



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

Case no: D11098/2021

In the matter between:

**GREAT AFRO TRADING CC
t/a SOMERSET COLD STORAGE**

APPLICANT

and

THE PORTS REGULATOR OF SOUTH AFRICA

FIRST RESPONDENT

TRANSNET PORTS AUTHORITY OF SOUTH AFRICA SECOND RESPONDENT

ORDER

The following order is made:

1. The application is dismissed with costs, such costs to include costs of one counsel on scale B.

JUDGMENT

Sibiya AJ:

Introduction

[1] The applicant, Great Afro Trading CC, seeks the review and setting aside of a ruling made by the first respondent, the Ports Regulator of South Africa (Ports Regulator) dated 05 November 2021. The contested ruling, concerns appeal proceedings before the Ports Regulator in which it found that it has jurisdiction to determine the validity of administrative action taken by the second respondent, Transnet Ports Authority of South Africa (Transnet).

[2] The application was launched in two parts. Part A, which sought to interdict the respondents from continuing the proceedings under case no: RA2020/11/0020, was dealt with in the urgent court on 2 December 2021 and adjourned *sine die*. This judgment is in respect of Part B.

[3] The applicant, in the notice of motion, seeks an order in the following terms:

- “1. The first respondent’s ruling dated 5 November 2021 finding that the first respondent has jurisdiction to determine the lawfulness of administrative action is reviewed and set aside;
2. The ruling of the first respondent dated 5 November 2021 is replaced with:
“The first respondent has no jurisdiction to determine the validity of administrative action;
3. Further or alternative relief as is just and equitable in terms of section 8 of the Promotion of Administrative Act 3 of 2000.
4. Costs against the Respondents jointly and severally in the event of their opposition.”

Background

[4] The essential facts giving rise to the dispute, which are largely common cause, can be summed up as follows. The applicant and Transnet entered into a short-term lease agreement during November 2003. The lease pertained to immovable property at Maydon Wharf, Port of Durban. This property belongs to Transnet. The lease agreement was initially for a period of six months, commencing in December 2003.

Upon the expiry of the six months, the applicant remained in occupation of the property on a month-to-month lease.

[5] Between 2009 to 2017 the applicant and Transnet engaged in negotiations in respect of Transnet's provision of a long-term lease agreement over the property. To this effect, the parties exchanged numerous letters. Reference will only be made to the letters which have a bearing on the issues raised in the review application. Transnet, by letter dated 29 May 2017, informed the applicant of its intention to conduct a bid process in respect of leased properties at the Port of Durban, including those leased by the applicant.¹ Dissatisfied, the applicant lodged an appeal with the Ports Regulator, challenging Transnet's decision. I shall refer to this appeal as the 'first appeal'.

[6] The applicant and Transnet reached an amicable settlement while the first appeal was pending. This settlement is central to the present dispute. It is thus necessary to set out in some detail the terms of the settlement, and the factual contentions that surround it. I have had regard to the correspondence exchanged between the parties that records the settlement they reached. The terms of the settlement are to be found in two letters, one from Transnet's attorneys, and the other in response, from the applicant's attorneys. On 13 March 2018 Transnet's attorneys addressed the first letter to the applicant's attorneys in which they confirmed an 'amicable settlement'. Transnet agreed to draft a lease agreement and an Acknowledgement of Debt, while the applicant would withdraw the first appeal. This arrangement is evidenced by the applicant's attorneys' letter dated 17 April 2018, which confirmed the appeal's withdrawal based on Transnet's commitment to conclude a new long-term lease on mutually agreed terms and conditions.

[7] On 30 April 2019, the acting Port Manager, Ms Nokuzola Nkowane, sent a letter to the applicant, the contents of which advised the applicant that Transnet was in the final stages of drafting a long-term lease. Because of the import of this letter, and its importance, it is necessary to quote it in full.

¹ Page 106 of the index to application case: RA2020/11/0020.

[8] It reads:

'This letter serves to confirm that TNPA is in the final stages of drafting a twenty-year lease for Great Afro Trading cc, which lease is envisaged to be signed pursuant to the successful outcome of Transnet Governance Procedures which are currently underway.

Transnet has been made aware that Great Afro Trading has applied for bank financing for their new refrigeration plant.

In the interim, whilst the outcome of the aforementioned governance processes are awaited, the existing lease agreement signed in 2003 remains in force on a month to month basis with all the same terms and conditions'²

[9] Some time elapsed and the applicant, not having received a draft lease agreement, addressed a letter on 5 June 2020 to the Transnet Group Chief Executive. The contents of this letter are not before me, but it appears to have enquired about the provision of a long-term lease. Transnet responded by letter dated 25 August 2020. In this letter Transnet purported to terminate the month-to-month lease that was in place. The following was stated in this regard:

'It is regrettable that the lease with Great Afro which expired in 2003 has continued on a month-to-month basis. While we have taken note of the history and attempts to secure a long-term lease, these are unfortunately not supported by the leasing governance frameworks. TNPA is therefore unable to grant any lease without complying with the requirements of an open, fair and transparent process.

Against the above considerations, TNPA hereby issues to Great Afro a twelve (12) months' notice of termination of the month-to-month lease, effective from 01 September 2020 to 01 October 2021. Thereafter, TNPA will be proceeding with an open and competitive tender for the site, in which you are welcome to participate.'³

[10] Aggrieved by this turn of events, the applicant, on 17 November 2020, lodged an appeal with the Ports Regulator in terms of s 46 of the National Ports Act 12 of 2005 (Ports Act). This appeal ('second appeal') is the subject matter of the present proceedings. In its founding papers in the second appeal, the applicant sought an order setting aside the decision of Transnet to terminate the month-to-month lease

² Page 122 of the Index to application under case: RA2020/11/0020.

³ Page 36 of the index to application under case: RA2020/11/0020.

agreement. It also sought an order directing that Transnet provide it with a written long term lease agreement for a period of twenty years.

[11] The second appeal was opposed by Transnet who raised two preliminary points in its answering affidavit. First, it denied that it was bound to conclude a lease agreement with the applicant. It contended that the 'in principle' agreement it reached with the applicant was subject to the approval of Transnet's governance structures. Second, and in the alternative, it contended that if it were bound by the settlement agreement, it could not lawfully implement that agreement. This was so because any lease agreement would have to comply with the provisions of the Ports Act. In particular, the applicant would be required to obtain a license to operate a port service as contemplated in s 57 of the Ports Act.⁴

[12] The applicant's response was to raise a point *in limine*. It contended that Transnet's defence, in effect, amounted to a collateral challenge. The applicant contended that Transnet was not permitted in law to resile from the settlement agreement. If the settlement agreement was unlawful, as Transnet contended, then only a court of law could set it aside. This is because only a court of law enjoys the power to review the lawfulness of an agreement, reached by an organ of state, on the principle established in *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others*.⁵ I shall refer to this principle, compendiously, as the *Oudekraal* principle.

The ports regulator's ruling

⁴ See para 27 and 28 of the Second Respondent's opposing affidavit where the following was argued:
 '27 . . . even if the Respondent is contractually bound by the aforementioned "in principle" settlement agreement to conclude a lease with the Appellant, (which is denied) then the Respondent contends that 27.1 If such lease agreement were, itself, to authorise the Appellant to operate a port terminal from the premises, it would fall foul of section 56(5) of the Ports Act read with section 56(1). That is because a procedure which was "fair, equitable, transparent, competitive and cost effective", was not followed;
 27.2 If the Appellant seeks to use the premises for a purpose other than providing a port service, this would offend against the provisions of section 11(1) of the Ports Act which provides that the main function of the Authority is, inter alia, to own, manage, control and administer ports to ensure efficient and economic functioning. A lease for a purpose other than providing for a port service would not ensure sufficient and economic functioning of the port.
 28. It is accordingly submitted that the in principle settlement agreement cannot lawfully be given effect to. Therefore, the notice which the Respondent gave to the Appellant to vacate the premises, is perfectly lawful and it should be given effect to. . . .'

⁵ *Oudekraal Estates (Pty) Ltd v City of Cape Town* [2004] ZASCA 48; 2004 (6) SA 222 (SCA) ('*Oudekraal*').

[13] The Ports Regulator issued a written ruling on the question of its jurisdiction on 5 November 2021. The Ports Regulator dismissed the applicant's point *in limine* and held that it had jurisdiction to determine the lawfulness or unlawfulness of the settlement agreement. The Ports Regulator reasoned that it enjoyed a wide discretion in terms of s 46(2) of the Ports Act to determine the consequences that flow from an invalid administrative act. This included the power to set aside an agreement reached by Transnet or to make any other competent order. The Ports Regulator considered itself bound by the judgment of the Constitutional Court in *Aquila Steel (South Africa) (Pty) Ltd v Minister of Mineral Resources and Others*⁶ in concluding that the requirement that an allegedly unlawful administrative act be challenged 'in the right proceedings' was broad enough to encompass a statutory body, such as itself, that is entrusted to adjudicate upon disputes within its statutory remit. The Ports Regulator in this regard, reasoned as follows:

'...the suggestion that the Ports Regulator does not have jurisdiction to consider a collateral challenge is entirely inconsistent with the concept that the appeal is a "wide appeal". It also runs contrary to the legislature's stated intention that the Ports Regulator must exercise regulatory functions and monitor the activities of the respondent.

In our view, it is inconceivable that the legislature would preclude the Ports Regulator from pronouncing upon the lawfulness of the conduct of the respondent. If that were so, it would mean that very few disputes concerning the conduct of the respondent would find their way to this body. That hardly accords with the express powers vesting on this body which are wide enough to encompass the investigation and determination of any conduct that falls within the provisions of the Act.

The very power reposing in the Ports Regulator requires that it determines whether any conduct of the respondent accords with the Act. If such conduct is at odds with the Act, then the Ports Regulator is perfectly entitled to make such a determination and conclude that such conduct is unlawful. By parity of reasoning, it logically follows that where the respondent's conduct falls short of its statutory obligations, then the Ports Regulator is similarly entitled to say so. Such pronouncement of unlawfulness is inextricably part of the statutory powers that vest in this body.

Consequently, it would be odd if the Ports Regulator were denuded of its statutory powers to determine the lawfulness of the respondent's conduct towards ports users. The interpretation

⁶ *Aquila Steel (S Africa) (Pty) Limited v Minister of Mineral Resources and Others* [2019] ZACC 5; 2019 (4) BCLR 429 (CC); 2019 (3) SA 621 (CC) at para 95.

relied upon by the appellant has no support in the statutory provisions that govern the Ports Regulator, nor does it find favour with the authorities that we have discussed above.’

[14] I turn now to address the submissions made before me, and the applicable law, in light of the factual contentions set out above.

The review

[15] Counsel for the applicant, *Mr Veerasamy*, submitted that the Port Regulator erred in finding that it has jurisdiction to determine the lawfulness of Transnet’s administrative action. He averred that it is only a High Court that has jurisdiction to adjudicate a collateral challenge raised by an organ of state. He contended that if the legislature wished for the Ports Regulator to have a similar status to that of a High Court, it would have legislated in specific terms as it did when it established the Competition Appeal Court. Section 36 of the Competition Act 89 of 1998 makes it clear that the Competition Appeal Court is a court of law, and that its status is similar to that of a High Court. In support of the argument that the Ports Regulator is ousted from exercising reviewing powers, *Mr Veerasamy*, submitted that the Ports Regulator as a Tribunal is in a similar position as the Competition Tribunal. He referred the court to the Constitutional Court decision of *The Competition Commission of SA v Group Five Construction Ltd.*⁷ This case established that the Competition Tribunal does not have powers to review an administrative action in terms of PAJA and also to conduct legality reviews. It is the Competition Appeal Court that enjoys the power to judicially review administrative action, and that is because it is a court of law.

[16] Counsel for Transnet, *Mr Pammenter*, agreed with *Mr Veerasamy*’s submission that the Ports Regulator does not have power to conduct reviews brought before it in terms of PAJA. The Ports Regulator was not established for that purpose, unlike a court of law. On the question of whether the Ports Regulator has the powers to conduct a legality review, *Mr Pammenter* submitted that the Ports Regulator is a creature of statute and thus reliance should be had to the provisions of the Ports Act that established it. He averred that the Ports Regulator, by being empowered to monitor the activities of Transnet in order to ensure that Transnet performs its functions in

⁷ *Competition Commission of South Africa v Group Five Construction Ltd* [2022] ZACC 36; 2023 (1) BCLR 1 (CC); [2023] 1 CPLR 1 (CC).

accordance with the Ports Act, as provided in s 30(1)(c), is in fact exercising a legality review of Transnet's administrative action.

[17] In response to *Mr Veerasamy's* submission that the legislature would have legislated in specific terms if it wished to afford the Ports Regulator reviewing powers, *Mr Pammenter* submitted that it is not always the case that the legislature would specifically use the words "reviewing powers" when it affords a Tribunal such powers. He averred that a cue can be taken from the provisions of the Special Investigating Units and Special Tribunals Act 74 of 1996 ('SIU Act') for which the legislature did not legislate in specific terms to afford the Special Tribunal its reviewing powers. He stated that the Special Tribunal attains its reviewing powers from s 8 of the SIU Act. He averred that the wide language employed in s 8(2) of the SIU Act, namely "any civil proceedings", points to the Special Tribunal's jurisdiction to conduct legality reviews. *Mr Pammenter* submitted further that the Ports Regulator was correct in finding that it has jurisdiction to determine the lawfulness of Transnet's administrative action due to the language employed in s 46(2) of the Ports Act. He concluded that the powers granted in s 46(2) are precisely the same powers a High Court has when it adjudicates a review of a matter before it.

Discussion

[18] The *Oudekraal* doctrine requires that an administrative action that is alleged to be invalid should be challenged in the right forum. The allegedly unlawful administrative action must be challenged by the right actor in the right proceedings. Until that occurs, for reasons that uphold the rule of law, the administrative action stands.⁸ This is because organs of state are not permitted to engage in self-help, and their decisions are presumed to be lawful until set aside by a competent forum. What then are the 'right proceedings' before which the administrative action of an organ of state may be challenged?

[19] *Mr Pammenter* contended that the 'right proceedings' are not confined to proceedings before a court of law. He submitted that the 'right proceedings' include proceedings before a tribunal that is empowered to review the lawfulness of

⁸ See *Aquila Steel* above fn5 para 95.

administrative action taken by an organ of state. There is support for this proposition in the judgment of the Constitutional Court in *Ledla Structural Development (Pty) Ltd and others v Special Investigating Unit*.⁹ In *Ledla* the Constitutional Court held that a Special Tribunal is not a court of law, and hence it is not a tribunal as contemplated by PAJA. Nonetheless, it found that a Special Tribunal enjoys the power to conduct a legality review. The Constitutional Court found that this power was to be found in s 8 of SIU Act, which conferred a broad remedial jurisdiction upon a Special Tribunal to adjudicate upon any civil proceedings brought before it by the Special Investigating Unit.

[20] The powers of the Ports Regulator are to be found in the Ports Act. Two provisions are of particular relevance to the present dispute. Section 30(1)(c) of the Ports Act empowers the Ports Regulator to 'monitor the activities of the Authority to ensure that it performs its functions in accordance with this Act'. Section 46(2) provides that after considering an appeal, the Ports Regulator must: '(a) confirm, set aside or vary the decision; or (b) substitute the decision of the Authority for its own'.

[21] If I am to accept the applicant's submission that it is only a High Court that is empowered to determine the validity of Transnet's administrative action, it will mean the Ports Regulator is ousted from exercising its oversight function as provided for in s 30(1)(c). As I see it, the words used in s 30(1)(c) and s 46(2) are clear enough to provide a sensible interpretation of the legislature's intention to afford the Ports Regulator reviewing powers. This is the case even where Transnet has not filed a counter-application to review and set aside its own invalid decision.

[22] In *Gobela Consulting CC v Makhado Municipality*,¹⁰ the Supreme Court of Appeal (SCA) found that the High Court was, in the absence of a counter-application seeking the review and setting aside of the contract concluded between the appellant and the municipality, entitled to find that the contract in question was invalid or unlawful. In this regard, the SCA reasoned as follows:

⁹ *Ledla Structural Development (Pty) Ltd and Others v Special Investigating Unit* [2023] ZACC 8; 2023 (6) BCLR 709 (CC); 2023 (2) SACR 1 (CC) para 65 ('*Ledla*').

¹⁰ *Gobela Consulting CC v Makhado Municipality* [2020] ZASCA 180 para 21.

'It is clear from the court a quo's judgment that it took into account that despite the absence of a frontal challenge in the form of a counter-application, the validity and lawfulness of Gobela's appointment were squarely raised in the pleadings. Another important consideration in considering whether the court a quo was justified in entertaining the municipality's collateral challenge is that by not declaring the contract invalid and unlawful, the untenable result would be that the court would be giving legal sanction to the very result which s 217 of the Constitution and other all procurement-related prescripts sought to prevent. . .'

(Footnotes omitted.)

[23] In my view, the Ports Regulator, by virtue of the provisions of ss 30(1)(c) and 46(2) of the Ports Act, enjoys the power to conduct a legality review. It is empowered to monitor the activities of Transnet. This necessarily entails the power to determine whether Transnet has acted lawfully. To find that Transnet acted unlawfully is to conduct a legality review. This conclusion is fortified by the provisions of s 46(2). The Ports Regulator is empowered, after considering an appeal, to 'set aside' the decision of Transnet. This power to set aside a decision is a remedial power exercised by a court of law when it conducts a review. There is no reason in principle why these powers, when conferred upon the Ports Regulator, should not include the power to conduct a legality review, when such a review falls within the powers conferred upon the Ports Regulator to monitor the activities of Transnet. This interpretation accords with a purposive reading of the Ports Act, and avoids the anomalous result that the Ports Regulator would be denuded of the power to effectively exercise its oversight function in terms of s 30(1)(c) of the Ports Act.

Conclusion

[24] For these reasons, I find that the Ports Regulator, in its ruling dated 5 November 2021, correctly dismissed the applicant's preliminary objection to the Port Regulator's jurisdiction to conduct a legality review of Transnet's administrative action. There is no need to deal with s 8 of PAJA given the order I am about to grant. I find that the Ports Regulator has jurisdiction to determine the lawfulness of Transnet's administrative action as envisaged in ss 30(1)(c) and 46(2) of the Ports Act.

[25] It is trite that costs follow a successful party. In determining the scale of costs to grant, I have considered that the matter was not complex to warrant the employment of two counsel. I am therefore granting costs of one counsel.

Order

[26] Accordingly, the following order is made:

1. The application is dismissed with costs, such costs to include costs of one counsel on scale B.

B P SIBIYA

Acting Judge of the High Court
Kwazulu-Natal Division, Durban

Appearances

For the applicant: I Veerasamy
Instructed by: Mooney Ford Attorneys., Umhlanga.

For the second respondent: J Pammenter SC (with M Mazibuko)
Instructed by: TKN Incorporated., Durban.

Heard: 24 July 2024

Delivered: 14 October 2024