



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable

Case no: 544/2021

In the matter between:

**MEC FOR THE DEPARTMENT OF PUBLIC
WORKS, EASTERN CAPE**

FIRST APPLICANT

**MEC FOR THE DEPARTMENT OF HEALTH,
EASTERN CAPE**

SECOND APPLICANT

and

IKAMVA ARCHITECTS CC

RESPONDENT

Neutral citation: *MEC for the Department of Public Works, Eastern Cape and
Another v Ikamva Architects CC* (544/2021) [2022] ZASCA 184
(20 December 2022)

Coram: VAN DER MERWE and GORVEN JJA and BASSON, WINDELL
and SALIE-HLOPHE AJJA

Heard: 21 November 2022

Delivered: This judgment was handed down electronically by circulation to the parties' 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 11h00 on 20 December 2022.

Summary: Constitutional and administrative law – just and equitable order under s 172(1)(b) of the Constitution – factors to be taken into account – default judgment valid and binding – s 165(5) of the Constitution – enforceability of court orders – order sought having effect of prohibiting execution of the default judgment – order not just and equitable – application for leave to appeal dismissed.

ORDER

On appeal from: Eastern Cape Division of the High Court, Grahamstown (Beshe J sitting as court of first instance):

- 1 The application for condonation is granted. The applicants are ordered to pay the costs of that application, including those consequent on the employment of two counsel, where so employed.
- 2 The application for leave to appeal is dismissed with costs, including those consequent on the employment of two counsel, where so employed.

JUDGMENT

Gorven JA (Van Der Merwe JA and Basson, Windell and Salie-Hlophe AJJA concurring)

[1] This is an application for leave to appeal a judgment of the Eastern Cape Division of the High Court, Grahamstown (the high court), where Beshe J dismissed an application with costs and refused leave to appeal. The matter before us was referred for oral argument in terms of s 17(2)(d) of the Superior Courts Act 10 of 2013 (the Act). The parties were informed that, if called upon to do so, they should be prepared to address this Court on the merits.

[2] As part of the order referring the matter for oral argument, the applicants were directed to file five additional copies of the application for leave to appeal and to comply with the rules of this Court by filing the record within three months of the order. Both parties were directed to comply with all of the remaining rules relating to the prosecution of an appeal. The applicants failed to comply with that direction and sought condonation for that failure. Condonation was opposed. The failure follows a litany of other procedural deviations by the applicants as will be seen in due course. This more than justified the opposition. Despite the prospects of success not having been evaluated as yet, it seems to me to be in the interests of justice to grant condonation. Apart from other considerations, this matter raises a novel point and cries out for finality. However, the applicants must bear the costs of that application, including those of two counsel, where so employed.

[3] The grant of leave to appeal is governed by s 17(1)(a) of the Act, which reads: ‘(1) Leave to appeal may only be given where the judge or judges concerned are of the opinion that –

- (a) (i) the appeal would have a reasonable prospect of success; or
- (ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration’

For present purposes, it is not necessary to enter the debate whether the test under s 17(1)(a)(i) is more stringent than that under the Supreme Court Act 59 of 1959. It should also be said that the application for leave was based squarely on that section and not on s 17(1)(a)(ii).

[4] This matter stems from an application launched in September 2019 by the applicants, the Member of the Executive Council for the Department of Public Works, Eastern Cape (the Department of Works) and the Member of the Executive

Council for the Department of Health, Eastern Cape (the Department of Health). The department directly involved in the contract mentioned below was the Department of Works. The respondent herein, as in that matter, was Ikamva Architects CC (Ikamva). The amended notice of motion sought the following relief from the high court:

- ‘1. The decision of the Department of Public Works of 29 August 2002 to appoint Ikamva Architects CC (the respondent) . . . is reviewed and set aside;
 2. The decision of the then Head of Department of the Department of Public Works of 3 September 2002 to contract with the respondent . . . is reviewed and set aside;
 3. The contract concluded between the Department of Public Works and Ikamva Architects CC in September 2003 . . . is declared void *ab initio*;
 4. The respondent is entitled to no further payments under the contract referred to in paragraph 3 above and in terms of the default order of Malusi AJ on 1 December 2015 . . . ;
 5. Hearsay evidence contained in the founding and supplementary affidavits of Sabelo Mgujulwa of 2 and 25 September 2019 respectively is hereby admitted into evidence in terms of section 3(c) of the Law of Evidence Amendment Act, to the extent that it is necessary;
 6. The respondent is ordered to pay the costs of the application, only in the event of its opposition.’
- Although there was some debate concerning which of two contracts was targeted, it was clearly the contract concluded between the Department of Works and Ikamva in September 2003 and not 2002.

[5] In order to give perspective to this matter, it is necessary to deal in some detail with the history of the litigation leading to this point. Suffice to say, it has travelled a long and winding road. On 3 September 2003, the Department of Works offered to appoint Ikamva ‘as Consulting Architects/Principal Agent’ for the project described as ‘Frere Hospital (East London): Maintenance (Various): Masterplan, Upgrade’. The appointment was accepted on 15 September 2003 (the contract). The contract did not fare well. On 23 March 2007, the Department of Works appointed

Coega Development Corporation (Coega) as implementing agent for the Frere Upgrade Project. Coega in turn appointed architects to do essentially the same work as Ikamva had been appointed to do. Through a series of events, which need not be detailed, an opinion was sought as to the legality of the appointment of Ikamva to the contract. The Department was advised that the appointment contravened the provisions of, inter alia, s 217 of the Constitution and the contract was accordingly invalid. As a result, on 9 July 2007 the Department wrote to Ikamva. It indicated that it had received legal advice and stated:

‘The procurement of the services of your firm was unlawful since, during the appointment process, there was a failure to act in accordance with a system that is fair, equitable, transparent, competitive and cost-effective, as required by the Provisions of the Constitution and the Preferential Procurement Policy Framework Act, 2000, and the Regulations promulgated in terms thereof. Since the aforesaid appointment of your firm is invalid, I advise that the Department will henceforth not honour its obligations in terms of the aforesaid invalid appointment.’

[6] That letter caused Ikamva to accept the repudiation, to cancel the contract and, on 7 August 2008, to sue the Departments for damages incurred as a result of the cancellation. The action was defended and the Departments pleaded the invalidity mentioned above. The Departments were called upon to make discovery of relevant documents in terms of Uniform rule 35(1). When they failed to do so, Ikamva applied for an order directing them to do so within ten days on pain of having their defences struck out. They then discovered. On 12 October 2010, Ikamva delivered a notice in terms of rule 35(3) requiring further and better discovery by way of making additional listed documents available for inspection and copying. This notice was ignored. On 26 September 2011, Ikamva applied for an order compelling compliance with the rule 35(3) notice within a period of ten days, ‘failing which the [Departments’] defence will be struck out and [Ikamva] will apply for judgment . . .

based on the same papers amplified if necessary'. On 10 November 2011, Majiki AJ granted that relief unopposed. The Departments failed to comply with the order.

[7] On 7 November 2012, Ikamva applied for default judgment on notice to the Departments. The matter came before Dukada J, who refused default judgment and held that, despite the terms of the order, Ikamva had to apply to strike out the defence prior to moving for default judgment. Ikamva appealed this order to the full court, which set aside his order. Not only that, but the full court departed from the usual custom and, presumably in the light of the past misguided efforts of the Departments, gave guidance as to the way forward. It indicated that, even at that stage, the Departments could avoid default judgment being granted by complying with the order of Majiki AJ and applying to have their defences reinstated. This guidance notwithstanding, the Departments neglected to do so. Instead, they launched an application to reinstate their defence without having to comply but withdrew it on the day of the hearing. On 1 December 2015, Ikamva applied for, and Malusi AJ granted, default judgment for damages in the sum of R41 031 279.58.

[8] The Departments applied for leave to appeal. This was refused by Malusi AJ. They then applied to rescind the default judgment. That application was dismissed by Hartle J. Her dismissal was appealed to the full court, which refused the appeal. Thereafter, this Court and, on 29 July 2019 the Constitutional Court, refused applications by the Departments for leave to appeal the order of Hartle J. In their founding papers, the Departments accepted that 'the application for rescission has been definitively disposed of'.

[9] It must be clearly stated at the outset that, during argument, any contention that the default judgment was anything other than competent, valid and binding was

expressly abandoned. As such, this application for leave to appeal must be determined on that basis and on that basis alone.

[10] The application under consideration was brought in the high court in September 2019. An interim order led to a stay of execution of the default judgment pending the determination of the relief referred to in paragraph 4 above. The interim order was granted by consent, along with one declaring that the *in duplum* rule¹ would not apply to interest on the judgment debt in order to ameliorate any prejudice to Ikamva. Prayers 1 and 2 of the notice of motion sought to set aside the decisions leading to the award of the contract to Ikamva. Since those orders would be ones made under s172(1)(a) of the Constitution, the high court was urged to grant relief under s 172(1)(b) in the form of orders in terms of prayers 3 and 4 thereof.

[11] The application was opposed by Ikamva on various grounds. Some of these were:

- a) The impugned decisions were not those which had led to the award of the contract in question but to a prior one. This refers to the confusion as to whether the 2002 or 2003 contract was implicated.
- b) The delay in bringing the self-review application should non-suit the Departments.
- c) Even if the impugned decisions did relate to the contract in question, the case was not made out for them to be reviewed.
- d) The issue of the validity of the contract was rendered *res judicata* by the default judgment.

Beshe J dealt with these defences and based her decision on some of them.

¹ This provides that interest must not exceed the capital sum.

[12] In the view I take of the matter, however, these defences need not be determined. It is preferable to go to the heart of the relief sought by the Departments. As mentioned, the object of the relief sought in prayers 1-3 of the notice of motion was the relief under prayer 4. All of the relief flowed from the provisions of s 172(1) of the Constitution. This reads:

‘(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; an
(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.’

[13] I will assume without deciding, for present purposes, that we would arrive at the view that there are prospects that an appeal court would find that:

- a) The impugned decisions were those which led to the contract on which the default judgment was granted.
- b) The delay in the self-review did not non-suit the Departments despite their not having launched it since 2007 when they first became aware of the alleged invalidity.
- c) The Departments had made out a case that the impugned decisions amounted to ‘conduct that is inconsistent with the Constitution’.
- d) The decisions accordingly fell to be declared invalid as envisaged in s 172(1)(a) and orders issued in terms of prayers 1 and 2 of the notice of motion.
- e) The issue of the validity of the contract is not *res judicata*.
- f) A declaration should be made that the contract was void *ab initio*.²

² As was acknowledged by the Departments, such a declaration would be made as part of a just and equitable order under s 172(1)(b).

[14] That brings into focus the sole remaining issue being the order sought in prayer 4 of the notice of motion. Such an order would be based on the provisions of s 172(1)(b), which empowers a court to make an order that is just and equitable.³ For the application for leave to appeal to succeed, this Court must be ‘of the opinion that . . . the appeal would have a reasonable prospect of success’. In other words that there is a reasonable prospect that an appeal court would find that an order should be granted that:

‘The respondent is entitled to no further payments under the contract referred to in [prayer] 3 above and in terms of the default order of Malusi AJ on 1 December 2015.’

I now turn to this issue.

[15] Section 172(1)(b) flows from a declaration of invalidity under s 172(1)(a). Unlike s 172(1)(a), which obliges a court to declare any legislation or conduct which is incompatible with the Constitution invalid,⁴ s 172(1)(b) does not make it mandatory for a court to make any order at all following such a declaration. If the court exercises its discretion in favour of making such an order, the court may make any order, so long as it is just and equitable. In *Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others*, the Constitutional Court held, as regards the approach to a just and equitable remedy under s 172(1)(b):

‘I do not think that it is wise to attempt to lay down inflexible rules in determining a just and equitable remedy following upon a declaration of unlawful administrative action. The rule of law must never be relinquished, but the circumstances of each case must be examined in order to

³ The inclusive relief referred to in s 172(1)(b)(i) and (ii) does not apply since there is no need for:

‘(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.’

In any event this is not what was prayed for and does not form a ground on which leave to appeal is sought.

⁴ *Mazibuko NO v Sisulu and Others NNO* [2013] ZACC 28; 2013 (6) SA 249 (CC); 2013 (11) BCLR 1297 (CC) para 70.

determine whether factual certainty requires some amelioration of legality and, if so, to what extent.’⁵

And in *State Information Technology Agency SOC Limited v Gijima Holdings (Pty) Limited*, the Constitutional Court held:

‘. . . [U]nder 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.’⁶

[16] As a preliminary step, it is necessary to interrogate what was requested by the Departments in prayer 4. In argument before us, they conceded that there was no danger that Ikamva would become entitled to any payments under the contract in the future. This concession was well made since, on any version, the contract could no longer found any relief. On Ikamva’s version, it was cancelled after its acceptance of the repudiation by the Department of Works. It was this which animated the default judgment. On the version of the Departments, and on the assumptions referred to above, the Departments were entitled to have the contract declared null and void *ab initio*. As such, there could be no basis for any order proscribing future ‘payments under the contract’.

[17] That leaves for consideration the refusal of the high court to grant an order that, ‘[t]he respondent is entitled to no further payments . . . in terms of the default order of Malusi AJ’. The Departments were transparent as to their objective in seeking this order. As they said in reply, ‘the Departments are resisting payment by way of self-review’. In sum, they sought to render the default judgment nugatory.

⁵ *Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others* [2010] ZACC 26; 2011 (4) SA 113 (CC); 2011 (3) BCLR 229 (CC) para 85.

⁶ *State Information Technology Agency SOC Limited v Gijima Holdings (Pty) Limited* [2017] ZACC 40; 2018 (2) SA 23 (CC); 2018 (2) BCLR 240 (CC) para 53.

[18] It bears mention that this was not an application for an order suspending execution pending the outcome of proceedings to set aside the order. Such relief is readily granted if cause is shown. The relief sought by the Departments is a final order, which has the effect of permanently preventing execution by Ikamva of a valid and binding judgment granted in its favour. On enquiry, the Departments accepted this to be the case. They were unable to point to any direct authority where a court has ordered that, in the face of a valid and binding court order, which was not susceptible of being set aside, a judgment creditor should be prohibited from executing on it. Nor could I find any.

[19] The contentions of the Departments fell essentially into two categories: First, that courts have previously granted orders under s 172(1)(b) either for repayment of moneys or prohibiting any further payments on invalid contracts. This, they submitted, should apply equally to this matter. Secondly, that it is permissible under s 172(1)(b) for a court to excuse payment of a valid and binding order of court which is not subject to challenge.

Repayments, or a prohibition on future payments

[20] The submission of the Departments was that:

‘In some cases . . . the Courts unravel the financial consequences of the illegal contract *even after* any payment under the impugned contract has been made, by ordering repayment.’

Reliance was placed on such ‘return-of-payment’ orders in the following matters:

a) *Mining Qualifications Authority v IFU Training Institute (Pty) Ltd.*⁷ In this matter the entity that had profited from an unlawful contract was directed to repay the profits once these had been determined, along with interest.

⁷ *Mining Qualifications Authority v IFU Training Institute (Pty) Ltd* [2018] ZAGPJHC 455.

b) *Eskom Holdings SOC Limited v McKinsey and Company Africa (Pty) Ltd and Others*.⁸ There, Trillian was ordered to repay to Eskom the sum of R595 228 913.29, together with interest.

c) *Corruption Watch (NPC) (RF) v Chief Executive Officer of the South African Social Services and Others*,⁹ where Cash Paymaster Services was ordered to repay some R316 million to South African Social Security Agency along with interest and costs. That order was confirmed on appeal by this Court.¹⁰

[21] The Departments argued that, since no payment had yet been made to Ikamva, an order that it was not entitled to any payments would therefore be just and equitable. It would suffer no financial hardship since it would not be ordered to repay moneys. The glaring distinction between those matters and the present one, however, is that in none of the others had a judgment been granted in favour of the other contracting party. In a word, none of the matters relied upon above bears on the present enquiry.

[22] The Department also sought to rely on the dictum in *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd*,¹¹ where the Constitutional Court held: ‘I therefore make an order declaring the Reeston contract invalid, but not setting it aside so as to preserve the rights to that 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.’

⁸ *Eskom Holdings SOC Limited v McKinsey and Company Africa (Pty) Ltd and Others* [2019] ZAGPPHC 185.

⁹ *Corruption Watch (NPC) (RF) v Chief Executive Officer of the South African Social Services and Others* [2018] ZAGPPHC 7. The first respondent was, in fact, the Chief Executive Officer of the South African Social Security Agency.

¹⁰ *Cash Paymaster Services (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency and Others* [2019] ZASCA 131; [2019] 4 All SA 327 (SCA).

¹¹ *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd* [2019] ZACC 15; 2019 (6) BCLR 661 (CC); 2019 (4) SA 331 (CC) para 105.

The Departments submitted that payment of the judgment debt to Ikamva would have the effect that further rights would accrue to it under an invalid agreement. This submission fails on at least two levels. Unlike in *Buffalo City*, as has been discussed above and as conceded by the Departments, no further rights can accrue to Ikamva under the contract. The right of Ikamva to execute arises from the judgment and not the contract. In the second place, it is not a ‘further’ right since it accrued on the date default judgment was granted. The crisp question is whether Ikamva should be deprived of that right.

[23] The above discussion shows that none of the above cases provides support for a just and equitable order which, in effect, overrides or renders nugatory an extant, valid, and binding court order. Historic awards and the underlying reasoning relating to repayments or prohibitions on future payments under contracts are clearly distinguishable.

Permissible for a court to excuse payment of a valid and binding order of court?

[24] Here, the Departments set great store by the matter of *Department of Transport and Others v Tasima (Pty) Ltd*.¹² After a fixed term contract for a period of five years in favour of Tasima had expired by effluxion of time, it was renewed on a monthly basis. Thereafter, the Director-General purported to extend it for five years to 30 April 2015. The extension was invalid. The department accordingly stopped all payments. Tasima approached the high court and obtained an order that the department should comply with its obligations under the extension ‘. . . pending the finalisation of the dispute resolution proceedings . . .’. In March 2015, Tasima launched an urgent application seeking to hold the department and others in

¹² *Department of Transport and Others v Tasima (Pty) Ltd* [2016] ZACC 39; 2017 (2) SA 622 (CC); 2017 (1) BCLR 1 (CC).

contempt. This prompted a counter-application to review and set aside the extension of the contract on the basis that it did not comply with s 217 of the Constitution¹³ and s 38 of the Public Finance Management Act 29 of 1999.

[25] The majority in the Constitutional Court found that even if such an order based on the invalid extension of the contract was invalid, ‘. . . in light of section 165(5) of the Constitution, the order is binding, irrespective of whether or not it is valid, until set aside’¹⁴ and that, ‘[for] as long as the contract persisted, the High Court orders had to be obeyed’.¹⁵ This was based on a finding that, at the time the interim order on which the contempt proceedings were based was granted, the judge concerned had the authority to grant such order. The Constitutional Court accordingly declined to treat the order as null and void, instead holding that:

‘The interdict granted by Mabuse J only falls away once the counter-application is upheld by a court. Until this point, it is binding and enforceable.’¹⁶

This means that, despite finding that the extension of the contract was invalid, a court order premised on its validity remained effective until set aside.

[26] *Tasima* is clearly distinguishable. In the light of the admitted validity of the default judgment in the present matter, it differs from a situation where the court order could be regarded as invalid. It does not provide a basis for an order which

¹³ Section 217 of the Constitution provides:

‘(1) 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.

(2) Subsection (1) does not prevent the organs of state or institutions referred to in that subsection from implementing a procurement policy providing for—

(a) categories of preference in the allocation of contracts; and

(b) the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination.

(3) National legislation must prescribe a framework within which the policy referred to in subsection (2) must be implemented.’

¹⁴ *Tasima* fn 16 above para 180.

¹⁵ *Ibid* para 185.

¹⁶ *Ibid* para 198. Emphasis in the original. References omitted.

would prevent Ikamva from executing pursuant to its default judgment. *Tasima* does not assist the Departments. On the contrary, it underscores the importance of giving effect to court orders.

[27] Turning, then, to broader considerations of the nature of court orders in our law, s 165(5) of the Constitution is a useful point of departure:

‘An order or decision issued by a court binds all persons to whom and organs of state to which it applies.’

This finds firm support in s 2 of the Constitution:

‘This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.’

It is clear that, if the Legislature promulgated a law which had the effect that an order of court was not binding, that law would offend the principle of the separation of powers¹⁷ and fall foul of s 165(5) of the Constitution. What then, of the effect of a court order which does so?

[28] The only basis of which I am aware to prevent execution of a court order is if it is set aside or abandoned. The first of these is in the power of a court and the second in the party in whose favour the order was granted. There are limited procedures available to set aside an order. This is for at least two reasons, as indicated in *Erasmus: Superior Court Practice*.¹⁸ First, a court becomes *functus officio* after pronouncing judgment¹⁹ such that, unless specifically empowered to do

¹⁷ *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of SA, 1996* [1996] ZACC 26; 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC) para 106, which referred to Constitutional Principle VI dealing with the separation of powers and held that the Constitution complied with it:

‘There shall be a separation of powers between the legislature, executive and judiciary, with appropriate checks and balances to ensure accountability, responsiveness and openness.’

¹⁸ D E van Loggerenberg & E Bertelsmann *Erasmus: Superior Court Practice* 2 ed at D1-561f.

¹⁹ *Firestone South Africa (Pty) Ltd v Genticuro AG* 1977 (4) SA 298 (A) at 306F-G.

so, it may generally not amend or set aside a judgment.²⁰ Secondly, public policy requires finality in litigation.²¹ In *Zondi v MEC, Traditional and Local Government Affairs and Others*, the Constitutional Court explained why this should be the case: ‘The parties must be assured that once an order of court has been made, it is final and they can arrange their affairs in accordance with that order.’²²

This was firmly underscored, particularly as regards the Constitutional Court, in *Zuma v Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State and others (Council for the Advancement of the South African Constitution and another as amici curiae)*:

‘It is trite that orders of this Court are final and immune from appeal. They are, however, rescindable, and the Legislature has carefully augmented the common-law grounds of relief by expressly providing for narrow grounds of rescission by crafting rule 42. Narrow those grounds are, for good reason, for the very notion of rescission of a court order constitutes the exception to the ordinary rule that court orders, especially those of this Court, are final. By its nature the law of

²⁰ Ibid. In *Firestone*, at 306H-307G, this Court recognised that, in limited circumstances, a court may revisit and amend its judgment:

‘There are, however, a few exceptions to that rule which are mentioned in the old authorities and have been authoritatively accepted by this Court. Thus, provided the court is approached within a reasonable time of its pronouncing the judgment or order, it may correct, alter, or supplement it in one or more of the following cases:

(i) The principal judgment or order may be supplemented in respect of accessory or consequential matters, for example, costs or interest on the judgment debt, which the Court overlooked or inadvertently omitted to grant . . .

(ii) The Court may clarify its judgment or order, if, on a proper interpretation, the meaning thereof remains obscure, ambiguous or otherwise uncertain, so as to give effect to its true intention, provided it does not thereby alter “the sense and substance” of the judgment or order . . .

. . .

(iii) The Court may correct a clerical, arithmetical or other error in its judgment or order so as to give effect to its true intention . . .

. . .

(iv) Where counsel has argued the merits and not the costs of a case (which nowadays often happens since the question of costs may depend upon the ultimate decision on the merits), but the Court, in granting judgment, also makes an order concerning the costs, it may thereafter correct, alter or supplement that order . . .’

²¹ *Zondi v MEC for Traditional and Local Government Affairs and Others* 2006 (3) SA 1 (CC); 2006 (3) BCLR 423 (CC) para 27.

²² Ibid.

rescission invites a degree of legal uncertainty. So, to avoid chaos, the grounds upon which rescission can be sought have been deliberately carved out by the Legislature.’²³

[29] In the magistrates’ courts, setting aside a judgment or order can be achieved by way of review, rescission or appeal. In the high court, it can only be done by way of appeal or rescission. The power to amend or set aside orders on appeal is specifically provided for in s 19(d) of the Act.²⁴ The Uniform Rules of Court provide for amendment and rescission of judgments²⁵ as does the common law.

[30] There is a plethora of authority to the effect that s 165(5) lies at the heart of the rule of law. In *Pheko and Others v Ekurhuleni Metropolitan Municipality (2)*, the Constitutional Court explained:

‘The rule of law, a foundational value of the Constitution, requires that the dignity and authority of the courts be upheld. This is crucial, as the capacity of the courts to carry out their functions depends upon it. As the Constitution commands, orders and decisions issued by a court bind all persons to whom and organs of State to which they apply, and no person or organ of state may interfere, in any manner, with the functioning of the courts. It follows from this that disobedience towards court orders or decisions risks rendering our courts impotent and judicial authority a mere mockery. The effectiveness of court orders or decisions is substantially determined by the assurance that they will be enforced.

²³ *Zuma v Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State and others (Council for the Advancement of the South African Constitution and another as amici curiae)* [2021] ZACC 28; 2021 (11) BCLR 1263 (CC) para 82, citing with approval *Vilvanathan v Louw NO* 2010 (5) SA 17 (WCC); [2011] 2 All SA 331 (WCC) at 28J-29C.

²⁴ Section 19(d) provides:

‘The Supreme Court of Appeal or a Division exercising appeal jurisdiction may, in addition to any power as may specifically be provided for in any other law –

...

(d) confirm, amend or set aside the decision which is the subject of the appeal and render any decision which the circumstances may require.’

²⁵ Rules 31(2)(b) and 31(6) and Rule 42 deal with the amendment or rescission of judgments.

Courts have the power to ensure that their decisions or orders are complied with by all and sundry, including organs of state. In doing so, courts are not only giving effect to the rights of the successful litigant but also and more importantly, by acting as guardians of the Constitution, asserting their authority in the public interest.²⁶

The novel question posed in the present matter is whether, when a court order is not susceptible of being set aside by way of rescission or appeal, it can be held to be just and equitable that another court can prohibit its enforcement.

[31] In *Provincial Government North West and Another v Tsoga Developers CC and Others*,²⁷ Constitutional Court, after referring to s 165(5) of the Constitution and the need to give effect to court orders, held:

‘. . . [O]nce the order has been made, it is an order like any other. That means it can only be set aside by means of a legally cognisable process like, for example, rescission.’²⁸

This finds echo in the present matter. The only real distinction is that in the present matter, rescission was refused rather than abandoned. And later, it was held:

‘Unless set aside by some competent legal process, at some point [the order] will have to be complied with.’²⁹

[32] Relief under s 172(1)(b) of the Constitution has ranged from keeping alive an invalid contract for the public good³⁰ to ordering repayment of ill-gotten profits derived from such a contract, as seen above. What has not yet been ordered is that a

²⁶ *Pheko and Others v Ekurhuleni Metropolitan Municipality (2)* [2015] ZACC 10; 2015 (5) SA 600 (CC); 2015 (6) BCLR 711 (CC) paras 1 and 2.

²⁷ *Provincial Government North West and Another v Tsoga Developers CC and Others* [2016] ZACC 9; 2016 (5) BCLR 687 (CC).

²⁸ *Ibid* para 52.

²⁹ *Ibid* para 57. This followed a similar *dictum* in *Bezuidenhout v Patensie Sitrus Beherend BPK 2001 (2) SA 224 (E)* at 229B-C, which found favour with this Court in *Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining and Development Company Ltd and Others* [2013] ZASCA 5; [2013] 2 All SA 251 (SCA) para 17.

³⁰ *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others (No 2)* [2014] ZACC 12; 2014 (4) SA 179 (CC); 2014 (6) BCLR 641 (CC).

valid and binding judgment may not be given effect. As was previously indicated, *Pheko (2)* held:

‘The rule of law, a foundational value of the Constitution, requires that the dignity and authority of the courts be upheld.

...

Courts have the power to ensure that their decisions or orders are complied with by all and sundry, including organs of state. In doing so, courts are not only giving effect to the rights of the successful litigant but also and more importantly, by acting as guardians of the Constitution, asserting their authority in the public interest.’³¹

This recently received the stamp of approval in *Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State v Zuma and Others*, which, after referring to this passage, went on to say:

‘Contempt of court proceedings exist to protect the rule of law and the authority of the judiciary. As the applicant correctly avers, “the authority of courts and obedience of their orders – the very foundation of a constitutional order founded on the rule of law – depends on public trust and respect for the courts”’.³²

It is thus no exaggeration to say that giving effect to court orders is an incident of the rule of law. In *Mjeni v Minister of Health and Welfare, Eastern Cape*, Jafta J said:

‘The constitutional right of access to courts would remain an illusion unless orders made by the courts are capable of being enforced by those in whose favour such orders were made. The process of adjudication and resolution of disputes in courts of law is not an end in itself but only a means thereto; the end being the enforcement of rights or obligations defined in the court order.’³³

³¹ *Pheko (2)* fn 32 above paras 1 and 2.

³² *Secretary, Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State v Zuma* [2021] ZACC 18; 2021 (5) SA 327 (CC); 2021 (9) BCLR 992 (CC) para 27.

³³ *Mjeni v Minister of Health and Welfare, Eastern Cape* 2000 (4) SA 446 (TkH) at 453C-D. Cited with approval in *Nyathi v Member of the Executive Council for the Department of Health Gauteng and Another* [2008] ZACC 8; 2008 (5) SA 94 (CC); 2008 (9) BCLR 865 (CC).

[33] The discussion thus far has shown that the cases where repayment or prohibition of payment orders were granted do not provide authority that a court may render nugatory an extant, valid, and binding court order. Likewise, no such authority is found in the instruments that empower courts to set aside judgments by way of rescission or appeal. The Constitution and rule of law establishes a strong principle supporting the sanctity of valid and binding court orders and the right of persons in whose favour they have issued to enforce them.

[34] All of this must inform the question whether it can ever be just and equitable for a court to grant the kind of order sought in prayer 4 of the notice of motion. In the light of the sanctity of court orders and the need to uphold the rule of law, the public interest in finality, the Constitutional imperative that court orders must be complied with, the lack of precedents in our law and the absence of specific powers granted to courts to render a judgment nugatory in this fashion, it is my view that the discretion under s 172(1)(b) does not extend to orders such as that sought by the Departments in prayer 4. Such an order is not permissible.

[35] In prayer 4, the Departments attempted to enlist the assistance of the court in their efforts to undermine ‘the dignity and authority of the courts’³⁴ by rendering nugatory a perfectly valid, binding, enforceable, extant judgment. In my view, this can and should not be countenanced. I am fortified in this conclusion by what was said in *Bengwenyama* to the effect that, in arriving at a just and equitable order under s 172(1)(b) of the Constitution, ‘[t]he rule of law must never be relinquished . . .’.³⁵ It seems to me that the relief sought strikes at the very heart of the Constitution and

³⁴ *Pheko (2)* fn 32 para 1.

³⁵ *Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others* [2010] ZACC 26; 2011 (4) SA 113 (CC); 2011 (3) BCLR 229 (CC) para 85.

the rule of law. In these circumstances it cannot be just and equitable to grant prayer 4 of the notice of motion.

[36] All of this adds up to the conviction that, far from coming to the opinion that the Department has prospects of success in persuading an appeal court that an order should be issued in terms of prayer 4 of the notice of motion under the discretion accorded by s 172(1)(b) of the Constitution, there are no such prospects.

[37] In the result:

1 The application for condonation is granted. The applicants are ordered to pay the costs of that application, including those consequent on the employment of two counsel, where so employed.

2 The application for leave to appeal is dismissed with costs, including those consequent on the employment of two counsel, where so employed.

T R GORVEN
JUDGE OF APPEAL

Appearances

For applicants: M A Albertus SC with S Sephton
State Attorney, East London
State Attorney, Bloemfontein

For respondent: I J Smuts SC with A G Dugmore SC
Stirk Yazbek Attorneys, East London
Lovius Block Inc, Bloemfontein