IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NUMBER: A5055/13

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED:

In the matter between:

CITY OF JOHANNESBURG First Appellant

TEMBISA ZWANE N.O. Second Appellant

CONNY BAPELA N.O. Third Appellant

And

WIDEOPEN PLATFORM (PTY) LTD Respondent

Coram: MAILULA ET WEPENER JJ ET GAIBIE AJ

Heard: 15 OCTOBER 2014

Delivered: 16 OCTOBER 2014

Summary: Legislation – declaration of invalidity – Parliament failing to correct inconsistency within time period allowed by Constitutional Court – only time period declared invalid – section still operative without any time-bar

---

JUDGMENT

WEPENER J:

[1] This appeal (with the leave of the court a quo) centres around the consequences of Parliament's failure to enact legislation which the Constitutional Court declared invalid by declaring that the words 'within 30 days' contained in s 78(2) of the Promotion of Access to Information Act 2 of 2000 (PAIA)[1] to be invalid.[2]

[2] The declaration of invalidity was suspended for a period of 18 months from the date of the declaration in order to enable Parliament to enact legislation to correct the inconsistency which resulted in the declaration of invalidity.[3]

[3] The appellant's case is that as a result of the failure of Parliament to cure the defective provision the entire s 78(2) of PAIA became invalid. We are consequently

---

[1] Section 78(2): 'A requester-
(a) that has been unsuccessful in an internal appeal to the relevant authority of a public body;
(b) aggrieved by a decision of the relevant authority of a public body to disallow the late lodging of an internal appeal in terms of section 75 (2);
(c) aggrieved by a decision of the information officer of a public body referred to in paragraph (b) of the definition of 'public body' in section 1-
(i) to refuse a request for access; or
(ii) taken in terms of section 22, 26 (1) or 29 (3); or
(d) aggrieved by a decision of the head of a private body-
(i) to refuse a request for access; or
(ii) taken in terms of section 54, 57 (1) or 60,
may, by way of an application, within 30 days apply to a court for appropriate relief in terms of section 82.'

[2] *Brümmer v Minister for Social Development and Others* 2009 (6) SA 323 (CC).

[3] *Brümmer* at 352H.

called upon to interpret, in so far as it may be necessary, the *Brümmer* judgment. In order to do so the approach set out by Wallis JA[4] is apposite:

'Over the last century there have been significant developments in the law relating to the interpretation of documents, both in this country and in others that follow similar rules to our own. It is unnecessary to add unduly to the burden of annotations by trawling through the case law on the construction of documents in order to trace those developments. The relevant authorities are collected and summarised in *Bastian Financial Services (Pty) Ltd v General Hendrik Schoeman Primary School*. The present state of the law can be expressed as follows: Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context it is to make a contract for the parties other than the one they in fact made. The "inevitable point of departure is the language of the provision itself", read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.'(footnote omitted)

[4] The unitary exercise to interpret the meaning of documents is in harmony with *Finishing Touch 163 (Pty) Ltd*[5] where the Supreme Court of Appeal said in relation to the interpretation of court orders that:

---

[4] *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) para 18. See also *Bothma – Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk* 2014 (2) SA 494 (SCA) para 12.

[5] *Finishing Touch 163 (Pty) Ltd v BHP Billiton Energy Coal South Africa Ltd and Others* 2013 (2) SA 204 (SCA) para 13.

'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 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. See *Firestone South Africa (Pty) Ltd v Genticuro* AG1977 (4) SA 298 (A).'

[5] In my view, it is quite clear that the challenge in the Constitutional Court was directed at the 30 day period.[6] In addition Ngcobo J (as he then was) in discussing time-bars said:

'The principles that emerge from these cases are these: time-bars limit the right to seek judicial redress. However, they serve an important purpose in that they prevent inordinate delays which may be detrimental to the interests of justice. But not all time limits are consistent with the Constitution. There is no hard-and-fast rule for determining the degree of limitation that is consistent with the Constitution. The "enquiry turns wholly on estimations of degree." Whether a time-bar provision is consistent with the right of access to court depends upon the availability of the opportunity to exercise the right to judicial redress. To pass constitutional muster, a time-bar provision must afford a potential litigant an adequate and fair opportunity to seek judicial redress for a wrong allegedly committed. It must allow sufficient or adequate time between the cause of action coming to the knowledge of the claimant and the time during which litigation may be launched. And finally, the existence of the power to condone non-compliance with the time-bar is not necessarily decisive.'[7] (footnotes omitted)

[6] In the circumstances, by reading the *Brümmer* judgment and order as a whole and in the context of the PAIA framework, the manifest purpose of the order of the Constitutional Court was to declare the time-bar provision contained in s 78(2) invalid and not to strike down the whole of the section.

[7] Having regard to the approach to interpretation as well as the clear and unambiguous wording contained in the order of the Constitutional Court that

[6] *Brümmer* paras 48 and 72.
[7] *Brümmer* para 51.

'(t)he words "within 30 days" in s 78(2) of the Promotion of Access to Information Act 2 of 2000 are declared to be inconsistent with ss 32 and 34 of the Constitution and s 78(2) is declared to be invalid for that reason.' (emphasis supplied)

There can be no doubt that it is only the time period that formed the subject of the declaration of invalidity. The court considered whether the 30 day period was 'adequate and fair' in all the circumstances.[8] The right to obtain redress in terms of s 78 (2) of PAIA and s 32(1) of the Constitution consequently remained unaffected. The very fact that the Constitutional Court held that the provision as such is indeed unobjectionable (save for the time-bar)[9] leads to one conclusion only namely, that the time period only was declared invalid.

[8] This, in turn, results in the provisions of s 78(2) remaining alive but without any time constraint contained therein. Indeed the right to access to information could hardly have been abolished by a court that said:

'As I have held above, s 78(2) has a dual limitation; it limits not only the right to seek judicial redress, but in effect also the right of access to information by imposing a very short time period within which a person seeking information must launch litigation. The importance of this right too, in a country which is founded on values of accountability, responsiveness and openness, cannot be gainsaid. To give effect to these founding values, the public must have access to information held by the State. Indeed one of the basic values and principles governing public administration is transparency. And the Constitution demands that transparency "must be fostered by providing the public with timely, accessible and accurate information".'[10] (footnote omitted)

[9] The appellants' submission, which will have the effect of abolishing the respondent's rights to access to information, is consequently wholly untenable as it would deny it a constitutionally entrenched right.[11] Counsel for the appellant submitted

[8] *Brümmer* para 52.
[9] *Brümmer* para 51.
[10] *Brümmer* para 62.
[11] Section 32(1) of the Constitution:
'Access to information.-(1) Everyone has the right of access to-
(a) any information held by the state; and
(b) any information that is held by another person and that is required for the exercise or protection of any rights.'

that the respondent had other remedies outside of PAIA available to it, such as a review, discovery proceedings and a declarator. These measures are different in form and nature and are based on different legal principles than the right to access to information pursuant to the provisions of PAIA. They cannot, in my view, replace the respondent's constitutionally entrenched rights as embodied in PAIA.

[10] Section 173 of the Constitution requires of courts to

'. . . protect and regulate their own process, and to develop the common law, taking into account the interests of justice.'

It would hardly be developing the law, or in the interests of justice to interpret the Constitutional Court as having abolished the right of access to information in the event of Parliament failing to amend the time limit in the section within the time period contained in the court order. Such an interpretation would serve to undermine the purpose of the legislation.[12]

[11] In the circumstances, the time period contained in s 78(2) of PAIA having been set aside, there remained no time limit within which a requester could seek access to information, save that a time period of 180 days was declared to remain operative for a period of 18 months from the date of the order.

[12] That being so, I am of the view that the judgment of the court a quo, holding that s 78(2) of PAIA was without time limits when the period of 18 months lapsed until Parliament amended the section,[13] is correct and unassailable.

[13] In all the circumstances, I would propose that the appeal be dismissed with costs.

_____

[12] Para 3, above

[13] Judicial Matters Amendment Act 42 of 2013 which amended the relevant period to 180 days.

Wepener J

I agree and it is so ordered.

_____

Mailula J

I agree.

_____

Gaibie AJ

Counsel for Appellant: S Mitchell

Attorneys for Appellant: Mojela Hlazo Practice

Counsel for Respondent: GD Wickens

Attorneys for Respondent: KWA Attorneys