

CONSTITUTIONALLY INVALID AGREEMENT ENFORCABLE BY COURT'S DISCRETION?

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

What happens when government leases a hotel property to you and then when you ask it to perform in terms of the lease, it ducks the obligation and argues that the lease is actually constitutionally invalid? Scenarios like these arise from time to time and the facts herein illustrate how courts are empowered, by discretionary powers granted to them in the Constitution, to craft just and equitable solutions, despite a finding that an agreement is constitutionally invalid.

The Judgment can be viewed [here](#).

FACTS

In December 2016, BW Brightwater Way Props (Pty) Ltd (Brightwater) and the Eastern Cape Development Corporation (ECDC) concluded a lease agreement in term of which Brightwater leased Portions A and B of the Remainder of Farm 31, Coffee Bay, commonly known as Ocean View Hotel (the property) from the ECDC for a period of 20 years at a rental of R32,000 per month.

Before this time, Brightwater had occupied the property as a sublessee. One Mr Botha and his wife, who operated a lodge on the property, were already in occupation of Portion B thereof when Brightwater became a sublessee.

When the lease agreement with Brightwater was concluded, Mr Sentwa, in his capacity as the ECDC's Chief Financial Officer, signed the lease. The lease imposed an obligation on the ECDC to give Brightwater vacant possession and to evict any illegal occupant(s).

Brightwater contended that, in breach of the lease agreement, the ECDC failed to give it vacant and undisturbed possession by not evicting the Bothas from the premises, and approached the Court for relief. The ECDC, in turn, brought a counter-application to review and set aside its own action in concluding the lease agreement on the basis that it had failed to comply with certain legislative prescripts, namely the Preferential Procurement Framework Act 5 of 2000 and the Public Finance Management Act 1 of 1999 relating to property disposal / letting of its property. It also contended that the lease agreement was concluded contrary to its Procurement Policy because Mr Sentwa, who signed the lease agreement on its behalf, did not have authority to do so.

In July 2017, Brightwater launched proceedings in the Eastern Cape High Court against the ECDC seeking, amongst other things, a declaration that the lease was valid, and of force and effect and directing ECDC to provide it with vacant possession of portions A and B of the premises leased, by evicting the Bothas.

The main application was dismissed, the Court finding that the lease agreement was **constitutionally invalid** because the ECDC: (i) failed to follow a transparent procedure of public and competitive participation when concluding the lease agreement and (ii) did not refer to market-related rental.

Thereafter, Brightwater brought an application in the High Court requesting that the Court's previous order be supplemented to read that it did not have the effect of divesting Brightwater of any rights to which it was entitled under the lease contract. In this cross-appeal, the Court was asked to determine whether the order - declaring the lease agreement constitutionally invalid whilst preserving all of Brightwater's rights under that agreement - made legal sense.

HELD

- The High Court determined that the conclusion of the agreement was contrary to Regulation 16A.3.2 of the Treasury Regulations, which requires the supply chain management system to be fair, equitable, transparent, competitive and cost effective. It stated further that, once it is found that the lease agreement lacked the makings of being transparent and competitive (even if the rental was market-related), the agreement fell foul of being constitutionally valid. It accordingly declared it invalid.
- Despite this finding, the High Court did not order the setting aside of the lease agreement. It invoked section 172(1)(b) of the Constitution and stated that “the application of justice and equity to the circumstances before [it], does not dictate both invalidating and entirely setting aside the impugned lease agreement”, and that Brightwater had been ‘in a manner, misled into believing that ECDC had the power to enter into an agreement with it, without any transparent and open recourse to public participation’. (Section 172(1) of the Constitution provides:

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

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

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

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

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

- The issue in the cross-appeal is whether the lease agreement which was declared to be invalid by virtue of a lack of compliance with constitutionally imposed procurement procedures may, notwithstanding the declaration of invalidity, allow Brightwater to remain in occupation for the remainder of the lease period (the lease period was 20 years).
- Section 172(1)(b) of the Constitution empowers a court, when deciding a matter, to make any order which it deems just and equitable with reference to the circumstances of a particular matter. This simply means that the effects of the declaration of invalidity may be ameliorated by the court in the exercise of its just and equitable discretion at the remedy stage.
- It must be accepted that the discretion that is exercised by a court under 172(1)(b) is a discretion in the true sense which therefore means that it would ordinarily be inappropriate for an appeal court to interfere, unless it was shown that the discretion was not exercised judicially, or that it had been influenced by wrong principle or a misdirection on the facts or that it had reached a decision which in the result could not reasonably have been made by a court properly directing itself to all the relevant facts and principles.
- In previous judgments where section 172 was invoked, the Constitutional Court used the mechanism to preserve the rights to which an affected party might have been entitled, such as the right to be paid for the work it had performed, often where a contract that was later declared constitutionally invalid, the implementation of the contract had commenced and was continuing.
- In the present matter, it appeared that the High Court misdirected itself by making the order which, in effect, nullifies the declaration of invalidity by effectively upholding the contract in all respects, including future rights. The right to occupy the premises after a declaration of invalidity constitutes future rights in favor of Brightwater, which is something that goes beyond what may be preserved under section 172(1)(b) of the Constitution.

- A contract or transaction which has no force and effect is necessarily void *ab initio* and can under no circumstances confer any right of action. On the same breath, our jurisprudence has long recognised that courts generally have no power to enforce a term of or a contract which it declared unlawful or void. What the law also recognises in both instances is performance or part performance in terms of a claim for unjust enrichment. The court has discretion to permit a party to recover what was performed where a contract has been declared invalid. In these circumstances, it was not disputed that Brightwater stood to be compensated by ECDC and it should, in future proceeding, quantify what is just and equitable compensation.

CONCLUSION

In the circumstances the cross-appeal succeeded.