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

Case No: 9132/16P

In the matter between:

THE TRUSTEES OF THE MYK FAMILY TRUST	**APPLICANT**
and	
THE MSUNDUZI LOCAL MUNICIPALITY	**FIRST RESPONDENT**
MATRISOVE (PTY) LTD	**SECOND RESPONDENT**

JUDGMENT

Delivered on…………………

POYO DLWATI J:

[1] On 30 August 2016, after hearing argument from both parties, Vahed J granted an order in the following terms:

‘1.That a rule nisi be and is hereby issued calling upon the respondents to show cause, if any, before this court sitting at Pietermaritzburg on 3 October 2016 at 09H30 or so soon thereafter as counsel may be heard, why an order in the following terms should not be granted:-

a. That the first respondent be and is hereby directed to comply with, and to undertake all its obligations arising from the lease concluded between the first respondent and the second respondent during or about September 2015, including the obligations to pay rental and service charges, which lease has now been assigned to the applicant.

b. That the first respondent pay the costs hereof.

2. That pending the final determination of this application the provisions of Paragraph 1 (a) above shall operate as a temporary order forthwith.’

[2] On the return date the applicant sought an extension of the rule until the finalisation of the action brought under case No.9201/16P. On the other hand, the first respondent sought an order discharging the rule with costs. The first respondent had also, on 26 August 2016, launched a counter application where it sought an order that it be exempted from complying with the provisions of the ‘lease’ pending the outcome of an action instituted by the first respondent under case No.9210/16P for the review and setting aside of the lease. It, therefore, on the return date sought for an order as prayed in its counter application.

Background

[3] During December 2014, the first respondent, represented by its erstwhile municipal manager, Mr Nkosi, entered into a lease agreement with the second respondent, represented by Xolile Zimu, over the property situated at 162 Pietermaritz Street, Pietermaritzburg. The lease commenced on 1 December 2014 and was to terminate on 30 November 2015 with a monthly rental of R152 375. It seems from the evidence presented before me that on subsequent

negotiations between Mr Nkosi and the second respondent, a further lease was entered into for the period 1 December 2015 to 30 November 2018.

[4] During November 2015 the second respondent entered into an agreement of purchase with the applicant and it purchased the property. The applicant, as a new owner of the property, was due to receive its first rental in May 2016 but it did not. The officials of the first respondent made numerous promises on payment including its acting municipal manager, Mr Hadebe, but these were not fulfilled. When payment was not received at the beginning of August 2016, despite an undertaking by Mr Hadebe on 13 July 2016, the applicant caused its legal representatives to send out a letter of demand to the first respondent for payment of the outstanding rental in the sum of R796 108.16. The first respondent, through its legal representative, responded to the letter of demand on 15 August 2016.

[5] For the first time in that letter, the first respondent advised the applicant of its intentions not to abide by the lease as it was invalid in its view as the first respondent had not followed a competitive bidding process in concluding the lease. It advised the applicant that it was in a process of having the decision to enter into the lease reviewed and set aside through a court action as that decision was an administrative action. It was also not in dispute that at the time that the application was launched, the first respondent was still in occupation of the building. Furthermore, as at the date of the application, the first respondent had not filed its review action.

Issues

[6] The applicant elected to abide the lease and sought performance of the contract in terms of clause 11 of the lease. The first respondent opposed the

application. It also filed its review action on 24 August 2016. In opposing the application, the first respondent alleged that the lease agreement in question was one of the contracts that were entered into by its previous municipal manager, Mr Nkosi, without following the first respondent's supply chain management policies. He, as a result, was suspended on allegations of financial misconduct.

[7] This was further substantiated by a report of forensic auditors, Sizwe Ntsaluba Gobodo whose view, according to the first respondent, was that the lease was subject to irregularities as it was concluded in breach of the provisions of the first respondent's supply chain management policy designed to ensure a transparent, cost effective and competitive tendering process in the public interest. It contended that the lease was not concluded pursuant to a competitive bidding process and was therefore invalid.

[8] Furthermore, the first respondent had purchased a building in Gallway Lane which was in the process of being renovated. It was therefore unnecessary for Mr Nkosi to have concluded a lease which would last another three years. According to the first respondent the reasoning to enter into a new lease was irrational as only five employees of the Integrated Rapid Public Transport Networks (IRPTN) unit were to be accommodated in the property at a cost of about R6 million. These rental rates, it was averred, were excessive compared to market related rental rates in the Pietermaritzburg city centre. It was for these reasons that the review action had been launched in order to review and set aside Nkosi's decision. It was also for these reasons that the first respondent sought to be exempted from paying any rentals to the applicant.

[9] The first respondent further alleged that as the relief sought was final in nature, especially in the absence of any undertaking by the applicant that should the decision to enter into the lease be set aside, then it would repay all

monies/rentals paid to it, the application ought to be dismissed. It contended that what the applicant sought was specific performance and therefore a mere *prima facie* right is insufficient. The first respondent contended that the specific performance demanded by the applicant can be properly adjudicated in conjunction with the review proceedings but not on an interim relief basis.

[10] It was submitted on behalf of the applicant that since the granting of the rule nisi, the first respondent had launched its action to review and set aside its decision to inter into the lease agreement with the second respondent. On that basis, it was submitted, the applicant sought an extension of the rule nisi, inclusive of the interim relief, until the finalisation of the action instituted by the first respondent. Furthermore, it was contended on behalf of the applicant that the lease was valid until set aside by the court. It was further argued that because a lot of material disputes of fact had arisen, the matter ought to be referred to oral evidence or be determined at the same time as the adjudication of the action.

Discussion and Findings

[11] In my view the relief now sought by the applicant is not final in nature now that the first respondent has launched its review proceedings. Whether that review was launched without unreasonable delay or whether there is any merit in the review is not an issue to be decided by me at this stage. The issues I must decide are the status of the lease pending the review action and whether the applicant is entitled to the extension of the interim relief pending the finalisation of the action or whether the first respondent should be exempted from complying with its obligations under the lease until the determination of the review action.

[12] It was not in dispute that the decision by Mr Nkosi to enter into the lease agreement with the second respondent is administrative action for the purposes of the Promotion of Administrative Justice Act 3 of 2000 ('PAJA'). That decision remains valid until reviewed or set aside by a court of law. This principle was enunciated in *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2004(6) SA 222 SCA para 26. Howie P with Nugent JA concurring held that until the administrator's approval (and thus also the consequences of the approval) is set aside by the court in proceedings for judicial review it exists in fact and it has legal consequences that cannot simply be overlooked.

[13] Mr *De Wet SC* on the other hand argued that the lease agreement is invalid as it was concluded without following a competitive bidding process and is unenforceable. For this proposition he relied on *Municipal Manager: Qaukeni Local Municipality and another v FV General Trading CC* 2010(1) SA 356 SCA paras 15 and 16. However, in my view, this argument is premature at this stage. The first respondent contends that the lease agreement is invalid for the reasons advanced above whilst the applicant contends otherwise. There has been no adjudication on this point and this will, I suppose, happen during the review proceedings. The lease agreement therefore remains valid.

[14] This principle has lately been confirmed by the Constitutional Court in *MEC for Health, Eastern Cape v Kirland Investments (Pty) Ltd t/a Eye & Lazer Institute* 2014(3) SA 481 (CC) para 65 where Cameron J held that:

'when government errs by issuing a defective decision, the subject affected by it is entitled to proper notice, and to be afforded a proper hearing, on whether the decision should be set aside. Government should not be allowed to take shortcuts. Generally, this means that government must apply formally to set aside the decision. Once the subject has relied on a decision, government cannot, barring specific statutory authority, simply ignore what it has

done. The decision, despite being defective, may have consequences that make it undesirable or even impossible to set it aside. That demands a proper process, in which all factors for and against are properly weighed'.

[15] To sum up therefore when an organ of state seeks to set aside its own administrative decision, PAJA applies. And when PAJA applies, litigants and the courts are not entitled to bypass its provisions and rely directly on the constitutional principle of legality, see *State Information Technology Agency Soc Ltd vs Gijima Holdings (Pty) Ltd* (641/2015) [2016] ZASCA 143 (30 September 2016) para 44.

[16] This was further emphasized by Khampepe J in *Department of Transport and others v Tasima (Pty) Ltd* (CC75/16) [2016] ZACC 39 (9 November 2016) para 147 where she held that a declaration of invalidity of an administrative action must be made by a court. Therefore, until a court is appropriately approached and allegedly unlawful exercise of public power is adjudicated upon, it has binding effect because of its factual existence. This is despite the fact that it may be objectively invalid. It follows therefore that the lease agreement remains valid until reviewed and set aside. (See also para 92 and 93 of *Kirland* above)

[17] This leads me to the next question and this is whether the applicant is entitled to the extension of the interim relief in view, as Mr *de Wet SC* had submitted, of the fact that the application brought by the applicant is one for interim interdict ordering specific performance, and not a *mandamus* as argued by Mr *Dickson SC* representing the applicant. This also entails a consideration of whether the relief sought by the applicant is final in nature.

[18] Loggerenberg et al *Erasmus Superior Court Practice* Vol 2 at D6-3describes a mandatory interdict as an order requiring a person to do some positive act to remedy a wrongful state of affairs for which he is responsible, or to do something which he ought to do if the complainant is to have his rights (eg. to demolish a building encroaching on the complainant's land). It has been said that a mandatory interdict can serve to compel the performance of a specific statutory duty, and to remedy the effects of unlawful actions already taken. See *Transnet BPK h/a Coach Express en n' ander v Voorsitter, Nasionale Vervoekommissie* 1995(3) SA 844 (T) at 847F. If the act to be performed must be carried out not by a private person but by a public official, the order is known as a mandamus.

[19] In *Zokufa v Compuscan (Credit Bureau)* 2011(1) SA 272 (ECM) the court emphasised that the most fundamental requirement for the granting of the mandatory interdict is the existence of a clear right. Furthermore, there must be a refusal to act in fulfilment of such right and the absence of no other remedy (see para 42). Even though the applicant does not seek a final interdict at this stage, I must satisfy myself that in the interim, it has established a right. I am of the view that this enquiry would have been dealt with by my brother Vahed J before granting the interim relief. What I must satisfy myself is whether the applicant has made out a case for the continuation of that relief until the review proceedings have been finalised.

[20] In my view the applicant established its *prima facie* right through the lease signed with the first respondent. That agreement is still valid until a determination has been made on its validity. It follows that the first respondent must fulfil its obligations in terms of that agreement. It is refusing to do so. It was in occupation of the building until somewhere in the middle of the proceedings. There is nothing stopping it from utilising these premises until the

review has been dealt with. I am therefore satisfied that a case has been made out for the extension of the rule nisi pending the finalisation of the review action. The balance of convenience favours the extension of the rule nisi. It follows that I make no order to the counter applications.

Order

[17] In the result I make the following order:

(a) The rule nisi inclusive of the interim relief is extended until the finalisation of the review action under case no: 9210/16P;

(b) There is no order made to the counter application;

(c) The costs of the hearing are reserved and are to be determined by the court hearing the review action.

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POYO DLWATI J

APPEARANCES

Date of Hearing	: 10 October 2016
Date of Judgment	: 5 December 2016
Counsel for Applicant	: Adv Dickson SC
Instructed by	: PKX Attorneys
Counsel for First Respondent	: Adv A De Wet SC
Instructed by	: Matthew Francis Inc.