

SOUTH AFRICA / JUDGMENT

Lesedi News CC v Rustenburg Local Municipality (4/14) [2014] ZANWHC 35 (6 November 2014) [2014] ZANWHC 35

COURT

North West High Court, Mafikeng

BEFORE

A.M. Kgoele, R.D. Hendricks, Samkelo Gura

CASE / FILE NUMBER

4/14

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“IN
THE HIGH COURT OF SOUTH AFRICA”
NORTH
WEST DIVISION, MAHIKENG
H.C.
APP FULL BENCH 4/14
In

the matter between:

LESEDI
NEWS CC
Appellant
and
RUSTENBURG
LOCAL MUNICIPALITY
Respondent
HENDRICKS
AJP, GURA J & KGOELE J
DATE
OF HEARING
:
01 AUGUST 2014
DATE

OF JUDGMENT :

06 NOVEMBER 2014
FOR

THE APPELLANT :

Adv. S.D. Wagener (SC)
FOR

THE RESPONDENT : Adv. A.D. De Oliveira

JUDGMENT

KGOELE J:

[1] The appellant applied for the review and setting aside of a decision by the respondent's Municipal Council to the effect that various outdoor advertising billboards of the appellant be dismantled. The said application was dismissed by the court a quo per Landman J. This appeal to the Full Bench of this division is with leave of the Court a quo.

[2] The material factual background to the appeal can be summarised as follows: On 15 March 2006, the respondent Municipality,

concluded an agreement with the appellant in terms whereby the appellant, an outdoor advertising company, became entitled to erect,

maintain, and display billboard advertising signs on land owned by the respondent. The agreement was for a fixed term of three years. The agreement did not designate any specific outdoor advertising sites, but constituted an overarching agreement

containing the terms and conditions upon which the rental of outdoor advertising sites, once identified, would take place. The appellant would only commence advertising on, and rental of, a particular site after obtaining the consent of the respondent.

[3] According to the agreement, once consent had been obtained, the appellant would be entitled to erect a gantry on the proposed site and rent it out and under the terms and conditions provided for in the agreement, and would be entitled to do so for as long as the overarching agreement remained in force or until the appellant's rental of the particular gantry site was terminated in terms of the agreement. The agreement was first extended by two years, then later expressly relocated by the parties into a month-to-month agreement that could be terminated by either party on one month's notice.

[4] In March 2012 the respondent Municipality informed appellant and all other outdoor advertising companies leasing sites from the respondent that it intended to terminate the letting of outdoor advertising sites along the planned Bus Rapid Transport (BRT) routes. On 28 August 2012, and despite representations and protestations made by representatives of the appellant, the Municipal

Council of the respondent resolved that the four outdoor advertising sites leased by the appellant should be cleared following applicable legal processes. This decision was communicated to the appellant on 19 September 2012, and notification was simultaneously

given to the appellant to dismantle the Swartruggens double gantry within 30 days. The decision constituted part of the Council

Resolution 233, adopted on 28 August 2012.

[5] About four months after being informed of the decision of the respondent's Council, the appellant launched this application

and on 12 December 2013 Landman J dismissed it with costs on the basis that the impugned decision is of "a contractual or executive nature" and "is not an administrative act and it cannot be reviewed".

[6] The reasoning of the Court a quo for the abovementioned finding were couched as follows:

6.1 There is no express provision of any of the relevant legislation that authorises the decision concerned;

6.2 Clause 11 of the overacting contract however contains an express term in terms whereof the respondent may direct the appellant to dismantle the structures;

6.3 The decision to direct the appellant to dismantle the structures concerned is not a termination of the agreement between the parties and may constitute a repudiation thereof;

6.4 The act of deciding to direct the appellant to dismantle the structure concerned cannot be found to be located in any specific legislature framework;

6.5 The authority for the Municipal Manager to act was contractual.

[7] In this appeal the appellant still persist with its contention that the decision under review is an administrative action within the ambit of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) and therefore submitted that the trial court erred in making the findings quoted above in paragraph [6].

[8] The appellant submitted that the nature of the approval to erect, maintain and display outdoor advertising structures (in terms of the applicable by-laws) and the rental of the individual sites are so intertwined to such an extent that it is impossible to differentiate between the administrative nature of the approval aspect and the contractual nature of the rental aspect. According to the appellant if the approval process is an administrative act, then the termination of that approval is similarly an administrative act. The results of this, he submitted, is that the withdrawal of the approval and the termination of the rental agreement regarding each site, are similarly so inter-twined that it cannot be separated. It is in this context that the appellant argued that the matter forms part of a larger legislative scheme, and that the impugned resolution did not only terminate the rental agreements regarding the specific sites concerned, but also withdrew the approval to erect, maintain and display the outdoor advertising structure.

[9] The appellant referred to the case of *Primedia (Pty) Ltd and another v Buffalo City Metropolitan Municipality and another*, an unreported judgement in the High Court of South Africa, Eastern Cape Division, Grahamstown, delivered on 19 December 2013. The appellant maintains that the facts of this matter are remarkably similar to the facts of this case, and the Court in that matter held that the termination of a month-to-month lease agreement for purposes of outdoor advertising was in fact an administrative action.

[10] The appellant's counsel further raised a number of considerations which it deemed relevant in an attempt to expand on

the submissions above, which can be summarised as follows:

10.1 There has been no decision by the respondent to terminate the lease agreements relating to the premises concerned. Instead, the only relevant decision that has been taken by the respondent is that the structures located on the premises concerned have to be dismantled;

10.2 There is no general contractual right for the respondent to direct the appellant to dismantle the advertising structures. The decision to direct the appellant to dismantle the structures on the premises also cannot simply be equated to a decision to terminate the lease agreements concerned;

10.3 The respondent's decision was not taken in its capacity as contractual counterpart, but in its capacity as local authority (organ of state) developing the BRT project. This therefore means that there was no contractual relationship with the appellant;

10.4 The respondent conceded that in developing the BRT project and controlling the outdoor advertising industry within its area of jurisdiction, it was exercising a public power or performing a public function in terms of legislation;

10.5 The fact that there is a contractual relationship between the parties in any event does not remove the decision from the ambit of an administrative act, as clearly shown by the following cases:

Logbro Properties CC v Bedderson NO and Others 2003 (2) SA 460 (SCA).

Grey's Marine Hout Bay (Pty) Ltd v Minister of Public Works [2005] ZASCA 43; 2005 (6) SA 313 (SCA).

Kouga Municipality v De Beer and Another 2008 (5) SA 503 (E).

10.6 The appellant and the respondent did not contract on an equal basis. The respondent, as the local authority that exercises statutory control over outdoor advertising in its jurisdictional area, is in a powerful position whereas the appellant as a citizen is subject to the exercise by the respondent of its said statutory powers. This inequality of contractual position already takes the matter outside of the ambit of decisions such as *Cape Metropolitan Council v Metro Inspection Services (Western Cape) CC and Others* 2001 (3) SA 1013 (SCA).

[11] In conclusion, the appellant's counsel referred this Court to the following cases as a support for the proposition that the exercise of seemingly purely executive powers do not cause a decision of an organ of state to fall outside of the ambit of being an administrative act:

■ terminating the supply of municipal services to inhabitants- *Joseph v City of Johannesburg* 2010 (4) SA 55 (CC);

■ approving building plans - *JDJ Properties CC and Another v Umngeni Local Municipality and Another* 2013 (2) SA 395 (SCA); *Walele v City of Cape Town* [2008] ZACC 11; 2008 (6) SA 129 (CC);

■ the decision regarding the changed use of property duly expropriated - *Harvey v Umhlathuze Municipality and Others* 2011 (1) SA 601 (KZP).

[12] The appellant further argued that should this Court find that the impugned decision is in fact an administrative action, then it submitted that the decision should be reviewed and set aside because:

12.1 The respondent failed to give the appellant reasonable opportunity to make representations;

12.2 The respondent failed to give adequate notice of the right to request reasons;

12.3 The respondent failed to give reasons;

12.4 The action in adopting the resolution was procedurally unfair and irregular.

[13] The respondent's contention is that the trial court was correct to find that the power exercised by it is purely contractual and furthermore, excluded from the definition of the words 'administrative action'.

[14] It is trite law that the principles of administrative law have no role to play in the outcome of a dispute after a tender had been awarded. The focus of the inquiry as to whether the conduct or an impugned decision is administrative action, is not the identity of the actor, but the nature of the power that is exercised. The Court a quo dealt extensively in its judgment on the authorities that support this proposition to an extent that there is no need to re-emphasise same.

[15] Furthermore, support of the authorities the Court a quo relied upon can be found in the revised first edition of JR de Ville, "Judicial Review of Administrative Action in South Africa", wherein he remarked in page 45 in the middle of the first paragraph that in determining whether the state action with a private law element qualifies as an administrative action, the courts have drawn a distinction between the consideration and award of a tender and the termination of the contract. The consideration and award of a tender has been held to be an administration action.

[16] The fact that policy choices and considerations related to an organ's of state's statutory functions may be present in the context in which a contractual decision is made, does not render a contractual decision an administrative one. Nor does it imply that an aggrieved person has remedies both in contract and in administrative law. This was made clear in the case of *The President of the Republic of South Africa v Reinecke* 2014 (3) SA 205 (SCA), wherein at 214F-215A, paragraph [16], the following was said:

"The correct view is that one cannot divorce a contract arising from the performance of statutory functions and the exercise of statutory

powers from its statutory background. Sometimes the contractual aspects will be crucial and sometimes the statutory. Which are the more important will depend on the facts giving rise to the dispute....it will often be difficult to determine whether the remediesare to be found in contract or in public law."

[17] On the facts of the case before us it is not difficult as the court a quo held, to make the determination referred to above. In casu, it is clearly the contractual aspects that are crucial and predominant.

[18] It is also clear from the facts of this case that the statutory framework, including all applicable by-laws and other national and provincial legislation were expressly incorporated into the agreement by reference thereto. The respondent's power to act in order to ensure compliance with by-laws, FIFA requirements or any other national or provincial legislation was written into the agreement.

[19] P Bolton, in his book "The Law of Government Procurement in South Africa"; 2007 edition, page 31, in the last paragraph thereof remarked that:-

"The cancellation of a procurement contract will amount to administrative action only if:

- (a) the organ of state when cancelling the contract is acting from a position of superiority, and/or
- (b) the cancellation of the contract amounts to the performance of a public duty or the implementation of legislation."

[20] In casu, the contract which regulated the relationship between the parties were a contract which was concluded on equal terms after the

conclusion of a tender process. The respondent therefore derived its power to cancel the contract from the terms of the contract and when making the impugned decision was not acting from a position of superiority or authority by virtue of it being a public authority. Where the cancellation of a contract was not prescribed by the organ of state in a position of superiority but were in terms agreed upon by parties, the decision to cancel will obviously not be an administrative action.

- [21] The Court a quo granted leave to appeal after the appellant referred it to a judgment of *Primedia (Pty) Ltd and Another v Buffalo City Metropolitan Municipality and Another* (2013) ZAECHGHC 112 (19 December 2013) by Tshiki J, which in my view is of no assistance to the appellant as was contended, despite sharing several similar facts. It is apparent that the Court a quo did not have the benefit of analysing that judgment as it was delivered shortly after its judgment. The decision in *Primedia* is not only in conflict with the decision of the Full Bench of this Division in the matter of the MEC, Department of Education, North West v *KC Productions CC*; Case No. CA14/2007 [2009] (05 March 2009), but also with the SCA decisions referred to by the Court a quo in its judgment.
- [22] In the *KC Production* matter supra, the following finding was made regarding cancellation of the agreement:
- [18] What distinguishes this matter from the Cape Metropolitan decision as intimated above is that there was no separate contract entered into between the appellant and the respondent after the conclusion of the tender process. The same terms and conditions which appeared in the tender documents formed the basis of the contract between the appellant and the respondent. There is a seamless transition from a tender to a contract without there being a separate written contract based on the terms and conditions laid in the tender. The relationship of the parties may be said to be that of ordinary contracting parties but tender conditions, which form the basis of the contract were dictated by the appellant, the province exercising public power or performing public function, see: the *Logbro* case above at par 11.
- [19] Having said that there was a seamless transition from a tender to a contract, the attempt by the appellant to separate the agreement from the statute that gave rise to the agreement is not a sound one. Furthermore, the fact that the agreement came into being as a result of a statute, renders its termination a public exercise of power (*Logbro* case at 13). I come to the conclusion that in the present matter, the decision by the province to terminate the contract was an exercise of public power. [Emphasis added].
- [23] An analysis of the decision in *Primedia* supra reveals that the Court referred only to a single decision of the SCA without stating how it applies to the facts before him. In addition, the Court makes no reference to the further decisions of the SCA that are more closely related to the facts before him and why they did not apply.
- [24] The Court in the *Premedia* matter did not even consider whether the termination of the agreement was authorised by statute or by a contract entered into between the parties. The Court seems to have accepted that the action was an administrative action merely on the basis that the respondent was an organ of the state. I am saying this because there appears to be no reason as to why the Court came to the conclusion that it is of the view that the conduct in terminating the contract amounts to administrative action. At any rate, based on the principle of *stare decisis*, we are bound to follow the decision in the *KC Production* matter supra.

[25] In my view, there is nothing on record that supports the view that the Court a quo misdirected itself by concluding that the impugned decision was not an administrative action. The court a quo was correct in dismissing the appellant's application for review in terms of PAJA as being incompetent in law.

ORDER

[26] Consequently the following order is made:

26.1 The appeal is dismissed with costs.

A.M. KGOELE

JUDGE OF THE HIGH COURT

I agree

R.D. HENDRICKS

ACTING JUDGE PRESIDENT OF THE HIGH COURT

SAMKELO GURA

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