



CONSTITUTIONAL COURT OF SOUTH AFRICA

Department of Transport and Others v Tasima (Pty) Limited

CCT 5/16

Date of hearing: 24 May 2016

Date of judgment: 9 November 2016

MEDIA SUMMARY

The following explanatory note is provided to assist the media in reporting this case and is not binding on the Constitutional Court or any member of the Court.

On 9 November 2016 at 10h00, the Constitutional Court handed down judgment in a matter concerning whether an organ of state is bound to adhere to court orders enforcing a purportedly invalid administrative act. At issue was an administrative decision extending a contract between a state organ and a private company.

In 2001, the respondent, Tasima (Pty) Limited (Tasima), contracted with the first applicant, the Department of Transport (Department), to provide traffic management services and functions through the electronic National Traffic Information System (eNaTIS). In 2010, the Department's Director-General extended the contract for a period of five years.

After some time had passed, and being of the view that the extension had been unlawfully granted, the Department sought to transfer the eNaTIS and associated services to the fifth respondent, the Road Traffic Management Corporation (Corporation) on 1 May 2012. Aggrieved by the Department's conduct, Tasima approached the High Court seeking an order enforcing the extension pending the outcome of a dispute resolution mechanism agreed to in the contract. This order was granted by Mabuse J on 11 December 2012. Numerous orders enforcing obligations arising out of the Mabuse J order were subsequently made.

In early 2015, the Department and the Corporation again made efforts to begin the transfer process. This resulted in Tasima, on 12 March 2015, seeking a further interdict from the High Court. That application also sought to uphold the orders previously made by the High Court enforcing the contract. Where compliance had not occurred, Tasima sought various declarations of contempt of court, and the committal to goal of officials in the Department and the Corporation on the basis of their contempt. This application, heard by Hughes J, gave rise to the present appeal.

The Department opposed Tasima's application by way of counter application, seeking to reactively review and set aside the extension of the contract on which Tasima relied. While endorsing the Department's reactive challenge, the Corporation also argued that the 2010 extension had, in any event, expired, and that they were therefore entitled to take steps to transfer the eNaTIS into their control.

The High Court found in favour of the applicants. It upheld the Department's counter application, set the extension of the contract aside, and declared the extension void from the outset. On this basis, the Court found that the various court orders could not have been granted. Tasima was ordered to hand-over the running of the eNaTIS and associated services to the Corporation, and the applications for contempt and committal were dismissed.

The Supreme Court of Appeal overturned the High Court's decision. It concluded that reactive challenges are not open to organs of state, and that even if they were, the counter application was brought too late to be considered. It found further that even if the extension could be set aside by way of a reactive challenge, this would not insulate the Department and Corporation from complying with the court orders enforcing the contract.

Before the Constitutional Court, the Department and the Corporation persisted with their reactive challenge, and argued that the extension was tainted by corruption and should therefore be treated as if invalid from the outset. Tasima disputed both of these grounds, and continued to argue that, in any event, the court orders stood to be enforced. The Court wrote two majority and two minority judgments.

In the first judgment, Jafta J (Mogoeng CJ, Bosielo AJ and Zondo J concurring) found that the extension to the contract was granted in contravention of the Constitution, the Public Finance Management Act, and Treasury Regulations. The first judgment held that the Department, as an organ of state, was entitled to bring its reactive challenge to the extension. When Tasima sought to uphold the extension before Hughes J in the High

Court, the Department was permitted to raise its counter application as a comprehensive defence.

The first judgment further considered the implications of finding that the extension was unlawfully granted. Distinguishing the matter from the Supreme Court of Appeal's decision in *Oudekraal Estates (Pty) Ltd v The City of Cape Town (Oudekraal)* and the Constitutional Court's decision in *MEC for Health, Eastern Cape v Kirland Investments (Pty) Ltd t/a Eye & Lazer Institute (Kirland)*, the first judgment held that because the extension was invalid, it could be ignored and no amount of delay could alter this position. As a result, Tasima was not entitled to rely on the extension to enforce the contract after the initial contractual period expired on 30 April 2012.

In respect of Tasima's argument that the court orders upholding the contract nevertheless stand, the first judgment finds that because the orders were effective only for the duration of the contract, once it expired on 30 April 2015, the orders fell away. It would therefore be unnecessary to consider the effect of the orders. The first judgment would consequently have set aside the extension, and ordered that Tasima hand-over the eNaTIS and associated systems to the Corporation within 30 days.

The second and majority judgment by Khampepe J (Froneman J, Madlanga J, Mhlantla J and Nkabinde J concurring) relied on *Merafong City Local Municipality v AngloGold Ashanti Limited* [2016] ZACC 35 (*Merafong*) to endorse a flexible approach to the question whether an organ of state is entitled to raise a reactive challenge. It held that the Department's reactive challenge could be brought, provided that the delay in doing so was not "unwarrantably" undue. On the facts, the second judgment found that while the delay was undue, there were a number of facts that justified this position. The Department's tardiness was therefore excusable. The second judgment concluded that the Departments reactive challenge should therefore be considered.

The second judgment then endorsed the first judgment's reasoning on the merits of the reactive challenge itself. It concluded that the extension to the contract stood to be set aside. However, the second judgment held that, for the period between the extension being granted and the reactive challenge succeeding, the extension was legally enforceable, as it was not set aside by a court. The Department was not entitled to ignore the extension on the assumption that it was invalid and of no force and effect.

The second judgment further considered the effect of the various High Court orders. It found that the obligation to perform in terms of the contract did not expire on 30 April 2015, as the contract itself set out requirements for the hand-over which had to be

complied with before the contract ended. The judgment concludes that the orders continued to be enforceable until the point Hughes J made her order.

The second judgment thereafter found that the Department was not entitled to ignore the High Court orders, even if the extension was unlawfully granted. The judgment held that the Constitution enjoins all to obey a court order for as long as it has not been set aside by another appropriate court. It concluded that the findings of contempt should be upheld for the period prior to the contract lapsing following the success of the counter application in front of Hughes J. The second judgment held that an order of committal is unnecessary in the circumstances.

In the third judgment, in which Mogoeng CJ, Bosielo AJ and Jafta J concurred, Zondo J held that the judgment of the Court in *Economic Freedom Fighters v Speaker of the National Assembly (EFF)* did not deal with a situation where the administrative action in issue was unlawful or invalid or where there was an argument by any party that it was unlawful or invalid. For that reason he expressed the view that that decision cannot be taken to have endorsed how an unlawful or invalid administrative decision should be dealt with. The third judgment drew attention to the fact that in *EFF* all parties accepted that the Public Protector's remedial action was valid, lawful and binding.

The fourth judgment, by Froneman J (Khampepe J, Madlanga J, Mhlantla J and Nkabinde J concurring), touched on two issues. The first was whether the precedents set out in *Kirland* and *Khumalo v Member of the Executive Council for Education: KwaZulu Natal (Khumalo)* still hold good. It found that on the accepted test for reconsidering precedent, namely, whether the previous decision was clearly wrong, there was no reason to deviate from the two decisions. They were not wrong, and certainly not clearly wrong. The decisions, it held, establish an important bulwark for the rule of law, to prevent administrative and executive self-help, and provide a flexible criterion to ensure that state organs must correct perceived wrongs timeously.

The second issue was whether what the majority judgment of Khampepe J held to the effect that the Court's judgment in *EFF* was support for Khampepe J's statement of the law that "until a court is appropriately approached and an allegedly unlawful exercise of public power is adjudicated upon, it has binding effect merely because of its factual existence" is correct. The fourth judgment found that it is correct, given the express quotation and approval, in the *EFF* judgment of a statement to that effect in *Kirland*. It also dealt with the fact that shortly before the hearing in *EFF* the President made a concession, stating on record that he accepted the legal and constitutional validity of the Public Protector's report. The judgment points out that the concession is neither the *ratio* nor the logical underpinning of the *ratio* of the *EFF* judgment by the Court. It postulated

that the third judgment cannot be intended to state or imply that if the President did not make this concession, then this Court's decision would have been different, and that this Court would have concluded that the President was entitled to ignore the Public Protector's report without approaching a court of law to have it set aside.

The Court ordered that the Department's reactive challenge succeeded, but that the orders of contempt made by the Supreme Court of Appeal should be upheld until that point. Finally, it ordered that unless an alternative transfer management plan is agreed to within 10 days of its order, the eNaTIS system must be transferred in accordance with the original contract within 30 days.