sandton
6 October 2022