

SOUTH AFRICA / JUDGMENT

Transnat Durban (Pty) Ltd v Ethekwinini Municipality and Another (D1710/2020) [2023] ZAKZDHC 48 (26 July 2023)

[2023] ZAKZDHC 48

COURT

Kwazulu-Natal High Court, Durban

BEFORE

Sanders AJ

CASE / FILE NUMBER

D1710/2020

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IN

THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL

LOCAL DIVISION, DURBAN

CASE NO: D1710/2020

In the matter between:

TRANSNAT DURBAN (PTY)

LTD

APPLICANT

and

ETHEKWINI

MUNICIPALITY

FIRST RESPONDENT

THE KWAZULU-NATAL

DEPARTMENT OF

TRANSPORT

SECOND

RESPONDENT

This

judgment was handed down electronically by circulation to the parties' representatives by email, and released to SAFLII.

The

date for hand down is deemed to be on 26th July 2023 at

12:30

ORDER

The

following order shall
issue:

1.
The impugned decision of the first respondent is reviewed and set aside.
2. The first respondent shall bear the costs of this application including costs of senior counsel.

JUDGMENT

Sanders AJ

Introduction

[1] I wish to commence my judgment by expressing my appreciation to both counsel for the well-researched heads of argument. The second respondent does not feature at all in this matter. Therefore, all references in this judgment to the respondent, are references to the first respondent. Despite the voluminous papers herein, the issues before me are crisp. The main issues to be determined are as follows:

- (a) is the impugned decision subject to being reviewed in terms of the Promotion of Administrative Justice Act[1] (“PAJA”) or;
- (b) is it more appropriate to deal with the impugned decision in terms of a legality review; and
- (c) was the respondent authorised to take the impugned decision in the first place.

The impugned decision

[2] The impugned decision in essence consisted of the publication by the respondent of a document in which interested parties were invited to bid by expressing their interest in the formation of an Operations Management Company (“OMC”) to assist the respondent in the formation of a Municipal Entity to run Durban Transport Bus Operations for the respondent.

The resolution of the full council of the respondent

- [3] It is not disputed that on 31 May 2018, the full council of the respondent, adopted a resolution of the Executive Committee of the council to the effect that the respondent was to establish a Municipal Entity that would provide a reliable bus service for the public. Flowing from that resolution, the City Manager was mandated and authorised to proceed with the establishment of the proposed Durban Transport Municipal Entity.
- [4] At this point it should be noted that the resolution mentioned above, is not the subject of these proceedings, and is not part of the impugned decision. At the time when the resolution was taken the applicant was contractually bound to provide the bus service to the public of Durban. The relationship between the applicant and the respondent, has endured for a number of years, but the relationship has been rocky, and characterised by various applications to this Court, some of which are still ongoing, while others are the subject of

appeal. Nevertheless, the applicant is currently the provider of the bus service to the public in Durban.

The applicant's case

- [5] The applicant's case herein stands on six legs, namely:
- (a) The impugned decision is part of an indivisible, administrative decision and process, which would ultimately lead to the formation of a distinct and separate OMC.
 - (b) The resolution mentioned above never authorised the City Manager to form the OMC, therefore, the City Manager had no authority to do so.
 - (c) The City Manager has no power to delegate his powers and functions to an independent company such as the OMC.
 - (d) The respondent has failed to comply with the following requisite legislation:
 - (i) ss 76 and 78 of the Local Government: Municipal Systems Act ("Systems Act");[2]
 - (ii) s 84 of the Local Government: Municipal Financial Management Act;[3] and
 - (iii) the National Land Transport Act.[4]
 - (e) The costs implications of an addition of the OMC to the structural layer to advise the yet to be formed Management Entity would ultimately be unlawfully visited on the public of Durban, who use the bus transport daily.
 - (f) The decision to form the OMC was unreasonable inter alia because it was impossible to implement.

Is the impugned decision reviewable in terms of PAJA?

- [6] Is the decision to call for expressions of interest for an OMC reviewable in terms of PAJA? [SG1] In terms of s 1 of PAJA the decision to be reviewed has to be one of an administrative nature. In *Sokhela and Others v MEC for Agriculture and Environmental Affairs (KwaZulu-Natal) and Others*[5][SG2] Wallis J stated that the phrase "of an administrative nature" requires a positive finding that the decision is as a matter of fact administrative and is not part of a mechanical process[SG3] .[6]
- [7] The respondent herein argues that the decision of publishing a request for expressions of interest for an OMC, is effectively the first step in the procurement process and hardly amounts to a decision of an administrative nature.
- [8] As[SG4] to whether the impugned decision has a direct effect, it is important to bear in mind that the learned authors Hoexter and Penfold[7] firmly link the question of a direct effect with finality.

[9] Perhaps the best exposition of what is required in order for a decision to have a direct effect, is set out in the judgment of Murphy J in *Free Market Foundation v Minister of Labour and Others*[8] where the following is stated:

‘[76]...If a decision requires several steps to be taken by different authorities, only the last of which is directed at the citizen, all previous steps taken within the sphere of public administration lack direct effect, and only the last decision may be taken to court for review. The idea is to concentrate judicial review pragmatically on the more important administrative decision. Instead of allowing challenges to intermediate or preliminary decisions, litigants are obliged to wait until the final decision has been made.’ (Footnote omitted.)

[10] In applying the above stated legal principles to the matter before me, I find as follows:

- (a) I am not in a position to make a positive finding that the impugned decision is as a matter of fact one of an administrative nature and not part of a mechanical process.
- (b) I find that the impugned decision is a preliminary decision in the process and is by no means the most important decision.
- (c) In light of all the foregoing, I find that the impugned decision is not reviewable in terms of PAJA.

The legality principle

[11] I find myself in full agreement with both counsel before me, that irrespective of the decision I have reached on the applicability or otherwise of PAJA; the impugned decision still has to pass muster in terms of the legality principle. If I find that the impugned decision fails to comply with the principle of legality then I must set it aside on that basis. The legality principle is clearly set out in three recent cases; namely:

- (a) *Merifon (Pty) Ltd v Greater Letabao Municipality and Another*[9] where Mlambo AJ stated as follows:

‘[1] ...This court as well as the Supreme Court of Appeal has stressed in a number of decisions that the exercise of public

power must strictly comply with ordained prescripts, and that failure to observe this contravenes the doctrine of legality.’

(Footnote omitted.)

Further in the judgment the following is stated:

‘[41] ...This Court, as well as the Supreme Court of Appeal have, in a number of cases, said that the performance of an act or exercise of public power that does not comply with applicable prescripts is invalid and null and void.’ (Footnote omitted.)

- (b) The second case is *Barnes v Mangaung Metropolitan Municipality and Another*[10] where Gorven JA stated as follows:

‘[4]...When addressing the legality of any action, it is therefore necessary to establish whether the entity that acted did so within the powers accorded to it (intra vires) or beyond those powers (ultra vires).’

- (c) The third case is *ETV (Pty) Ltd v Minister of Communications and Digital Technologies and Others*[11] where Mhlantla J stated as follows:

‘[49] The principle of legality has been extensively developed in our jurisprudence and is of application here too. This court has stated that, while determining whether a functionary exercised her powers correctly used to be a question answered in common law, the question is now answered under the Constitution and in terms of the principle of legality...”(t)he Constitution demands that all government decisions must comply with it, including the principle of legality which forms part of the rule of law, and which is one of our constitutional founding values”.’ (Footnotes omitted.)

Application of the law

- [12] The facts which are not in dispute are as follows:

- (a) That the second respondent in general and the City Manager in particular is not a free agent.
- (b) The City Manager exercises his public power through the provisions of the Systems Act, in particular, in terms of s 51(1)(k), thereof.
- (c) That the City Manager is required to carry out “the decisions of the political office bearers of the Municipality”.
- (d) That the political office bearers of the Municipality are the duly elected councilors of the Municipality .
- (e) The political decision which the 2nd Respondent in general and the City Manager in particular, was empowered to implement was the establishment of the Durban transport Municipal Entity.

- [13] On the respondent’s own version on the papers before me, the respondent was not able[SG12] to comply with the resolution of the council due to a lack of expertise on the part of the respondent[SG13] , hence the Durban Transport Municipal Entity could not be established by the respondent.

[14] In my view the all too obvious route to take once it was realised that the Durban Transport Municipal Entity could not be established, due to the lack of the necessary expertise, was to revert to council, explain the problem, perhaps even present a proposal concerning the process which would lead to the formation of the OMC and let the political office bearers of the Municipality[SG14] decide the way forward.

[15] As stated above [SG15] the Supreme Court of Appeal has stressed in a number of decisions that the exercise of all public power must strictly comply with ordained prescripts, and that failure to observe this contravenes the doctrine of legality.

[16] The question on which this matter ultimately turns is, did the respondent strictly comply with the council's resolution of 31 May 2018, in publishing its expression of interest regarding the formation of the OMC? If the question is answered in the affirmative the impugned decision passes muster in terms of the legality principle. If the question is answered in the negative then the impugned decision flies in the face of the legality principle and falls to be set aside.

[17] Before answering the question posed above I consider it apposite to deal with the respondent's argument that the impugned decision should effectively be considered in isolation, in the sense that no ongoing consequence, could or should be imputed to it. I disagree. Effectively, the impugned decision notionally and conceptually was but the first step in the process which would ultimately lead to the formation of the OMC. Whether suitable candidates expressed an interest or not, is in my view not relevant to determining whether the impugned decision complied with the legality principle in the first place. Similarly, the question of whether the OMC was to be formed to run the Durban Transport Municipal Entity as the procurement document would seem to suggest; or whether the OMC was to be formed to merely lend support and advise to the Durban Transport Municipal Entity as the respondent contends, does not impact on the legality of the decision.

[18] Strict compliance with the resolution of council requires that there must be a direct nexus between the empowering resolution taken by council and the impugned decision. As a matter of fact, the empowering resolution says nothing whatsoever about the formation of an OMC. There is nothing in the papers before me that even remotely suggests that the formation of the OMC was even contemplated by the council on 31 May 2018. While I accept that by the very nature of the position the City Manager is entitled to exercise the level of discretion, in the performance of his duties which is commensurate with his position. The respondent must stay strictly within its lane, and not encroach i[SG16] nto the lane reserved for the political office bearers of the Municipality[SG17] .

Finding in respect of the application

[19] Having read the papers and listened to the argument of counsel I am satisfied that:

- (a) the impugned decision required the approval of council;

- (b) no approval of council was ever obtained; and
- (c) therefore, the impugned decision is not in accordance with the legality principle and falls to be set aside.

Finding in respect of costs

[20] This costs order relates only to part B of the notice of motion. In relation to part A this Court has already spoken as per the order of Van Zyl J.

Order

[21] The following order is made:

1. The impugned decision of the first respondent is reviewed and set aside.
2. The first respondent shall bear the costs of this application including costs of senior counsel.

Sanders AJ

APPEARANCES

For the Applicant: G D Harper SC Instructed by: Norton Rose Fulbright South Africa La Lucia Ridge
For the Respondent C J Pammenter SC Instructed by The State Attorney Durban
Date of hearing: 20 July 2023 Date of Judgment: 26 July 2023

- [1] Promotion of Administrative Justice Act 3 of 2000.
- [2] Local Government: Municipal Systems Act 32 of 2000.
- [3] Local Government: Municipal Financial Management Act 56 of 2003.
- [4] National Land Transport Act 5 of 2009.
- [5] *Sokhela and Others v MEC for Agriculture and Environmental Affairs (KwaZulu-Natal) and Others* 2010 (5) SA 574 (KZP).
- [6] *Ibid* para 10.
- [7] Hoexter and Penfold *Administrative Law in South Africa* 3 ed (2021) at 325.
- [8] *Free Market Foundation v Minister of Labour and Others* 2016 (4) SA 496 (GP).
- [9] *Merifon (Pty) Limited v Greater Letaba Municipality and Another*
- [2022] ZACC 25; 2022 (9) BCLR 1090 (CC).
- [10] *Barnes v Mangaung Metropolitan Municipality and Another*
- [2022] ZASCA 77.
- [11] *ETV (Pty) Ltd v Minister of Communications and Digital Technologies and Others* 2023 (3) SA 1 (CC).

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