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DISPUTE RESOLUTION
ALERT

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Administrative bodies: Stay in your lane!

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Each administrative body has a role to play, obligations to fulfil and functions to perform within their own areas of expertise. The line can at times be blurred between what is the right thing to do and what is the required thing to do. In the recent judgment of *Vumacam (Pty) Ltd v Johannesburg Roads Agency and Others* (14867/20) [2020] ZAGPJHC 186 the court makes it clear that instead of veering over the solid white line, the Johannesburg Roads Authority should have stayed in its own lane.

Vumacam is a security service supplier which installs CCTV cameras across neighbourhoods to ensure the safety of streets, properties and homes. Whilst the purpose of these cameras is to detect crime, the majority of the persons under surveillance are not partaking in crime. In order to install the CCTV cameras, Vumacam requires written permission from the Council in the form of a wayleave in accordance with the City of Johannesburg Metropolitan Municipality Public Road and Miscellaneous By-Laws (by-laws).

Vumacam was successful in obtaining wayleaves from the JRA for some time. JRA wayleave's department temporarily closed from 20 March 2020 due to the COVID-19 outbreak. On 9 June 2020 JRA issued a letter to various parties, including Vumacam, informing them that it would be accepting wayleave applications from 10 June 2020, save for ones concerning aerial or CCTV installations. These applications would remain suspended until further notice, which meant that Vumacam was precluded from rolling out its CCTV network (suspension decision).

Court a quo

Vumacam approached the court to seek the following order:

(i) declaring the suspension decision to be unlawful and invalid;

(ii) setting aside the suspension decision;

(iii) a direction that the receipt of the wayleave applications be entertained, considered and determined; and

(iv) that all its wayleave applications that have been lodged prior to the suspension decision be determined within seven days of the date of the order.

The essence of JRA's case was that the prevention and detection of crime is not the primary reason for the installation of the cameras and Vumacam is spying on individual's movements and thereby infringing their rights to privacy.

JRA was of the view that wayleaves cannot be disjoined from the right to privacy of the public to use public spaces without having their movements monitored. The court indicated, however, that a wayleave application is very narrow in scope, as is the jurisdiction of JRA. The bylaws specifically define a wayleave as "a formal approval to carry out work in the road reserve". The bylaws further provide that if the application conforms with the requirements of schedule 2 *"a wayleave will be issued"* by JRA.

The court held that in terms of the bylaws, the only reason JRA could refuse to entertain the application of Vumacam would be if Vumacam had failed to secure the approval of any other municipal department or authorised agent if this is

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JRA alleged that to cope with the problems that arise from such spying activities, a regulatory framework should be established which protects the privacy rights of people.

necessary, or if its application failed to conform with the requirements set out in schedule 2. No requirement exists in the bylaws (or in any other law) which require Vumacam to first obtain approval for collecting and using data obtained from the CCTV cameras it wishes to install. It should be noted that it was never disputed that Vumacam complies with its obligations in terms of the Protection of Personal Information Act 4 of 2013. The court held that JRA's case was without merit.

JRA alleged that to cope with the problems that arise from such spying activities, a regulatory framework should be established which protects the privacy rights of people. JRA argued that until a law allowing for the regulation of CCTV cameras is put in place, it is entitled to refuse to entertain Vumacam's applications for wayleaves. In essence, JRA is stating that the law is deficient in this respect, and until the deficiency is remedied it is entitled to suspend the duties imposed upon it by the bylaws.

In response to this argument, the court held that –

> *"there is simply no basis for such a bold averment from an administrative body whose function in this case is to oversee the work that is undertaken at a road reserve and no more. It had no power to decide that the law is deficient".*

Even if, for argument sake, the law is deficient, the JRA is not entitled to suspend its duties pending promulgation of regulations or the enactment of a statute to deal with issues concerning the collection or usage of data obtained from CCTV cameras. Whilst JRA's conduct is admirable and valiant in that it is trying to protect peoples privacy rights, it is not lawful. The lack of a legal framework is not a matter that falls within JRA's proverbial 'lane'.

The court concluded that the JRA had to consider Vumacam's wayleave applications and issue a determination and if need be furnish supporting reasons as to why the applications are refused (High Court Order).

Application for leave to appeal & execution application

The JRA applied for leave to appeal in the High Court before Vally J. Ordinarily, orders are suspended pending an outcome of an appeal. Vumacam simultaneously brought an application in terms of section 18(1) and (3) of the Superior Court Act 10 of 2013 in terms of which the High Court Order is made operational pending the outcome of any appeal and the automatic suspension is lifted. Vumacam claims that the application for leave to appeal has been brought purely for purposes of delaying compliance with the order and to frustrate its business. Vumacam was required to indicate that;

1. there exists *"exceptional circumstances"* warranting the operation and execution of the judgment pending the outcome of the appeal; and
2. the party who applies for such an order (Vumacam in this case) will suffer irreparable harm if the order is not put into execution pending the appeal

Administrative bodies: Stay in your lane!...*continued*

It should be noted that where the prospects of success on appeal are very weak, there is no need to find that the victorious party has demonstrated 'a sufficient degree of exceptionality to justify an order in terms of section 18 of the Act'.

3. the respondent (the JRA) will not suffer irreparable harm in the event that the Order is put into execution pending the appeal
4. Additionally, the common law has iterated that the prospects of success in the appeal application remains a factor that a court is required to consider and take into account when determining an application in terms of section 18.

Vally J was of the view that Vumacam had met all of the above requirements and importantly, and that there was *"absolutely no prospects whatsoever of an appeal succeeding"*, to the extent that the prospects were *"non-existent"*.

It should be noted that where the prospects of success on appeal are very weak, there is no need to find that the victorious party has demonstrated 'a sufficient degree of exceptionality to justify an order in terms of section 18 of the Act'. The court dismissed the application for leave to appeal and granted the execution order.

Conclusion

The important take away from this case is that, whilst administrative bodies may have heroic intentions of protecting peoples' rights, it cannot flout its regulated duties to protect those rights and must still comply with its obligations in terms of the law.

Furthermore, this judgment provides businesses with some comfort that where litigants merely appeal a judgment to frustrate their business operations and prolong an inevitable outcome in which they have no prospects of success, courts will consider granting an execution order which lifts the automatic suspension and which order can be enforced immediately.

Pieter Conradie and Ashleigh Gordon

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Legality review, unreasonable delay and the Supreme Court of Appeal's view on the subject

It is worth noting at the outset that the facts underlying the dispute between the parties was muddied by politics.

The evolution of the principle of legality from a residual pathway to judicial self-review by organs of state to a compulsory one-directional road has been exhaustively critiqued by commentators from the Constitutional Courts decision in *Fedsure* through to *Gijima* and subsequently *Asla Construction*. But howling at the gates has done little to change the minds of the judges that occupy seats on our appellate benches. If anything, the latest Supreme Court of Appeals judgment in *Altech Radio Holdings (Pty) Limited and Others v City of Tshwane Metropolitan Municipality* [2020] ZASCA 122 (5 October 2020) reaffirms that the state must launch its challenge under the principle of legality when it seeks to set aside its own decisions.

It is worth noting at the outset that the facts underlying the dispute between the parties was muddied by politics. In 2014, the African National Congress had control over the City of Tshwane Metropolitan Municipality by virtue of its representation in the Municipal Council. The Municipality, under the ANC's control intended on developing a *"smart"* city to improve service delivery and provide socio-economic development. Accordingly, the Municipality published a Request for Proposals in respect of the municipal broadband network project. Eight bids were received in response to the RFP and, after consideration, the Municipality's Bid Evaluation Committee resolved to recommend Altech Radio Holding (Pty) Ltd as the successful bidder. On 9 June 2015 the Municipality awarded the tender to Altech. The agreement was to be executed through a special purpose vehicle (SPV) for the successful funding of the project, which would be the second appellant, Thobela Telecoms (RF) (Pty) Ltd. Upon the award of the tender the third appellant, ABSA Bank Limited, together with the Development Bank of Southern Africa, committed to financing the envisaged project.

On 28 April 2016, the Municipal Council passed a resolution approving the conclusion of a Build Operate and Transfer Agreement (BOT Agreement) with Thobela. At that Council meeting, the official opposition in the Municipality, the Democratic Alliance, recorded its objections to the transaction. Then, on 5 May 2016 the BOT Agreement was executed by the Municipality and Thobela. Separately, ABSA (supported by the DBSA), Thobela and the Municipality concluded a Tripartite Agreement in which ABSA agreed to make funds available to Thobela to the tune of R934 million, which formed 70% of the total funding of the project (being R1,335 billion). In terms of its obligations under the BOT Agreement, the Municipality had to pay an annual service fee of R244 million which was to be paid monthly and on a phased-in approach proportional to the number of designated service sites installed.

On the day prior to the signing of the Tripartite Agreement, the 2016 municipal elections took place, which as history records, resulted in the ANC losing control over the Municipality to a coalition government led by the DA. On 19 August 2016, the new municipal councillors were sworn.

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Legality review, unreasonable delay and the Supreme Court of Appeal's view on the subject...*continued*

The Supreme Court of Appeal did not deviate from the Constitutional Court decisions in *Gijima* and *Asla Construction*.

Having won control of the Municipality, the DA set its sights on a number of procurement contracts, including the BOT Agreement, which, so it stated, had been targeted for "*review and possible cancellation*". But at least a year was to pass before the Municipality applied on 22 August 2017 to the Gauteng Division of the High Court, Pretoria for an interdict coupled with a review application. On appeal, the Supreme Court of Appeal found that waiting for a year was unreasonable, given the DA was well aware of the BOT Agreement and had recorded its objections to it when the Bid Evaluation Committee report served before the Municipal Council more than a year before it launched the review application.

The Supreme Court of Appeal did not deviate from the Constitutional Court decisions in *Gijima* and *Asla Construction* where it was held that even if the delay is unreasonable, where the administrative action is offensive to the Constitution it must be set aside. Meaning that even when the delay is brought years later, the courts *must* have regard to the merits of the review. Thus, in this matter, having found that the explanation for the delay was unreasonable based on an analysis of the facts set out above, the Supreme Court of Appeal considered the merits of the review.

On the merits, the Supreme Court of Appeal began by confirming a previously held view of the Court that not every flaw in the administration of tenders by organs of state must be visited by judicial sanction. Rather, only those flaws that amount to a material irregularity should be sanctioned by the courts. With respect to the grounds of review, the Municipality claimed that when it concluded the BOT Agreement it failed to follow the mandatory processes required by the Local Government: Municipal Finance Management Act, 2003, particularly section 33 and the provisions regulating public-private partnerships. The Court disagreed with the Municipality on both grounds of review. Having found that the delay was unconscionable and that the Municipality's grounds of review were meritless, the Supreme Court of Appeal upheld the appeal and set aside the High Court's judgment.

Judgments often acquire fame or infamy when new legal principles are introduced. One only needs to look at the number of critical publications that followed *Gijima*. Seldom does the application of legal precedent attract an equal amount of attention. This is predominantly because the application of legal precedent signals the settling of law, which is important because it allows litigants to avoid uncertainty and confusion, to protect vested rights and legitimate expectations as well as to uphold the dignity of the court. So as far as stories are concerned, the Supreme Court of Appeal may be sending a message to critics of *Gijima* that there is no such thing as a never ending story; and that may be time to draw the curtain and end this play.

Vincent Manko and Imraan Abdullah

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Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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