

SOUTH AFRICA / JUDGMENT

HCB Eiendomswaarders BK v Scholtz and Others (1229/2007) [2008] ZAWCHC 231 (1 August 2008)

[2008] ZAWCHC 231

COURT

Western Cape High Court, Cape Town

BEFORE

Davis, Steyn

CASE / FILE NUMBER

1229/2007

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REPORTABLE IN THE HIGH COURT OF SOUTH AFRICA (CAPE OF GOOD HOPE PROVINCIAL DIVISION) CASE NUMBER: 1229/2007 DATE: 1 AUGUST 2008 In the matter between HCB EIENDOMSWAARDEERDERS BK APPLICANT and J J SCHOLTZ 1st RESPONDENT DIE TENDERTOOKENINGSKOMITEE VAN DIE SWARTLANO MUNISIPALITEIT 2nd RESPONDENT A W BREDELL, UITVOERENDE BURGEMEESTER 3rd RESPONDENT M

MEDEWERKERS 4tn

RESPONDENT

JUDGMENT

DAVIS, J: The applicant is a close corporation which appears to transact business as a valuator of property. On 29 April 2006, the Swartland

Municipality on 29 April 2006 caused an advert to be published for applications to tender for a process to ensure a general valuation

of properties in the area for the period 1 July 2008 to 30 June

2012. A number of applications were made pursuant to this advert,

including one generated by the applicant and another by fourth respondent. It appears from the evidence that the applicant produced the lowest tender in the amount of R1 339 604, whereas the fourth respondent

applied by way of its tender in the amount of R2 706 665. The designated committee of the Swartland Municipality decided on 12

September 2006 to award the tender to fourth respondent. Applicant was dissatisfied with this decision and lodged an appeal against the decision to award the tender to fourth respondent. It appears to be common cause that on 10 October the appeal was received and on 20 November 2006, the Executive Mayor, Mr Bredell,

considered the appeal and dismissed it. Applicant then lodged an application for review and setting aside of these decisions, such application being instituted by way of a notice of motion on 6 February 2007. It is significant that when the notice of motion was generated, the application was not brought on the basis of urgency nor was any interim relief sought, in this connection the process and procedure adopted by the applicant should be contrasted with that which recently vexed this Court in the case of *Entsha Henra BK v Hessequa Munisipaliteit & 3 Others*, unreported judgment of Griessel. J, 15 May 2008. The case, to the extent that it had been launched by the applicant in February 2007, appeared to meander at a surprisingly

leisurely pace. The common cause facts are that an answering affidavit, generated by first and second respondent, was finally

deposed to on 1 October 2007. According to Mr Pretorius, who appeared on behalf of the applicant, there was some action taken by applicant's attorney in the period between February 2007 and October 2007 to expedite the hearing. This Court was referred to a document, 28 June 2007, entitled kennisgewing van inskrywing op rol, which was lodged by applicant's attorney and which says: "Geliewe kennis te neem dat die applikant die bovermelde saak op 14 Junie 2007 op die deurlopende rol van bestrede aansoeke ingeskryf net en wel onder folionommer 77/2007 daarvan." That notice was lodged on 28 June 2007. Significantly, nothing appears to have transpired until a chamber book application was brought on 3 August 2007 in which an order was sought that the respondents file heads by the latest 22 August 2007. According to an affidavit from applicants attorney of 2 August 2007, presumably filed in support of the chamber book application, the following is stated: "Na ontvangs van die oorkonde, het die applikant op 24 April 2007 'n aanvullende beedigde verklaring geliasseer. In die omsiandighede

moes die respondente ten faaste 19 Junie 2007 hul opponerende verklarings hasseer... Ek versoek derhalwe eerbiediglik namens die applikant, ft bevel ingevolge waarvan die respondente beveel word om teen 17 Augustus 2007 hulle opponerende verklarings te liasseer, 'n gebreke waarvan die applikant geregtig sal wees om sy aansoek vir aanhoor op 28 Augustus 2007 in die onbestrede rol van hierdie Agbare Hof te rolle te plaas." I have referred in some considerable detail to these events leading up to the hearing of this application this morning, being 1 August

2008. They are important, particularly in the light of two considerations: No urgent relief was ever sought by the applicant pursuant to the appeal against the decision having been dismissed on 20 November

2006 and the launching of the application in February 2007 or throughout the period which I have now documented with regard to ensuring that the case proceed to court.

These events are particularly relevant when the time lines for the implementation of the tender are considered. According to the evidence, it appears that the tender process would go through some ten different phases, the first being completed on 30 September 2006 and the final phase being completed on 30 April 2008. In essence, when the process of work envisaged by the tender is examined, the work for which the successful tenderer would be remunerated, was to be completed by and large by the end of December

2007. It appears that this was the case in so far as the work undertaken by fourth respondent was concerned. These considerations are extremely important with regard to the question as to whether an application of this kind should be entertained by this Court. In *Millennium Waste Management v Chairperson Tender Board* 2008(2) SA 481 (SCA), Jafta, J A at para 23 said the following: "The difficulty that is presented by invalid administrative acts, as pointed out by this Court in *Oudekraal Estates*, is that they often have been acted upon by the time they are brought under review. That difficulty is particularly acute when a decision is taken to accept a tender. A decision to accept a tender is almost always acted upon immediately by the conclusion of a contract with the tenderer and that is often immediately followed by further contracts concluded by the tenderer in executing the contract. To set aside the decision to accept the tender, with the effect that the contract is rendered void from the outset, can have catastrophic consequences for an innocent tenderer and adverse consequences for the public at large, in whose interests an administrative body or official purported to act. Those interests must be carefully weighed against those of the disappointed tenderer if an order is to be made that is just and equitable." The proposition advanced in this dictum, constitutes an invitation to courts to implement a doctrine of proportionality; that is to weigh up the affected interest for the disappointed tenderer against public interests in ensuring that work adopted in the public interest is implemented expeditiously, that delays do not take place and that the public are not jeopardised by such delays, or considered within the prism whether the public body has acted, in a reasonable fashion. This point was explicated in the judgment which followed hard on the heels of the *Millennium Waste Management* judgment supra by Scott, J A in *Chairperson STC v J F E Sapela Electronics* 2008(2) SA 638 at para 28, in which the learned judge of appeal states: "In appropriate circumstances a court will decline in the exercise of its discretion to set aside an invalid administrative act. This was observed in *Oudekraal Estates (Pty) Ltd v City of Cape Town* 204(6) SA 222 (SCA) para 36 at 246 D: 'It is that discretion that accords to judicial review its essential and pivotal role in

administrative law, for it constitutes the indispensable moderating tool for avoiding or minimising injustice when legality and

certainty collide." A typical example would be the case when an aggrieved party fails to institute review proceedings within a reasonable time. The effect of this delay would be to "validate" what would otherwise be invalid. In the present case, as I have found, there was no culpable delay on the part of the respondents. The *raison d'être* of the delay rule was set out by Brand, J A in *Associated Institution Pension & Others v Van Zyl & Others* 2005(2) SA 302 (SCA) at para 46: "First

the failure to bring a review within a reasonable time may cause prejudice to the respondent. Secondly, there is a public interest element in the finality of administrative decisions and the exercise of administrative functions. Under the rubric of the second, I would add considerations of pragmatism and practicality.¹ In this case the applicant took almost two and a half months before it launched its application for review, having been dissatisfied with the appeal process. It then appeared to have done nothing to expedite the hearing until, on its own version, June 2007. Even then there were further delays until steps were taken to implement a chamber book application in August 2007. All of this took place within the context of an applicant, which knew full well that the entire process would have been completed by the latest December

2007. It made no attempt to stop the process by way of interim relief to which it might well have been entitled. I make no comment thereon. If the competing interests of the municipality, anxious to ensure that an important component of its entire revenue basis are carried out as expeditiously and efficiently as possible, against the rights of applicant are weighed, the fact that applicant took so long and did so little to ensure that the process could be brought forward so that a court adjudicate thereon before considerable prejudice was incurred by way of a review, which would have subverted the laudable objectives of the municipality, is itself indicative that in a balancing process this Court should do no more than find that the application was not brought timeously and that the dicta, to which I have made reference from the SCA, must hold sway. I accept, as Mr Pretorius urged upon this Court, that there may well have been some problem with the administration within these courts to ensure that the matter was brought expeditiously, but the correspondence to which he has referred, indicates that for a very long time little was done to ensure that the urgency was grasped by the applicant. An applicant cannot, in a matter of such urgency, knowing full well the facts, take a leisurely approach to review and then complain when the review is rejected for reasons of pragmatism, practicality and delay. Delay, of course, is always a contextually based inquiry. Given the facts as I have outlined them, it is, to my mind, a fatal obstacle to the prosecution of this review. That, of course, is the end of the matter, because if there cannot be a review, there cannot be the relief as sought by applicant. However, I do need to say a few things with regard to this aspect of the case. Realising the difficulty that a review application to set aside a tender which had already been completed, applicant sought at a very, very late stage to bring an application for an amendment to its notice of motion. There is, therefore, before us a further affidavit deposed to by Mr Hendrik Coenraad Botha, who describes himself as "die algemene bestuurder van applikant beslote korporasie". In this affidavit Mr Botha claims, what Mr Pretorius later described as 'out of pocket expenses' incurred in what proved to be an unsuccessful application for the tender. I must add that it is a very sloppily drafted document. The amount which is claimed in typing referred to R55 360 and an extra amount of R97 918. The document makes some very curious claims. That having been said, the proposition, advanced by Mr Pretorius on behalf of applicant, was that this Court could adopt a far more pragmatic approach to award damages in the form of the 'out of pocket expenditure' to applicant, such amounts being just and equitable in the circumstances of an unsuccessful tender, which may have been

unsuccessful only because of breaches of the rules of administrative justice as contained in the Promotion of the Administration of Justice Act 3/2000 ('PAJA'). In this regard Mr Pretorius referred to a decision in *Parson Construction (Pty) Ltd v City of Cape Town* 2007(4) SA 488 (C). In that case, Selikowitz, J considered a review application in circumstances where, as in the present case, the work had already been completed. He accepted that the claim for damages in the form of a loss of profits claim could not be sustained as damages by their nature were unliquidated and that some form of statement as to what loss of profits would be, could not be a justifiable reason for so granting damages of a constitutional nature, even if the decisions were set aside. However, the learned judge accepted that an 'out of pocket expenditure' of R25 955 was justified in the circumstances of the case as he considered that the decision to award a tender should be reviewed and set aside. It is clear that in cases of this kind, damages can only be awarded in exceptional circumstances. Mr Olivier, who appeared together with Mr Engela on behalf of respondent, correctly referred us to section 8(1) of PAJA, in terms of which a Court is empowered to grant any order that is just and equitable, including the setting aside of the administrative action and in exceptional circumstances, directing the administrator or any other party to the proceedings to pay compensation. (Section 8(1)(c)(ii)(b)(e)). In this case, even were I inclined to consider that the review application should succeed, the manner in which this has been brought at the proverbial twelfth hour, the vagueness of the claims cannot justify a Court, simply taking a relatively cavalier approach to the award of damages. I have no basis for understanding how Selikowitz, J arrived at the award of R25 000 for out of pocket expenditure, but I must presume that on those papers, those claims were sufficiently clear to satisfy the grant of the amount. In this case, the claims produced in the affidavit of Mr Botha, are of an unsatisfactory nature and would necessitate a carefully

consideration by the Court after proper evidence has been adduced by both parties. That, fortunately or unfortunately as the case may be, does not have to vex the Court, because as Seikowitz, J made it clear in his carefully considered judgment, damages can only be granted after a review application succeeds. In this case, for the reasons that I have set out, the applicant's own conduct and the jurisprudence of the Supreme Court of Appeal, as I have outlined it, dictate that the application for review should be dismissed. Once dismissed, the issue of compensation falls away. For these reasons, therefore, the application is dismissed with costs, including the costs of two counsel. DAVIS, J STEYN, AJ: Concurred STEYN, A J

REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NUMBER: 1229/2007

DATE: 1 AUGUST 2008

In the matter between

HCB EIENDOMSWAARDEERDERS BK APPLICANT

and

J J SCHOLTZ 1st RESPONDENT

DIE TENDERTOEKENNINGSKOMITEE

VAN DIE SWARTLANO MUNISIPALITEIT 2nd

RESPONDENT

A W BREDELL, UITVOERENDE

BURGEMEESTER 3rd RESPONDENT

M

MEDEWERKERS 4tn

RESPONDENT

JUDGMENT

DAVIS, J:

The applicant is a close corporation which appears to transact business as a valuator of property. On 29 April 2006, the Swartland

Municipality on 29 April 2006 caused an advert to be published for applications to tender for a process to ensure a general valuation

of properties in the area for the period 1 July 2008 to 30 June

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applied by way of its tender in the amount of R2 706 665. The designated committee of the Swartland Municipality decided on 12

September 2006 to award the tender to fourth respondent. Applicant was dissatisfied with this decision and lodged an appeal against the decision to award the tender to fourth respondent.

It appears to be common cause that on 10 October the appeal was received and on 20 November 2006, the Executive Mayor, Mr Bredell,

considered the appeal and dismissed it. Applicant then lodged an application for review and setting aside of these decisions, such application being instituted by way of a notice of motion on 6 February 2007. It is significant that when the notice of motion was generated, the application was not brought on the basis of urgency nor was any interim relief sought, in this connection the process and procedure adopted by the applicant should be contrasted with that which recently vexed this Court in the case of *Entsha Henra BK v Hessequa Munlsipaliteit & 3 Others*, unreported judgment of Griessel. J, 15 May 2008.

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"Geliewe kennis te neem dat die applikant die bovermelde saak op 14 Junie 2007 op die deurlopende rol van bestrede aansoeke ingeskryf net en wel onder folionommer 77/2007 daarvan."

That notice was lodged on 28 June 2007. Significantly, nothing appears to have transpired until a chamber book application was brought on 3 August 2007 in which an order was sought that the respondents file heads by the latest 22 August 2007. According to an affidavit from applicants attorney of 2 August 2007, presumably filed in support of the chamber book application, the following is stated:

"Na ontvangs van die oorkonde, het die applikant op 24 April 2007 'n aanvullende beedigde verklaring geliasseer. In die omsiandighede

moes die respondente ten faaste 19 Junie 2007 hul opponerende verklarings hasseer... Ek versoek derhalwe eerbiediglik namens die applikant, ft bevel ingevolge waarvan die respondente beveel word om teen 17 Augustus 2007 hulle opponerende verklarings te liasseer, 'n gebreke waarvan die applikant geregtig sal wees om sy aansoek vir aanhoor op 28 Augustus 2007 in die onbestrede rol van hierdie Agbare Hof te rolle te plaas."

I have referred in some considerable detail to these events leading up to the hearing of this application this morning, being 1 August

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2007. It appears that this was the case in so far as the work undertaken by fourth respondent was concerned. These considerations are extremely important with regard to the question as to whether an application of this kind should be entertained by this Court.

In *Millennium Waste Management v Chairperson Tender Board* 2008(2) SA 481 (SCA), Jafta. J A at para 23 said the following:

"The difficulty that is presented by invalid administrative acts, as pointed out by this Court in *Oudekraal Estates*, is that they often have been acted upon by the time they are brought under review. That difficulty is particularly acute when a decision is taken to accept a tender. A decision to accept a tender is almost always acted upon immediately by the conclusion of a contract with the tenderer and that is often immediately followed by further contracts concluded by the tenderer in executing the contract. To set aside the decision to accept the tender, with the effect that the contract is rendered void from the outset, can have catastrophic consequences for an innocent tenderer and adverse consequences for the public at large, in whose interests an administrative body or official purported to act. Those interests must be carefully weighed against those of the disappointed tenderer if an order is to be made that is just an equitable."

The proposition advanced in this dictum, constitutes an invitation to courts to implement a doctrine of proportionality; that is to weigh up the affected interest for the disappointed tenderer against public interests in ensuring that work adopted in the public interest is implemented expeditiously, that delays do not take place and that the public are not jeopardised by such delays, or considered within the prism whether the public body has acted, in a reasonable fashion.

This point was explicated in the judgment which followed hard on the heels of the *Millennium Waste Management* judgment *supra* by Scott, J A in *Chairperson STC v J F E Sapela Electronics* 2008(2) SA 638 at para 28, in which the learned judge of appeal states:

"In appropriate circumstances a court will decline in the exercise of its discretion to set aside an invalid administrative act. This was observed in *Oudekraal Estates (Pty) Ltd v City of Cape Town* 204(6) SA 222 (SCA) para 36 at 246 D: 'It is that discretion that accords to judicial review its essential and pivotal role in

administrative law, for it constitutes the indispensable moderating tool for avoiding or minimising injustice when legality and certainty collide."

A typical example would be the case when an aggrieved party fails to institute review proceedings within a reasonable time. The effect of this delay would be to "validate" what would otherwise be invalid. In the present case, as I have found, there was no culpable delay on the part of the respondents. The *raison d'être* of the delay rule was set out by Brand, J A in *Associated Institution Pension & Others v Van Zyl & Others* 2005(2) SA 302 (SCA) at para 46:

"First the failure to bring a review within a reasonable time may cause prejudice to the respondent. Secondly, there is a public interest element in the finality of administrative decisions and the exercise of administrative functions. Under the rubric of the second, I would add considerations of pragmatism and practicality.¹"

In this case the applicant took almost two and a half months before it launched its application for review, having been dissatisfied with the appeal process. It then appeared to have done nothing to expedite the hearing until, on its own version, June 2007. Even then there were further delays until steps were taken to implement a chamber book application in August 2007. All of this took place within the context of an applicant, which knew full well that the entire process would have been completed by the latest December

2007. It made no attempt to stop the process by way of interim relief to which it might well have been entitled. I make no comment thereon.

If the competing interests of the municipality, anxious to ensure that an important component of its entire revenue basis are carried out as expeditiously and efficiently as possible, against the rights of applicant are weighed, the fact that applicant took so long and did so little to ensure that the process could be brought forward so that a court adjudicate thereon before considerable prejudice was incurred by way of a review, which would have subverted the laudable objectives of the municipality, is itself indicative that in a balancing process this Court should do no more than find that the application was not brought timeously and that the dicta, to which \ have made reference from the SCA, must hold sway.

I accept, as Mr Pretorius urged upon this Court, that there may well have been some problem with the administration within these courts to ensure that the matter was brought expeditiously, but the correspondence to which he has referred, indicates that for a very long time little was done to ensure that the urgency was grasped by the applicant. An applicant cannot, in a matter of such urgency, knowing full well the facts, take a leisurely approach to review and then complain when the review is rejected for reasons of pragmatism, practicality and delay. Delay, of course, is always a contextually based inquiry. Given the facts as I have outlined them, it is, to my mind, a fatal obstacle to the prosecution of this review. That, of course, is the end of the matter, because if there cannot be a review, there cannot be the relief as sought by applicant.

However, I do need to say a few things with regard to this aspect of the case. Realising the difficulty that a review application to set aside a tender which had already been completed, applicant sought at a very, very late stage to bring an application for an amendment to its notice of motion. There is, therefore, before us a further affidavit deposed to by Mr Hendrik Coenraad Botha, who describes himself as "die algemene bestuurder van applikant beslote korporasie". In this affidavit Mr Botha claims, what Mr Pretorius later described as 'out of pocket expenses' incurred in what proved to be an unsuccessful application for the tender.

I must add that it is a very sloppily drafted document. The amount which is claimed in typing referred to R55 360 and an extra amount of R97 918. The document makes some very curious claims. That having been said, the proposition, advanced by Mr Pretorius on behalf of applicant, was that this Court could adopt a far more pragmatic approach to award damages in the form of the 'out of pocket expenditure' to applicant, such amounts being just and equitable in the circumstances of an unsuccessful tender, which may have been unsuccessful only because of breaches of the rules of administrative justice as contained in the Promotion of the Administration of Justice Act 3/2000 ('PAJA').

In this regard Mr Pretorius referred to a decision in *Parson Construction (Pty) Ltd v City of Cape Town* 2007(4) SA 488 (C). In that case, Selikowitz, J considered a review application in circumstances where, as in the present case, the work had already been completed. He accepted the claim for damages in the form of a loss of profits claim could not be sustained as damages by their nature were unliquidated and that some form of statement as to what loss of profits would be, could not be a justifiable reason for so granting damages of a constitutional nature, even if the decisions were set aside.

However, the learned judge accepted that an 'out of pocket expenditure' of R25 955 was justified in the circumstances of the case as he considered that the decision to award a tender should be reviewed and set aside. It is clear that in cases of this kind, damages can only be awarded in exceptional circumstances. Mr Olivier, who appeared together with Mr Engela on behalf of respondent, correctly referred us to section 8(1) of PAJA, in terms of which a Court is empowered to grant any order that is just and equitable, including the setting aside of the administrative action and in exceptional circumstances, directing the administrator or any other party to the proceedings to pay compensation. (Section 8(1)(c)(ii)(b)(e)).

In this case, even were I inclined to consider that the review application should succeed, the manner in which this has been brought at the proverbial twelfth hour, the vagueness of the claims cannot justify a Court, simply taking a relatively cavalier approach to the award of damages. I have no basis for understanding how Selikowitz, J arrived at the award of R25 000 for out of pocket expenditure, but I must presume that on those papers, those claims were sufficiently clear to satisfy the grant of the amount.

In this case, the claims produced in the affidavit of Mr Botha, are of an unsatisfactory nature and would necessitate a carefully

consideration by the Court after proper evidence has been adduced by both parties. That, fortunately or unfortunately as the case may be, does not have to vex the Court, because as Seikowitz, J made it clear in his carefully considered judgment, damages can only be granted after a review application succeeds. In this case, for the reasons that I have set out, the applicant's own conduct and the jurisprudence of the Supreme Court of Appeal, as I have outlined it, dictate that the application for review should be dismissed. Once dismissed, the issue of compensation falls away.

For these reasons, therefore, the application is dismissed with costs, including the costs of two counsel.

DAVIS, J

STEYN, AJ: Concurred

STEYN, A J

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