

IN THE HIGH COURT OF SOUTH AFRICA



GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NUMBER: 39314/2015

DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE: ~~YES~~/NO
- (2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
- (3) REVISED: ✓

In the matter of:

PARETO LIMITED

Plaintiff

CITY OF JOHANNESBURG METROPOLITAN MUNICIPALITY

Defendant

Coram: WEPENER J

Heard: 3 September 2018

Delivered: 13 September 2018

Summary: The effect of declaring that, when taking a decision, the party who took the decision failed to comply with the prescribed statutory requirements. Such decision contravenes the principle of legality. Such a declaration does not automatically result in invalidity. It remains extant unless set aside by a court.

JUDGMENT

WEPENER J:

[1] The plaintiff is Pareto Limited, a public company duly registered as such in terms of the company laws of South Africa, being legally obliged to pay rates to the defendant as determined by the defendant, in respect of immovable properties owned by the plaintiff within the defendant's area of rating. Such rates were to be determined as falling into the business, commercial and industrial category.

[2] The defendant is the City of Johannesburg Metropolitan Municipality established in accordance with the laws of the Republic of South Africa.

[3] The parties presented a stated case of agreed facts and required a decision based thereon. The only issue that eventually remained for consideration is the following: Whether the judgment of the Supreme Court of Appeal¹ entitles the plaintiff to claim the amount of R6,462,503, set out in its summons together with interest and costs. This amount represents the difference between the amount paid by the plaintiff in terms of an impugned decision taken by the defendant and the amount it would have paid had the decision not been taken.

[4] Before me was the narrow issue of whether the crucial finding therein entitled the plaintiff to make a claim, ie, the finding that the defendant

¹ *Sapoa v Council of the City of Johannesburg Metropolitan Municipality* [2013] 1 AllSA 1451 (SCA).

'failed to comply with the prescribed statutory requirements and procedures in arriving at its decision on 21 May 2009 to impose a rate of R0.0154 in the Rand on the value of business, commercial and industrial properties. . . .'

and the declaration

'that the first, second and third respondents failed to comply with the prescribed statutory requirements and procedures in arriving at the decision. . . .'

The declaration came about as a result of the defendant, when materially amending its budget, was required, but failed to follow all statutory procedures it was obliged to follow when it proceeded to adopt a budget.² The question that arises is the legal consequences of this declaration by the Supreme Court of Appeal and in particular the plaintiff's right to recover amounts overpaid. The plaintiff's entitlement to rely on any possible benefit of the order of the Supreme Court of Appeal was also not in dispute.³ The stated case sets the matter out thus:

9. On 16 March 2009 the Defendant passed a resolution as contemplated in section 17(3) of the Finance Act and / or Section 14 of the Rates Act in terms of which it approved a property rate of 0.0132c in the Rand based on the market value of immovable properties that we categorised as "business, commercial and industrial" for the period 1 July 2009 to 30 June 2010.

10. On 21 May 2009 the Defendant adopted a resolution as contemplated in section 17(3) of the Finance Act and / or Section 14 of the Rates Act to increase the property rate referred to in paragraph 9 above to a property rate of 0.0145c in the Rand on the market value of immovable properties categorised as "business, commercial and industrial" for the period 1 July 2009 to 30 June 2010.

11. Pursuant to the above, the Defendant levied upon the Properties the property rates as referred to in paragraph 10, based on the market value thereof, and rendered monthly accounts to the Plaintiff in respect thereof in terms of section 27 of the Rates Act.

² *Sapoa* para 67.

³ *Kouga Municipality v Bellingan and Others* 2012 (2) SA 95 (SCA) para 21.

12. During the period 1 July 2009 until 30 June 2010 the Plaintiff paid to the Defendant its proportionate share of the amounts claimed by the Defendant as being due and payable by the Plaintiff in respect of property rates payable in respect of the Properties as per the statement rendered by the Defendant to the Plaintiff, in the aggregate the amount of R60,570,666,00.

13. On or about 8 November 2012 and in the matter between South African Property Owners Association (SAPOA) and the Council of the City of Johannesburg Metropolitan Municipality and others under case number 648/2011, the Supreme Court of Appeal of South Africa declared that the first, second and thirds respondents in that matter (consisting of the Council of the defendant in the present matter; the executive mayor of the defendant and the defendant) failed to comply with the prescribed statutory requirements and procedures in arriving at the decision of the 21 May 2009 to impose a rate of R0,0154c in the Rand on the value of properties that were categorised "business, commercial and industrial" properties and found that:

13.1 the Defendant failed to comply with the provisions of the Systems Act, the Rates Act and the Finance Act.

13.2 the Defendant, by imposing an additional increase of 18% in the rates payable in respect of properties categorised as "business, commercial or industrial", acted unlawfully; and

13.3 the rates levied on properties categorised as "business, commercial or industrial" in the 2009 / 2010 budget year, had been imposed unlawfully, and contrary to the provisions of Section 19(1)(b) of the Rates Act.'

[5] The plaintiff's counsel submitted, correctly in my view, that *Sapoa* did not seek a review of the defendant's decision, which in turn, would have had specific consequences but rather that *Sapoa* attacked the decision based on the principle of legality

'... in terms of which the Council's decision had to be taken in accordance with the law failing which it was invalid to the extent that it was inconsistent with the law.'⁴

⁴ *Sapoa* para 5.

It was submitted that once the declaration was issued by the Supreme Court of Appeal, and in the absence of exercising any power under s 172(1)(b) of the Constitution,⁵ the declaration has the effect of a declaration of invalidity. It took effect immediately from the date on which the impugned decision was taken,⁶ resulting in it being void ab initio. Upon a declaration of invalidity due to the failure by the defendant to comply with prescribed statutory prescripts, a court is empowered to ameliorate the finding by utilising the provisions of s 172(a)⁷ of the Constitution. The Supreme Court of Appeal, however, did not utilise this power and thus, it was argued, left no room for a partial implementation of the impugned decision and did not validate it in any respect. I will return to the argument that the declaration of non-compliance leads to invalidity.

[6] Against this, the defendant's counsel submitted that the Supreme Court of Appeal did not set aside the impugned decision and therefore there is no basis on which the plaintiff can base its action. The argument is that, because the Supreme Court of Appeal did not declare the decision invalid and set it aside, it resulted in the principle expounded in *Oudekraal Estates (Pty) Ltd v The City of Cape Town and Others*,⁸ being applicable. The principle is that an executive or administrative decision, once taken, continues to have legal effect until it has been reviewed and set aside by a court. There is no dispute between the parties that the *Oudekraal* principle is also applicable in matters even when the decision at issue did not amount to administrative or executive action⁹. Counsel for the defendant submitted that, having regard to the aforementioned, the defendant's decision was valid and effectual and that payments made pursuant thereto were properly made.

⁵ '172. (1) When deciding a constitutional matter within its power, a court—

(a) . . .

(b) may make any order that is just and equitable, including—

(i) an order limiting the retrospective effect of the declaration of invalidity; and

(ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.'

⁶ *Danster v S; Nquido v S* [2002] JOL 9475 (C) at p6.

⁷ '(1) When deciding a constitutional matter within its power, a court—

(a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency;'

⁸ 2004 (6) SA 222 (SCA).

⁹ See *MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd t/a Eye and Laser Institute* 2014 (3) SA 481 (CC); *Gundwana v Steko Development CC and Others* 2011 (3) SA 608 (CC) para 58; *Economic Freedom Fighters v Speaker, National Assembly and Others* 2016 (3) SA 580 (CC).

[7] It is, in my view, not contentious that the Supreme Court of Appeal did not review the decision under PAJA¹⁰. This was clearly so because it was not called upon to review the decision on that basis. This much is clear from the *Sapoa* judgment:¹¹

‘As the imposition of rates is not administrative action, Sapoa did not seek to review and set aside the Council’s budget or the decision to levy an additional 18% rate on business properties in terms of the Promotion of Administrative Justice Act 3 of 2000. It case is based on the principle of legality in terms of which the Council’s decision has to be taken in accordance with law, failing which it was invalid to extent that it was inconsistent with the law.’

The action of the decision maker was in any event not reviewable¹²:

‘It follows that the imposition of the rates and the levies and the payment of the subsidies did not constitute “administrative action” under section 24 of the interim Constitution.’

The defendant’s case is squarely based on the absence of a setting aside of the decision and consequently that, according to its argument, the decision remains extant.

[8] The decision was attacked on the basis of legality, ie, that the decision was not taken in accordance with the law failing which it is invalid and thus unconstitutional. That is also the basis upon which the Supreme Court of Appeal issued the declaratory order. The Supreme Court of Appeal did not declare the decision invalid nor did it set it aside, as it could have done. I am of the view that the Supreme Court of Appeal carefully weighed up¹³ the matter and did not intend to and did not invoke its powers to declare the decision invalid or invoke any powers pursuant to s 172 of the Constitution. It did not do so because of the view, as Navsa JA said¹⁴:

‘My colleague is, with respect, correct when he states that it was recognised on behalf of SAPOA in so far as the setting aside of the budget is concerned, that the egg could not be

¹⁰ Promotion of Administrative Justice Act 3 of 2000.

¹¹ At para 5.

¹² *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* 199 (1) SA 374 (CC) para 45.

¹³ *Millennium Waste Management (Pty) Ltd v Chairperson, Tender Board: Limpopo Province & Others* 2008 (2) SA 481 (SCA) para 23.

¹⁴ *Sapoa* para 70.

unscrambled. And as he pointed out also, s 172 of the Constitution requires that although the court must declare conduct that is inconsistent with the Constitution invalid to the extent of its inconsistency, it may make any order that is just and equitable. In my view it is fair and equitable now, for the reasons I have set out and follow, not to order the repayment of rates that were not validly imposed.¹⁵

[9] When a court pronounces on the validity of a matter that is inconsistent with the Constitution, s 172 of the Constitution allows for the court to ameliorate the consequences if it so decides by imposing an order that is just and equitable including –

- '(i) an order limiting the retrospective effect of the declaration of invalidity; and
- (ii) an order suspending the declaration of invalidity of any period and on any condition, to allow the competent authority to correct the defect.'

It is clear why no order pursuant to the provision of s 172 of the Constitution was issued. The Court recognised the effect if it set the decision aside. It held¹⁶

'Although counsel on behalf of SAPOA persisted in having the rate improperly imposed set aside, he advisedly recognized the difficulties of a court even attempting to set aside the 2009/2010 budget, two budgetary periods thereafter. Successive budgets are based on surpluses or deficits from prior periods. One is built on the outcome of the other. This, in modern language, is called a knock-on effect. The legality of the budgets for the successive periods has not been challenged. Considering the knock-on effect it must be so that any subsequent increase in rates would have owed its genesis to and been premised on the rate presently sought to be impugned.'

[10] The Supreme Court of Appeal went further and expressly declined to set aside the decision¹⁷:

'If, as the parties and my colleagues accept, the effluxion of time and the practical realities referred to above dictate that the budget for the 2009/ 2010 year cannot be set aside, the corollary must be that, the rate in question, which was its principal component, also cannot be set aside.'

¹⁵ *Sapoa* para 70.

¹⁶ At para 71.

¹⁷ *Sapoa* para 75.

[11] A further indication that the Supreme Court of appeal did not intend to undo the decision but only to regulate future conduct is found where Navsa JA held that¹⁸:

'For all these reasons I would refrain from ordering the undoing of any constituent part of the 2009/2010 budget and adding any additional orders other than the limited ones I propose. Does this mean the Council can continue flagrantly flouting the law with impunity? The short answer based on the principle of legality is no. If it becomes clear that the Council has not rectified or is not willing to deal with the shortcomings in the valuation roll, an application to court for a mandatory interdict would be warranted in advance of the budgetary process.'

[12] The Supreme Court of Appeal refrained from granting an order of invalidity and to set the decision aside. The failure of the defendant to comply with the relevant statutory provisions does not necessarily lead to the decision under scrutiny being rendered invalid.¹⁹ Where a court deliberately refrains from doing so, as it is entitled to do,²⁰ the decision remains extant. Although the remarks in *Sapela* were made in relation to review proceedings, there is no reason why it should not apply when the principle of legality is considered. The result is that the decision was to be regarded as factually in existence at the time when payments were made. The payment of rates were therefore not made 'sine causa'.

[13] Relying on the matter of *Danster*²¹ the plaintiff submitted that the decision of the defendant was void ab initio. *Danster*, however was expressly overruled in *De Kock v Van Rooyen*²² and dealt with the effect of an order declaring a law to be invalid. In this matter the Supreme Court of Appeal deliberately refrained from making a declaration of invalidity.

[14] In the circumstances, the plaintiff's claim is dismissed with costs.

¹⁸ *Sapoa* para 79.

¹⁹ *Liebenberg NO and Others v Bergrivier Municipality* 2013 (5) SA 246 (CC) para 26.

²⁰ *Chairperson, Standing Tender Committee and others v J JFE Sapela Electronics (Pty) Ltd and Others* 2008 (2) SA 638 (SCA) para 28.

²¹ Note 6, *supra*.

²² 2005 (1) SA 1 (SCA).

A handwritten signature in black ink, consisting of a horizontal line with a small loop at the end and a small mark below it.

Wepener J

Counsel for Plaintiff: J.J. Reyneke SC

Attorneys for Applicant: Blake Bester De Wet & Jordaan Inc.

Counsel for Defendant: K. Pillay SC with T. Makgate and K. Motshadi

Attorneys for Defendant: Mogaswa Inc.