

SOUTH AFRICA / JUDGMENT

Bobani v Nelson Mandela Bay Metro Municipality and Others (1459/13)

[2013] ZAECPEHC 31 (28 June 2013)

[2013] ZAECPEHC 31**COURT**

Eastern Cape High Court, Port Elizabeth

BEFORE

C Plasket

CASE / FILE NUMBER

1459/13

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IN THE HIGH COURT OF
SOUTH AFRICA
(EASTERN CAPE, PORT
ELIZABETH)

Case No. 1459/13**Date Heard: 25/6/13****Date Delivered:**

28/6/13

Not Reportable

In the matter between:

MONGAMELI ELLCOTTE
BOBANI

.....Applicant

and

NELSON MANDELA BAY
METROPOLITAN
MUNICIPALITY

.....First

Respondent

LINDIWE MSENGANA

NDLELASecond

Respondent

MEMBER OF THE
EXECUTIVE COUNCIL
FOR LOCAL GOVERNMENT
AND
TRADITIONAL AFFAIRS
(EASTERN CAPE)

.....Third Respondent

Interim interdict –

requirements – well-grounded apprehension of irreparable harm

not established – application

for interim interdict dismissed

with costs.

JUDGMENT

PLASKET, J:

- [1] Mr Mongameli Ellcotte Bobani (Bobani) has brought an application in two parts against the Nelson Mandela Bay Metropolitan Municipality (the municipality), Dr Lindiwe Msengana-Ndlela (the municipality's municipal manager) and the Member of the Executive Council for Local Government and Traditional Affairs in the Eastern Cape Provincial Government (the MEC). In Part A of the notice of motion – with which this judgment is concerned – he seeks orders interdicting the municipality from continuing to use the services of the municipal manager and her from rendering services to the municipality pending the finalisation of Part B of the notice of motion, a review of the decision to appoint her to that post. (The MEC is cited as a respondent as a result of his interest in the matter but no relief is claimed against him in either Part A or Part B of the notice of motion.)
- [2] The application was brought as a matter of urgency. When it came before Griffiths J on 28 May 2013 he ruled that it was indeed urgent but he postponed it at Bobani's cost to allow the respondents adequate time to prepare and file answering papers. Sandi J then postponed the matter again on 18 June 2013, with costs reserved. The papers have now grown to nearly 500 pages.
- [3] The municipal manager initially placed in issue Bobani's standing and she also brought an application in terms of rule 47 of the uniform rules in which she sought an order requiring him to furnish security for costs. At the hearing of the matter, Mr Beyleveld, who appears for both the municipality and the municipal manager, abandoned the rule 47 application and conceded that Bobani had established his standing, albeit, he said, in reply. The rule 47 application will therefore be dismissed with costs. That means that the only issue that I am required to deal with is whether Bobani has made out a case for an interim interdict.
- [4] An applicant who applies for an interim interdict must establish: (a) the right that forms the subject matter of the main application and which he or she seeks to protect, on a prima facie basis at least (even if it is open to some doubt); (b) a well-grounded apprehension that, if the interim interdict is not granted and the main application succeeds in due course, he or she will suffer irreparable harm; (c) the balance of convenience favours the granting of interim relief; and (d) he or she has no other satisfactory remedy.¹

- [5] I do not intend dealing with each of the requirements in turn because that is not necessary on account of the view I take of the matter. It can be disposed of with reference to one of the elements, that of the apprehension of irreparable harm. (This should not be taken to mean that I have found that the remaining elements have been established. I leave those issues open.)
- [6] Bobani's case is that irreparable harm will be suffered if the interim interdict is not granted and the review succeeds in due course because the municipal manager will, in the period between now and the review, take a significant number of decisions (if she is not interdicted from doing so) that will be liable to be set aside with prejudicial consequences for the municipality and its rate-payers. The arguments of all of the parties centred around whether this apprehension was a reasonable one and the starting point of the argument was the Supreme Court of Appeal's judgment in *Oudekraal Estates (Pty) Ltd v City of Cape Town & others*.²
- [7] Oudekraal dealt with the effect of invalid administrative actions. After finding that the administrator of the Cape Province had, many years previously, taken a decision which was invalid, Howie P and Nugent JA proceeded to say:³

'But the question that arises is what consequences follow from the conclusion that the Administrator acted unlawfully. Is the permission that was granted by the Administrator simply to be disregarded as if it had never existed? In other words, was the Cape Metropolitan Council entitled to disregard the Administrator's approval and all its consequences merely because it believed that they were invalid

provided that its belief was correct? In our view, it was not. Until the Administrator's approval (and thus also the consequences of the approval) is set aside by a court in proceedings for judicial review it exists in fact and it has legal consequences that cannot simply be overlooked. The proper functioning of a modern State would be considerably compromised if all administrative acts could be given effect to or ignored depending upon the view the subject takes of the validity of the act in question. No doubt it is for this reason that our law has always recognised that even an unlawful administrative act is capable of producing legally valid consequences for so long as the unlawful act is not set aside.'

- [8] Because invalid administrative acts have a factual existence, they can create valid legal consequences: in many cases they will serve as the basis for a further administrative action and the validity of the second action may not be dependant on the validity of the first, only on its factual existence.⁴ This position is not absolute for, as Howie P and Nugent JA point out later in their judgment, where an administrator seeks to use coercive powers against a person, that person may, if he or she believes the basis for the coercive power is invalid, ignore it and rely on its invalidity in a collateral (or defensive) challenge to it when the administrator attempts to enforce it. This is so because '[w]hen construed against the background of principles underlying the rule of law a statute will generally not be interpreted to mean that a subject is compelled to perform or refrain from performing an

act in the absence of a lawful basis for that compulsion'.⁵

[9] Mr Richards, who appeared for Bobani, pointed to three issues in particular. In the first place, he said, there are powers that only a municipal manager may perform. He cited decisions relating to procurement of goods and services as an example. Decisions of this nature, if taken by the municipal manager, may not be ratified subsequently by the municipality if her appointment is found to be invalid. These decisions will therefore be vulnerable to challenge by, for instance, disgruntled unsuccessful tenderers. Secondly, municipal managers are vested with coercive powers and if the municipal manager's appointment is found to be invalid, her exercise of coercive powers may be ignored with impunity and, if there is an attempt to enforce a coercive power, it may be reviewed collaterally. Thirdly, and more generally, if her appointment is found to be invalid, all of her decisions may be vulnerable to challenge.

[10] Both Mr Beyleveld and Mr Gqamana, who appeared for the MEC, while accepting the legal position set out in *Oudekraal*, disavow the consequences that Mr Richards apprehends. From a practical perspective, they argue, the dire consequences that he

predicts are unlikely to materialise. In the first place, if the municipal manager's appointment is set aside, there is no

reason to believe that there will be a flood of applications to set aside large numbers of decisions that have been taken by her.

Secondly, those decisions that she may have taken that can validly be ratified by the municipality would probably be. Thirdly, it is not a matter of certainty that challenges to her decisions based on the invalidity of her appointment will succeed: their validity may not be dependant on the invalidity of her appointment and, even if decisions she has taken are found to be invalid on this account, the remedy of setting aside, being discretionary, may be withheld in order to prevent dislocation of the municipality's functioning and to prevent administrative chaos. Finally, the court that reviews and sets aside her appointment may, for reasons of good governance, follow the Constitutional Court's lead in *Democratic Alliance v President of the Republic of South Africa & others*⁶ in which it was ordered that decisions and acts of an invalidly appointed National Director of Public Prosecutions whose appointment was set aside would not be invalid 'merely because of the invalidity of his appointment'. (I note that many of the decisions and acts of a National Director of Public Prosecutions will, in the nature of things, tend to be coercive.)

[11] For these reasons I am of the view that Bobani has not established a well-grounded apprehension of irreparable harm if the interim interdict is not granted and the review succeeds in due course. That being so, there is no basis for the grant of the interim interdict on this ground alone and consequently no need for me to deal with the other requirements.

[12] Costs were reserved by Sandi J when he postponed this matter on 18 June 2013. I was informed by Mr Gqamana that it was occasioned by Bobani requiring an opportunity to file a replying affidavit. As he brought the application as a matter of urgency, and thus was in a position to determine the time needed for the various procedural steps to be completed, he must pay the costs of the postponement.

[13] I make the following order.

- (a) The second respondent's rule 47 application is dismissed with costs.
- (b) The applicant's application for interim relief is dismissed with costs, including the costs reserved on 18 June 2013.

C Plasket

Judge of the High Court

APPEARANCES:

Applicant: Mr J G Richards, instructed by Kaplan Blumberg Attorneys

First and second respondents: Mr A Beyleveld SC, instructed by Minnaar Niehaus Attorneys and Le Roux Inc

Third respondent: Mr N Gqamana, instructed by the State Attorney

1Eriksen Motors (Welkom) Ltd v Protea Motors, Warrenton & another 1973 (3) SA 685 (A), 691D-E; Andries Charl Cilliers, Cheryl Loots and Hendrik Christoffel Nel Herbstein and Van Winsen: The Civil Procedure of High Courts and the Supreme Court of Appeal of South Africa (5 ed) Vol 2 at 1456-1457.

2Oudekraal Estates (Pty) Ltd v City of Cape Town & others 2004

(6) SA 222 (SCA).

3Para 26.

4Paras 28-29.

5Para 32.

6Democratic Alliance v President of the Republic of South Africa & others 2013 (1) SA 248 (CC) para 95. See too para 93.

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