



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

Case No: 5709/2021P

In the matter between:

NEXOR 312 (PTY) LTD t/a VNA CONSULTING

APPLICANT

and

OVERBERG DISTRICT MUNICIPALITY

FIRST RESPONDENT

SMEC SA (PTY) LTD

SECOND RESPONDENT

ORDER

The following order is granted:

1. The objection to the jurisdiction of the KwaZulu-Natal Division of the High Court, Pietermaritzburg to determine this matter is upheld;
2. In terms of section 27(1)(a) and (b) of the Superior Courts Act 10 of 2013, the matter is transferred to the Western Cape Division of the High Court;
3. The applicant is directed to pay the costs of the application for relief in terms of Part A of its notice of motion, such to include the costs of two counsel where so employed.

JUDGMENT

Mossop AJ:

Introduction

[1] Rule 6(1) of the Promotion of Administrative Justice Act¹ ('PAJA') provides that '[a]ny person may institute proceedings in a court or a tribunal for the judicial review of an administrative action'.

[2] That is what the applicant has done in this matter. In part B of its application it seeks the judicial review of a decision taken by the first respondent to disqualify it as a compliant tenderer in respect of a tender issued by the first respondent, and which was ultimately awarded by the first respondent to the second respondent.

The relief claimed

[3] In part A of its application, the applicant seeks interim relief in the form of an interdict pending the determination of its review application. That relief initially comprised of the following:

- (a) The first respondent being interdicted and restrained from:
 - (i) proceeding with and/or implementing and/or giving effect in any way to the decision made by the first respondent to award the tender to the second respondent;
 - (ii) completing any agreement with the second respondent pursuant to the award of the tender to it;
 - (iii) allowing and/or permitting any work foreshadowed by the tender to be undertaken by the second respondent.
- (b) The second respondent being interdicted and restrained from:
 - (i) concluding any agreement pursuant to the award of the tender with the first respondent; and
 - (ii) undertaking any of the work foreshadowed by the tender.

[4] As a consequence of developments that occurred after the application was delivered, the relief as initially claimed was varied by the applicant. This became necessary because the first respondent indicated that it had implemented its decision to award the tender to the second respondent and had concluded an agreement with the second respondent as the successful tenderer. Later, the first

¹ Promotion of Administrative Justice Act 3 of 2000.

respondent advised that the second respondent had commenced work on the tender. The relief now claimed is that the:

- (a) first respondent is interdicted and restrained from allowing any further work foreshadowed by the tender to be undertaken by the second respondent; and
- (b) second respondent is interdicted and restrained from undertaking any further work foreshadowed by the tender.

[5] What I am tasked with is a consideration of the relief claimed in part A of the application only.

Appearances

[6] When the matter was called, I had the pleasure of hearing argument from Mr Gajoo SC, who appears for the applicant and who led Ms Qono. Appearing for the first respondent was Mr Dickson SC, leading Mr Nacerodien. I point out, however, that Mr Nacerodien was not physically present but had, according to Mr Dickson, earlier done much of the work on behalf of the first respondent in compiling its answering affidavit. Appearing for the second respondent was Mr van Vuren from the Pretoria Bar. All counsel are thanked for the obvious effort that they have put into the matter and for their helpful submissions.

[7] In his practice note, Mr Dickson identified certain issues and proposed the sequence in which they should be dealt with. One of the issues identified by him was that of jurisdiction. Contrary to the roadmap proposed by Mr Dickson, I intend dealing briefly with the facts of the matter and then with the issue of jurisdiction as its determination may prove to be dispositive of the application.

The facts of the matter

[8] The essential facts of the matter are not complex. The first respondent is the Overberg District Municipality which is located in Bredasdorp in the Western Cape. It invited bids for a tender that was described as being concerned with the 'management and implementation of the rural road asset management system within the Overberg District Municipality for a period of three years'.

The tender process was to be regulated by the terms of the first respondent's supply chain management policy. The applicant, which is based in Pinetown, KwaZulu-Natal and the second respondent, which is based in Cape Town, were two of six entities that submitted bids. While dealing with places of business, it is important to note that the applicant also has a presence in the Western Cape, having a branch office at the Convention Tower, corner of Walter Sisulu and Heerengracht Streets, Cape Town. The second respondent ultimately emerged as the successful bidder after the applicant was disqualified due to it not securing the requisite minimum number of points in the functional evaluation component of the tender.

[9] The application was brought on an extremely urgent basis and the respondents were given very little time to put up their answering affidavits. The application itself was lengthy, the founding affidavit alone filling some 60 pages. It was accompanied by numerous annexures that eventually swelled the application to approximately 350 pages in length. The application is dated 2 August 2021 and was issued by the registrar of this court on that date. Following service, the respondents were required to notify the applicant of their intention to defend the matter by 3 August 2021 and to deliver their answering affidavits by 4 August 2021. Effectively, the respondents were given two days to respond to the voluminous application papers which were replete with dense, technical issues, particularly in the annexures that were attached to the founding affidavit. In this regard:

- (a) the first respondent managed to comply with these truncated time periods and delivered an answering affidavit by 4 August 2021, but pointedly reserved its rights therein to supplement that affidavit in due course, complaining that it had not been afforded sufficient opportunity to deal with the detailed allegations raised by the applicant in its application papers; and
- (b) the second respondent filed a notice in terms of rule 6(5)(d)(iii) of the Uniform Rules of Court, in which it raised certain questions of law.

The issue of jurisdiction

[10] The issue of jurisdiction is a vigorously contested issue in the application:

- (a) the first respondent has taken the point in its answering affidavit that this court lacks jurisdiction, asserting that the tender was for the rendering of services in the

Overberg District Municipality in Bredasdorp, Western Cape, the adverse decision was taken in Bredasdorp, that PAJA only applies to review proceedings and not to interdictory proceedings and that the applicant has failed to consider the provisions of section 21 of the Superior Courts Act² (the Act’); and

(b) the second respondent has raised the same point in its rule 6(5)(d)(iii) notice, where it makes similar assertions to those made by the first respondent.

[11] The applicant contends that this court has jurisdiction to adjudicate the application by virtue of the fact that it is domiciled or ordinarily resident within the area of jurisdiction of this court.

The ordinary jurisdiction of the high court

[12] Jurisdiction means the power vested in a court by law to adjudicate upon, determine and dispose of a matter.³ Importantly, it is territorial in nature and ‘does not extend beyond the boundaries of, or over subjects or subject-matter not associated with, the Court’s ordained territory’.⁴

[13] Previously, section 19 of the Supreme Court Act dealt with the issue of jurisdiction.⁵ It provided as follows:

‘(1)(a) A provincial or local division shall have jurisdiction over all persons residing or being in and in relation to all causes arising and all offences triable within its area of jurisdiction and all other matters of which it may according to law take cognizance, and shall, subject to the provisions of subsection (2), in addition to any powers or jurisdiction which may be vested in it by law, have power:

- (i) to hear and determine appeals from all inferior courts within its area of jurisdiction;
- (ii) to review the proceedings of all such courts;
- (iii) in its discretion, and at the instance of any interested person, to enquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon the determination.’

² Superior Courts Act 10 of 2013.

³ *Veneta Mineraria Spa v Carolina Collieries (Pty) Ltd (in liquidation)* 1987 (4) SA 883 (A) at 886D.

⁴ *Ewing McDonald & Co Ltd v M&M Products Co* 1991 (1) SA 252 (A) at 256G-H.

⁵ Supreme Court Act 59 of 1959.

[14] In commenting upon section 19, Harms DP in *Gallo Africa Ltd v Sting Music (Pty) Ltd*⁶ stated that

‘. . . our courts have for more than a century interpreted it to mean no more than that the jurisdiction of High Courts is to be found in the common law. For purposes of effectiveness the defendant must be or reside within the area of jurisdiction of the court . . . Although effectiveness “lies at the root of jurisdiction” and is the rationale for jurisdiction, “it is not necessarily the criterion for its existence”. What is further required is a *ratio jurisdictionis*. The *ratio*, in turn, may, for instance, be domicile, contract, delict and, relevant for present purposes, *ratione rei sitae*. It depends on the nature of the right or claim whether the one ground or the other provides a ground for jurisdiction. Domicile on its own, for instance, may not be enough.’ (Footnotes omitted.)

[15] Section 19 of the Supreme Court Act was replaced by section 21 of the Act. The wording of the two sections is not dissimilar. Section 21 now provides that:

‘A Division has jurisdiction over all persons residing or being in, and in relation to all causes arising and all offences triable within, its area of jurisdiction and all other matters of which it may according to law take cognisance, and has the power:

- (a) to hear and determine appeals from all Magistrates’ Courts within its area of jurisdiction;
- (b) to review the proceedings of all such courts;
- (c) in its discretion, and at the instance of any interested person, to enquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon the determination.’

[16] It is well established that, just as in the case of the now repealed section 19 of the Supreme Court Act, section 21 of the Act does not contain a codification of the jurisdiction of the high court. The jurisdiction of the high court is accordingly also to be determined by reference to the common law. In doing so, regard must be had to the jurisdictional connecting factors, or *rationes jurisdictionis*, recognised by the common law. These include:

- (a) residence and domicile (*ratio domicilii*);
- (b) the situation of the subject-matter of the action within the jurisdiction (*ratio rei sitae*); and

⁶ *Gallo Africa Ltd and others v Sting Music (Pty) Ltd and others* 2010 (6) SA 329 (SCA) para 10.

(c) the cause of action (*ratio rei gestae*) which includes the conclusion or performance of a contract (*ratio contractus*).⁷

[17] A consideration of these factors and the facts of this matter reveal that on the conventional approach to jurisdiction, the KwaZulu-Natal Division of the High Court would lack jurisdiction to determine the matter as none of the respondents are resident or domiciled within the area of jurisdiction of this court and the applicant's cause of action arises in the Western Cape as this is where the administrative action complained of occurred. These same factors vest jurisdiction in the Western Cape Division of the High Court.

Does this court have jurisdiction?

[18] In the light of the aforementioned facts and understanding of the law, the question that must be asked is what gives this court, located in KwaZulu-Natal, jurisdiction to hear this matter? The answer to the question posed, according to the applicant, is PAJA.

PAJA and jurisdiction

[19] As was pointed out at the beginning of this judgment, PAJA permits a court to review administrative decisions, and defines a 'court', in part, as:

- '(b)(i) a High Court or another court of similar status;
- (ii) . . .

within whose area of jurisdiction the administrative action occurred or the administrator has his or her or its principal place of administration or the party whose rights have been affected is domiciled or ordinarily resident or the adverse effect of the administrative action was, is or will be experienced.'⁸

[20] Thus PAJA grants jurisdiction to a court to determine a matter within whose area of jurisdiction:

- (a) the administrative action occurred; or
- (b) the administrator has its principal place of administration; or
- (c) the affected party is domiciled or in which it is ordinarily resident; or

⁷ *Van Wyk t/a Skydive Mossel Bay v UPS SCS South Africa (Pty) Ltd* [2020] 1 All SA 857 (WCC) para 53.

⁸ Section 1 of PAJA.

(d) where the adverse effect of the administrative action will be experienced.

The changes brought about by PAJA

[21] In *Gallo*, Harms DP had occasion to say that the domicile of the plaintiff never determines jurisdiction.⁹ This is no longer the case since the introduction of PAJA. The definition of the word 'court' employed by PAJA now permits jurisdiction to be founded on the place of domicile or residence of the applicant. This runs contrary to the principle of *ratione domicilii* and the principle of *actor sequitur forum rei*¹⁰ that underlies the principle of *ratione domicilii*.

[22] Performing the same exercise when considering whether section 21 of the Act gives this court jurisdiction, but now using PAJA in the stead of the Act, it is evident that the KwaZulu-Natal Division of the High Court does have jurisdiction. The Western Cape Division of the High Court would continue to have jurisdiction as the administrative action occurred within its area of jurisdiction and the principal place of administration of the administrator is likewise within its area of jurisdiction. This court acquires jurisdiction arising out of the fact that the applicant is both domiciled and ordinarily resident in KwaZulu-Natal and the adverse effect of the first respondent's decision will be experienced by the applicant within the jurisdiction of this court according to the applicant.

Case law

[23] There are few cases in which the issue of jurisdiction arising out of PAJA has been considered.

[24] In *National Arts Council and another v Minister of Arts and Culture and another*,¹¹ the court held that the question of whether a court has jurisdiction in review proceedings under PAJA has to be decided with reference to both the Supreme Court Act (being the applicable Act in place at the time), read with the provisions of ss 1 and 6 of PAJA.¹² In that case, an application was brought in the Western Cape High Court that sought the review of a decision taken by the Minister

⁹ *Gallo Africa Ltd and others v Sting Music (Pty) Ltd and others* 2010 (6) SA 329 (SCA) para 8.

¹⁰ Which means: 'The plaintiff follows the defendant's court'.

¹¹ *National Arts Council and another v Minister of Arts and Culture and another* 2006 (1) SA 215 (C).

¹² *Ibid* para 15.

of Arts and Culture in Pretoria. The principal applicant was the National Arts Council, which was ordinarily resident in Johannesburg. The applicants were not domiciled or resident in the court's area of jurisdiction. The court found that it did not have jurisdiction to hear the matter.

[25] In *B.O. Mahony NO and others v MEC, Health and Social Development, Eastern Cape and others*,¹³ the applicants asked the Western Cape Division of the High Court to decide whether it had jurisdiction to determine the main application, which involved an application for a mandamus. The applicants resided, and were domiciled, within the court's area of jurisdiction. The respondents were not: their respective principal places of business were in the Eastern Cape. As in this case, the applicants argued that the court had jurisdiction by virtue of the fact that they resided and were domiciled in the court's area of jurisdiction. As in this case, the respondents conceded this point but argued that in terms of the principle of convenience, the matter should be heard in the Eastern Cape Division of the High Court. The court confirmed the approach in *National Arts Council* that the question of whether it had jurisdiction was to be answered with reference to the Act read with the provisions of ss 1 and 6 of PAJA. The court accepted that the principle of convenience would have a bearing on the issue of jurisdiction and applied it, but held, contrary to the respondents' argument, that the principle of convenience favoured the matter being heard in the Western Cape because of the specific facts of the matter. Ultimately the court found that it had jurisdiction to hear the main application.

[26] In *TMT Services and Supplies (Pty) Ltd v The MEC: Department of Transport, KZN*,¹⁴ the applicant brought a review of a tender for a traffic contravention management system in the Western Cape Division of the High Court. The applicant had its registered office and principal place of business in Cape Town, whilst four of the respondents, including the party that issued the tender, were based in KwaZulu-Natal and the party that won the tender had its registered office in Pretoria, Gauteng.

¹³ *B.O. Mahony NO and others v MEC, Health and Social Development, Eastern Cape and others* (WCC) unreported case number 1444/2015.

¹⁴ *TMT Services and Supplies (Pty) Ltd v The MEC: Department of Transport, KZN and others* (WCC) unreported case number 18339/2018 (6 March 2020).

The respondents alleged that the Western Cape Division of the High Court lacked jurisdiction to hear the matter, it being alleged that it had no connection to the dispute which arose in KwaZulu-Natal and that none of the respondents were resident or domiciled within the area of jurisdiction of the Western Cape Division of the High Court. Given the particular facts of that matter, the respondents submitted that it would be more convenient for the matter to be heard in KwaZulu-Natal. The applicant submitted, to the contrary, that once jurisdiction is established in terms of PAJA, other considerations such as effectiveness, convenience and the like cease to apply and are of no consequence. The court rejected this and found that even where jurisdiction is based upon PAJA, considerations of convenience, effectiveness and common sense continue to remain relevant considerations. The court found that the dispute was territorially connected to KwaZulu-Natal, the impugned decision was taken in that province and the respondents had their principal places of business there. As a consequence, the application was dismissed.

Why this court lacks jurisdiction

[27] The reasoning employed in *TMT Services* commends itself to me. The following facts and circumstances are, in my opinion, pertinent and militate against this court having jurisdiction to determine the urgent relief and the review application:

- (a) the respondents are based in the Western Cape;
- (b) the applicant has a presence in the form of an office in the Western Cape;
- (c) the tender was issued in the Western Cape;
- (d) the tender was for the provision of a rural road asset management system in the Western Cape;
- (e) the tender was to be evaluated in accordance with the provisions of the Overberg District Municipality's supply chain management policy;
- (f) the bid was adjudicated upon in Bredasdorp in the Western Cape;
- (g) the internal appeal afforded to the applicant was likewise adjudicated upon in Bredasdorp in the Western Cape;
- (h) the adverse decision complained of by the applicant was taken in Bredasdorp in the Western Cape;
- (i) the person who was involved in the functionality evaluation of the tender, a Mr van Eck, is based in Worcester in the Western Cape. The person involved in the

appeal process, a Mr Mathee, also appears to be based in the Western Cape, having commissioned his affidavit in Stanford, which is in the Western Cape. Both gentlemen came in for some trenchant criticism from the applicant regarding their qualifications, expertise and impartiality in the bid evaluation process; and

(j) the service that the winning bidder of the tender is required to render is in the Western Cape.

[28] This court has no connection whatsoever with the dispute between the parties save for the fact that the applicant is resident at Pinetown, within this court's area of jurisdiction. Notwithstanding the fact that PAJA provides for an additional statutory ground for the establishment of jurisdiction, considerations of convenience and common sense as well as effectiveness remain valid considerations. That these are valid considerations when considering the issue of jurisdiction was commented upon by the Appellate Division in *Estate Agents Board v Lek*,¹⁵ a matter decided prior to the advent of PAJA, where the court stated that

' . . . as set out earlier in this judgment, convenience and common sense, are, *inter alia*, valid considerations in determining whether a particular Division has jurisdiction to hear and determine the particular cause.'¹⁶

[29] In my view, a consideration of these factors leads ineluctably to the conclusion that it is convenient for the matter to be heard in the Western Cape Division of the High Court, notwithstanding the provisions of PAJA.

Section 27 of the Act

[30] In its replying affidavit, the applicant made an alternative submission that in the event of this court finding that it lacked jurisdiction to determine the matter, an order would be sought that the application be removed to the Western Cape Division of the High Court in terms of the provisions of section 27 of the Act. My attention was redrawn to this fact in argument by Mr Gajoo, who indicated that whilst it was not his first choice of order, it was an alternate order that the applicant persisted in. Section 27 of the Act provides that

¹⁵ *Estate Agents Board v Lek* 1979 (3) SA 1048 (A).

¹⁶ *Ibid* at 1067E.

‘(1) If any proceedings have been instituted in a Division or at a seat of a Division, and it appears to the court that such proceedings—

(a) should have been instituted in another Division or at another seat of that Division; or

(b) would be more conveniently or more appropriately heard or determined:

(i) at another seat of that Division; or

(ii) by another Division,

that court may, upon application by any party thereto and after hearing all other parties thereto, order such proceedings to be removed to that other Division or seat, as the case may be.’

[31] In my view, this application ought to have been brought in the Western Cape Division of the High Court and it will be more convenient for it to be considered by that court.

Conclusion

[32] I am unpersuaded that this court has jurisdiction to hear the matter. Convenience, effectiveness and a large dollop of common sense dictates that this application should be considered by the Western Cape Division of the High Court. I accordingly cannot find that this court has jurisdiction to hear the application for urgent interim relief or for the review of the administrative decision about which the applicant makes complaint.

Order

[33] I accordingly make the following order:

2. The objection to the jurisdiction of the KwaZulu-Natal Division of the High Court, Pietermaritzburg to determine this matter is upheld;

3. In terms of section 27(1)(a) and (b) of the Superior Courts Act 10 of 2013, the matter is transferred to the Western Cape Division of the High Court;

4. The applicant is directed to pay the costs of the application for relief in terms of Part A of its notice of motion, such to include the costs of two counsel where so employed.

APPEARANCES

- Counsel for the applicant : Mr V Gajoo SC and Ms Z Qono
Instructed by:
V Chetty Incorporated
6 Rydall Vale Crescent
Rydall Vale Office Park
La Lucia
- Counsel for the first respondent : Mr A J Dickson SC and Mr A Nacerodien
Instructed by:
Fairbridges Wertheim Becker
16th Floor
South Tower, The Towers
Heerengracht
Cape Town
- Counsel for the second respondent : Mr S. M. van Vuren
Instructed by:
Weavind and Weavind
361 Oberon Street
Faerie Glen
Pretoria
- Date of Hearing : 8 September 2021
- Date of Judgment : 16 September 2021