

SOUTH AFRICA / JUDGMENT

Rankethoa Construction v Setsoto Local Municipality (5881/2019) [2021] ZAFSHC 72 (8 March 2021) [2021] ZAFSHC 72

COURT

Free State High Court, Bloemfontein

BEFORE

Mathebula, Majosi

CASE / FILE NUMBER

5881/2019

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IN THE HIGH COURT OF SOUTH AFRICA,

FREE STATE DIVISION, BLOEMFONTEIN

Case number: 5881 /2019

In the matter between:

RANKHETOA CONSTRUCTION

Applicant

and

SETSOTO LOCAL MUNICIPALITY

Respondent

HEARD ON: 08 MARCH 2021

QUORAM:

MATHEBULA, J et al MAJOSI, AJ

REASONS

I

INTRODUCTION

[1] On Monday the 8 March 2021 we heard oral submissions in an unopposed Rule 53 review. The respondent had filed a notice to abide. We were in agreement that an order in terms of the notice of motion be granted and to that end, the draft order provided to us in court was made an order of court save for an amendment to the prayer pertaining to costs.

For the sake of completeness, the order reads as follows:

1. The decision and or resolution reached on the 06/12/2017 as item 12/11, by the Respondent in terms of whereof the Respondent decided and /or resolved that the site situated at Erf 1399 Ficksburg revert back to the Respondents and that it should be put back on tender, is hereby reviewed and /or declared unlawful, invalid and set aside.
2. Respondent shall pay the costs of this application on a party and party scale.

Hereunder are the

reasons:

The applicant seeks an order to review and set aside a resolution taken by the respondent at a Council Meeting dated the 6 of December

2017. A decision was taken that the site described as erf number 1339, Ficksburg which was awarded to the applicant, revert to the latter as clause 3.2 of the Deed of Sale was not implemented and that it should be put on tender. The review also makes reference to the Promotion of Administrative Justice Act 3 of 2000 (PAJA) as the applicant considered the decision to fall into the ambit of administrative action.

II THE PARTIES

- [2] The applicant is Rankhethoa Construction, a close corporation with its principal and registered address in Ficksburg, Free State. It is represented in these proceedings by Mr F.F. Jacobs, duly instructed by Bokwa Attorneys.
- [3] The respondent is Setsoto Local Municipality, a local municipality established in terms of the laws of the Republic of South Africa with its principal place of business situated in Ficksburg, Free State.

III RELIEF SOUGHT

- [4] In support of the relief sought, Ms. Mantlibi Rankhethoa, the sole member and managing director of the applicant deposed to an affidavit. She indicated that her close corporation (the applicant) was successful in its bid for tender number T08 (13/14) for the said erf as advertised and put out by the respondent. [1]

[5] In lieu of its successful bid, the parties concluded a Deed of Sale Agreement on the 5 December 2014 where the salient terms were that the applicant was to pay the purchase price of R50 000.00 over into the Transferring Attorneys' Trust Account within 30 days upon signature of the contract and to facilitate the transfer and

registration of the property. [2]

[6] After the Deed of Sale was concluded, the applicant alleges that the respondent failed to provide the particulars of the Transferring Attorney's Trust Account to enable it to pay over the purchase price despite numerous requests. No payment could be effected and transfer could not take place and the property remained unoccupied thus not developed. In January 2017, the applicant opted to pay the purchase price directly into the account of the Municipality as evidenced by their attached proof of payment.[3]

[7] The applicant first learned of the respondent's resolution in June 2018 after an application was made to the respondent for subdivision and rezoning of the site by their property developer, Bokgoni Spatial Consulting Services. The respondent, at no stage informed the applicant of its decision but opted to inform the said developer of its resolution in a letter dated the 25th of June 2018.[4]

[8] The said resolution was taken despite the full purchase price being paid by the applicant, the respondent's failure to provide assistance to the purchaser (transferring attorney's trust account details withheld) with the suspensive conditions in clause 6.2. and the absence of a written 7 day notice to the applicant to remedy the alleged breach as required by clause 7 of the Deed of Sale. The respondent unilaterally cancelled the agreement.

[9] The applicant thus contends that resolution taken by the respondent is an administrative action and reviewable by this court. Sufficient grounds have been provided to set aside the administrative action.

VI RULE 53 UNIFORM RULES OF COURT AND PAJA

[10] Rule 53 states the following:

- (1) "Save where any law otherwise provides, all proceedings to bring under review the decision or proceedings of any inferior court and of any tribunal, board or officer performing judicial, quasi-judicial or administrative functions shall be by way of notice of motion directed and delivered by the party seeking to review such decision or proceedings to the magistrate, presiding officer or chairperson of the court, tribunal or board or to the officer, as the case may be, and to all other parties affected —
- (a) calling upon such persons to show cause why such decision or proceedings should not be reviewed and corrected or set aside, and

- (b) calling upon the magistrate, presiding officer, chairperson or officer, as the case may be, to despatch, within fifteen days after receipt of the notice of motion, to the registrar the record of such proceedings sought to be corrected or set aside, together with such reasons as he or she is by law required or desires to give or make, and to notify the applicant that he or she has done so.
- (2) The notice of motion shall set out the decision or proceedings sought to be reviewed and shall be supported by affidavit setting out the grounds and the facts and circumstances upon which applicant relies to have the decision or proceedings set aside or corrected...”
- [11] In *Tshwane City and Others v Nambiti Technologies (PTY) LTD* 2016 (2) 494 (SCA) Wallis JA at paragraphs 22 and 23 stated the following:

“[22] PAJA gives effect to the right to just administrative action in s 33 of the Constitution. It provides for judicial review of

administrative action. What constitutes administrative action is the subject of a lengthy and somewhat convoluted definition, which was consolidated and abbreviated by Nugent JA in *Grey's Marine*, 6 in the following terms:

'Administrative action means any decision of an administrative nature made . . . under an empowering provision [and] taken . . . by an organ of State, when exercising a power in terms of the Constitution or a provincial constitution, or exercising a public power or performing a public function in terms of any legislation, or [taken by] a natural or juristic person, other than an organ of State, when exercising a public power or performing a public function in terms of an empowering provision, which adversely affects the rights of any person and which has a direct external legal effect. . . .'

- [23] The Constitutional Court, (*Minister of Defence and Military Veterans v Motau and Others* 2014 (5) SA 69 (CC)) citing *Grey's Marine* with approval, has broken the definition into seven components, namely that —

'there must be (a) a decision of an administrative nature; (b) by an organ of state or a natural or juristic person; (c) exercising a public power or performing a public function; (d) in terms of any legislation or an empowering provision; (e) that adversely affects rights; (f) that has a direct, external legal effect; and (g) that does not fall under any of the listed exclusions!'

- [12] The respondent is indeed an organ of state which exercised its powers during a council meeting and took a resolution that the site was awarded to the applicant after a tender process, should revert back to the former due to non – compliance with clause 3.2 of the deed of sale (failure to pay the purchase price of R 50 000). This decision adversely affected the rights of applicant despite having concluded a legally binding deed of sale agreement. This undoubtedly amounts to administrative action.

- [13] In my view, this decision was taken in a vacuum. Firstly, the respondent failed to ascertain if the purchase price had indeed been paid by the applicant. If this had been done, it would have known that payment had already taken place on the 22 January 2017, almost eleven months prior to the meeting. Secondly, the respondent itself also did not perform in terms of clause 6.2 of the deed of sale and assist the seller with the particulars of the Transferring Attorneys' Trust Account details so they may pay over the purchase price.
- [14] Thirdly, if much reliance had been placed on non-compliance of the Deed of Sale, clause 7.1 of the agreement allows any party who commits any breach to be given notice in writing to remedy the breach within 7 days. This was never done by the respondent. It is also evident from the minutes pertaining to the said resolution that members of the council took the decision and adopted the resolution without having all the facts before them despite one member of council suggesting that they obtain legal advice and thereafter take a decision.[5]
- [15] Lastly, the respondent did not inform the applicant in writing that it is cancelling the contract despite this being a formal requirement of the deed of sale as per clause 7.1.2.[6] If this had been done, in writing to the applicant, they (applicant) may have opted to exercise their rights in terms of the deed of sale and claimed damages it suffered as a result of the administrative decision or at least inform the respondent that they had complied with clause 3.2 some eleven months ago. In my view, for the reasons mentioned herein above, the relief ought to be granted.
- [16] It is trite that costs follow the successful party. Counsel for the applicant argued that costs should be awarded on an attorney and client scale as the respondent unnecessarily opposed the matter and caused it to be postponed on the 5th of October 2021 for the filing of an opposing affidavit and if necessary, a replying affidavit.
- [17] The applicant neglects to mention that they were also granted leave to supplement their papers on the 7 of December 2020 as the actual administrative decision (minutes of meeting and item 11/12 resolution) they desired to have set aside was not annexed to the papers, even at the initial hearing date of 5 October 2020 it was the same situation. Substantial part of the delay and postponements is squarely at the door of the applicant. Under that premise, it would only be fair to grant the relief sought on the normal party and party scale.

MAJOSI, AJ

I concur

MATHEBULA, J

On behalf of Appellant:

Mr. F.F. Jacobs

Instructed by:

Bokwa Attorneys

BLOEMFONTEIN

On behalf of Respondent:

No appearance

Instructed by:

Mhlokonyane Attorneys

[1] Founding Affidavit, Annexure B, P14.

[2] Annexure C, Deed of Sale P 2 para 3.2.

[3] Annexure D, P 22.

[4] Annexure E, P 24.

[5] Minutes of Council Meeting: 6 December 2017 page 40.

[6] Ibid Annexure C, clause 7.1.2 reads “To cancel the sale by written notice to the Purchaser”.

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