THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Case number : 44/03
Reportable

In the matter between :

A BULLOCK NO & 2 OTHERS — Appellants

and

PROVINCIAL GOVERNMENT OF
NORTH WEST PROVINCE — First Respondent

KINGSLEY JACK WHITEAWAY SEALE — Second Respondent

CORAM : HOWIE P, CONRADIE, CLOETE JJA, JONES, SOUTHWOOD AJJA

HEARD : 26 FEBRUARY 2004

DELIVERED :

Summary: The disposal of a right in land vested in an organ of State may be administrative action as contemplated in s 33, read as set out in item 23 of schedule 6, of the Constitution. Standing for the purpose of setting such a decision aside and for fair administrative action, decided.

JUDGMENT

CLOETE JA

CLOETE JA

[1] The present appeal raises the question whether the disposal by an organ of State of a right in property vested in it, may be administrative action; and if so, who has standing to approach a court for different forms of relief.

[2] The appellants are the trustees of the Transvaal Yacht Club ('the TYC'). The TYC is the owner of immovable property on the northern side of the Hartebeestpoort Dam. The second respondent, an individual, owns immovable property which is almost adjacent to the TYC's property on the latter property's western side. On the southern boundary of both properties is the northern foreshore of the dam, ownership of which is vested in the first respondent, the Provincial Government of the North West Province.

[3] The TYC has operated a yacht club on its property continuously since 1922. It has the right to use the foreshore immediately to the south of its property. It has also since 1969 occupied the property immediately to the south of the second respondent's property (to which I shall refer, for the sake of convenience, as 'the relevant foreshore') in terms of a series of leases concluded on behalf of the first respondent's predecessors in title.

The first lease was concluded on 6 June 1969. The final lease expired on 31 July 2001. The later leases were for periods of 9 years and 11 months.

[4] Whilst in occupation of the relevant foreshore, the TYC erected a number of improvements thereon. According to the appellants, these improvements 'are vital to the continued operation of the yacht club'. The TYC accordingly wished to conclude a further lease with the first respondent entitling it to continue to occupy the relevant foreshore. To this end, in December 1999 representatives of the TYC entered into protracted negotiations with the Department of Water Affairs and Forestry and thereafter, representatives of the first respondent.

[5] Unbeknown to the representatives of the TYC, the officials of the Department of Water Affairs and (until a late stage) the representatives of the first respondent, the Premier of the first respondent had already on 29 July 1999 approved the registration of a servitude over the relevant foreshore in favour of the property owned by the second respondent. The Premier's decision was based on legal advice that the second respondent was entitled to the servitude because of the provisions of a contract with one Schoeman entered into by the Government on 5 January 1918, part of which was embodied in a notarial contract registered on 3 October 1922 in the Register of Miscellaneous Contracts. According to the advice received by the Premier, Schoeman's rights in the notarial contract had devolved

upon the second respondent. Ultimately, the first respondent informed the TYC in a letter dated 12 October 2001 that it had decided not to enter into a further lease. An official of the first respondent had, in the meantime, on 18 April 2001, executed a power of attorney for registration of the servitude and a notarial deed of servitude had been executed on 12 July 2001.

[6] The appellants brought motion proceedings for an order setting aside the decision of the Premier to register the servitude and remitting the question whether such a servitude should be granted, to the first respondent for reconsideration after the TYC had been afforded an opportunity to make representations in this regard. The appellants relied for this relief on the provisions of the Promotion of Administrative Justice Act, 3 of 2000 ('the Act'). They averred that the TYC had had a legitimate expectation that the most recent lease agreement in respect of the relevant foreshore would be renewed, or at least that the TYC would be afforded a proper hearing before a decision was taken by the first respondent whether or not to renew such lease. The court below (Hartzenberg J) concluded that the advice given to the Premier was correct and that because the decision of the Premier was to give effect to a contractual obligation owed by the first respondent to the second respondent, the Premier's decision did not constitute administrative action

and was not reviewable under the Act. The TYC has appealed to this court with the leave of the court below.

[7] The Act only came into operation on 29 November 2000 i.e. sixteen months after the Premier's decision had been taken. Accordingly, any rights which the appellants had to have that decision set aside have to be sought in item 23(2)(b) of schedule 6 to the 1996 Constitution, which provides that at the relevant time s 33(1) and (2) of the Constitution had to be read as follows:

'Every person has the right to ─

(a) lawful administrative action where any of their rights or interests is affected or threatened;

(b) procedurally fair administrative action where any of their rights or legitimate expectations is affected or threatened;

(c) be furnished with reasons in writing for administrative action which affects any of their rights or interests unless the reasons for that action have been made public; and

(d) administrative action which is justifiable in relation to the reasons given for it where any of their rights is affected or threatened.'

[8] The appellants' counsel submitted that the grant of the power of attorney for the registration of the servitude in itself amounted to an administrative decision which could be impugned in terms of the provisions of the Act, because it went beyond the authority which the Premier's decision conferred. The submission was that the Premier had

merely decided to grant a servitude in favour of the second respondent over the relevant foreshore whereas the power of attorney was to register an exclusive servitude in favour of the second respondent. There is no merit in this submission. The relevant part of the decision of the Premier read:

'I in my capacity as constitutionally designated chief executive authority of the Province of the North-West, hereby approve of the registration of the three outstanding servitudes, as described in the legal opinion of Adv. J P Verster (dated 28 May 1998) subject to the conditions as stipulated in Notarial Agreement 99/1922M, dated 27 September 1922.'

The opinion was not annexed to the papers but a summary was. That summary said that a servitude for exclusive use of the relevant foreshore should be registered in favour of the owner of the second respondent's property. There is no reason to believe that the Premier intended anything else.

[9] The right to which the Premier sought to give effect by registering the servitude was a right given to Schoeman. That right was a right of access to the Hartebeestpoort Dam for the purpose of boating on the dam and fishing therein. Even assuming that the right could have been transmitted to the second respondent through successive cessions by Schoeman to his sons, and by the latter to the second respondent, which is the first respondent's case, that right of access cannot translate into an exclusive

right to use the entire area of the relevant foreshore. The advice given to the Premier by counsel briefed for that purpose was that the second respondent 'is entitled to the exclusive use' of the relevant foreshore. The decision by the Premier was accordingly based on wrong advice. It is also plain from the advice given by counsel that the Premier did not decide to grant the servitude to the second respondent in substitution for the right he alleged he had acquired from Schoeman, as contended on appeal by counsel representing the first respondent: The decision was taken because the Premier was advised, and obviously believed, that the second respondent was entitled to the servitude.

[10] The essential question is therefore whether the Premier's decision to grant the servitude amounted to administrative action as contemplated in s 33 of the Constitution quoted above. The factors relevant to the determination of the question were summarised by this court in *Cape Metropolitan Council v Metro Inspection Services (Western Cape) CC & Others* 2001 (3) SA 1013 (SCA) paras [16] and [17]:

'The section is not concerned with every act of administration performed by an organ of State. It is designed to control the conduct of the public administration when it performs an act of public administration i e when it exercises public power (see *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 2000 (1) SA 1 (CC) ('*SARFU*') at para [136] and *Pharmaceutical Manufacturers Association of SA and Another: In re Ex parte President of the Republic of South Africa*

and Others 2000 (2) SA 674 (CC) at paras [20], [33], [38]–[40]). In paras [41] and [45] of the *Pharmaceutical Manufacturers Association* case Chaskalson P said:

> "[41] Powers that were previously regulated by common law under the prerogative and the principles developed by the courts to control the exercise of public power are now regulated by the Constitution…."
>
> "[45] Whilst there is no bright line between public and private law, administrative law, which forms the core of public law, occupies a special place in our jurisprudence. It is an incident of the separation of powers under which courts regulate and control the exercise of public power by the other branches of government. It is built on constitutional principles which define the authority of each branch of government, their interrelationship and the boundaries between them…. Courts no longer have to claim space and push boundaries to find means of controlling public power. That control is vested in them under the Constitution, which defines the role of the courts, their powers in relation to other arms of government and the constraints subject to which public power has to be exercised…."

[17] It follows that whether or not conduct is 'administrative action' would depend on the nature of the power being exercised (*SARFU* at para [141]). Other considerations which may be relevant are the source of the power, the subject-matter, whether it involves the exercise of a public duty and how closely related it is to the implementation of legislation (*SARFU* at para [143]).'

I would merely add the following remarks of Chaskalson P in *SARFU* para [143]:

'Difficult boundaries may have to be drawn in deciding what should and what should not be characterised as administrative action for the purposes of s 33. These will

need to be drawn carefully in the light of the provisions of the Constitution and the overall constitutional purpose of an efficient, equitable and ethical public administration. This can best be done on a case by case basis.'

[11] The *Cape Metropolitan Council* case held that on the facts the decision by the appellant, a public authority, to cancel a contract was not administrative action as the appellant had not negotiated the right to cancel from a position of superiority or authority by virtue of its being a public authority; nor, in cancelling the contract, was it performing a public duty or implementing legislation (para [18]). These aspects were emphasized, and the decision very much limited to the facts, in the subsequent decision of this court in *Logbro Properties CC v Bedderson NO & Others* 2003 (2) SA 460 (SCA) paras [9] and [10]. *Cape Metropolitan Council* was distinguished from the facts in *Logbro* for the reason that in *Logbro* the province itself dictated the tender conditions and was accordingly acting from a public position of superiority or authority (para [11]).

[12] In *Logbro* the decision of the majority in *Mustapha & Another v Receiver of Revenue Lichtenburg & Others* 1958 (3) SA 343 (A) was overruled and the dissenting judgment of Schreiner JA was approved (paras [12] and [13]). The majority in *Mustapha* held that since a statutory permit to occupy land was embodied in a contract, the termination of the permit constituted the exercise of an absolute and unqualified

contractual power. Schreiner JA on the other hand held at 347D-G, in the passage approved in *Logbro* (para [12]):

'Although a permit granted under s 18(4) of Act 18 of 1936 has a contractual aspect, the powers under the subsection must be exercised within the framework of the Act and the regulations which are themselves, of course, controlled by the Act. The powers of fixing the terms of the permit and of acting under those terms are all statutory powers. In exercising the power to grant or renew, or to refuse to grant or renew, the permit, the Minister acts as a State official and not as a private owner, who need listen to no representations and is entitled to act as arbitrarily as he pleases, so long as he breaks no contract. For no reason or the worst of reasons the private owner can exclude whom he wills from his property and eject anyone to whom he has given merely precarious permission to be there. But the Minister has no such free hand. He receives his powers directly or indirectly from the statute alone and can only act within its limitations, express or implied. If the exercise of his powers under the subsection is challenged the Courts must interpret the provision, including its implications and any lawfully made regulations, in order to decide whether the powers have been duly exercised….'

[13] It was not suggested that the Premier was unable to take the decision to grant the servitude in the absence of legislation which specifically empowered him to do so: *Minister of Public Works and Others v Kyalami Ridge Environmental Association and Another (Mukhwevo intervening*) 2001 (3) SA 1151 (CC) paras [40], [41] and [55]. The submission on behalf of the first respondent was that the decision by the Premier was taken by an organ of State in its capacity as owner of the

land in question, and the State was accordingly in no different position to that of any landowner who may freely grant or refuse to grant rights in property vested in such private owner. It was accordingly submitted that the decision is not capable of constituting administrative action.

[14] I emphatically disagree. The North West Province is landlocked. So is the adjacent province of Gauteng, the most populous province of South Africa, which has the Hartebeestpoort Dam close to its western border. The dam is a valuable recreational resource available to the public at large. Ownership of the foreshore is vested in an organ of State, the first respondent. A decision by the first respondent to grant, in perpetuity, a right over a part of the foreshore to one property owner to the exclusion of all other persons, significantly curtails access to that resource by the public. In my view, for the reasons which follow, the decision to grant the servitude can and must be classified as administrative action and therefore liable to be set aside by a court at the suit of a person who has the standing to claim such relief.

[15] A decision of an organ of State may relate to question of policy, and the policy itself may not be open to judicial scrutiny: *SARFU* paras [142] and [143]; *Permanent Secretary, Department of Education and Welfare, Eastern Cape and Another v Ed-U-College (PE) (Section 21) Inc* 2001 (2) SA 1 (CC) para [18]. The decision of the first respondent to grant the

servitude does not fall into this category. The first respondent did not purport to dispose of the right pursuant to a policy decision taken in the light of broad policy considerations (contrast *Logbro* paras [19] and [20]); it disposed of the right because it thought it was obliged to do so.

[16] If legislation has empowered a functionary to make a decision, in the public interest, the decision should be made on the material facts which should have been available for the decision properly to be made: *Pepkor Retirement Fund and Another v Financial Services Board and Another* 2003 (6) SA 38 (SCA) para [47]. There is no reason why the same does not apply to a decision by an organ of State which is performing a function which affects the public interest and which cannot be categorized as a policy decision.

[17] One of the ways in which the courts have in the past controlled, and will continue to control, the exercise of public power is to examine whether the organ of State which has exercised such power has complied with the requirements of the legislation which governs such exercise. That was the approach of Schreiner JA in *Mustapha*. But because of the new constitutional dispensation, and for the reasons given by Chaskalson P in the *Pharmaceutical Manufacturers Association* case quoted in the *Cape Metropolitan Council* case in para [10] above, a court is not confined to this approach.

[18] In the present matter, the Premier was advised that the first respondent was obliged to grant the servitude over the disputed foreshore to the second respondent. That advice was wrong. The decision to grant the servitude was accordingly not justifiable in relation to the reasons given for it, as contemplated in para (d) of the transitional provisions of the Constitution quoted above.

[19] According to the wording of paragraph (d) of the transitional provisions, administrative action which falls into the category contemplated in that paragraph can be challenged only by a person whose 'rights' are affected. By contrast paragraphs (a) and (c) contemplate 'rights or interests' which are affected and paragraph (b) contemplates 'rights or legitimate expectations'. These differences cause problems in interpretation, as academic authors have pointed out (see eg Chaskalson *et al, Constitutional Law of South Africa* para 25.3; Davis *et al, Fundamental Rights in the Constitution* p 155ff). In my view, the concept of 'rights' in paragraph (d) should not be restricted to rights enforceable in a court of law (*cf Premier, Mpumalanga and Another v Executive Committee, Association of State-Aided Schools, Eastern Transvaal* 1999 (2) SA 91 (CC) para [31] n9 where the Constitutional Court said of s 24 of the Interim Constitution, which was preserved in the transitional provisions of the 1996 Constitution quoted above: 'It may be that a broader notion of "right"

than that used in private law may well be appropriate'). The present facts provide a good example of why this must be so. No-one, save possibly the second respondent who may have succeeded to the rights of Schoeman, has a right, strictly so called, to use the disputed foreshore. If a narrow interpretation of 'rights' in paragraph (d) is adopted, the decision of the first respondent, based as it is on an incorrect premise, could not be challenged, with consequent lack of accountability on the part of the first respondent, despite prejudice to those affected by the decision. In my view the TYC, as the owner of a stand in the township of Schoemansville which is situated on the northern shore of the dam, and therefore a party which would be concerned with the use to which the disputed foreshore is put, had a sufficient right in the broader sense envisaged in paragraph (d), and therefore the necessary standing, to mount a constitutional challenge to the decision in question and have it set aside in a court of law.

[20] Counsel representing the TYC ultimately did not seek an order requiring the first respondent to allow the TYC to make representations to it before it decided whether or not to renew the TYC's lease, although this was the basis upon which the TYC initially sought review of the Premier's decision to grant the servitude. This aspect was fully canvassed in the papers. In the circumstances it would be desirable to decide the question in order to give a guideline to the first respondent as to the procedural

parameters within which it must make any decision in regard to the disputed foreshore and to obviate further litigation.

[21] The same broad interpretation of 'rights' adopted above in respect of paragraph (d) is not necessarily justified in terms of paragraph (b) of the transitional constitutional provisions. It is one thing to be accorded standing to have an administrative decision, which is not justifiable, set side, and another to be heard before an administrative decision is taken (*cf Ed-U-College* paras [20] and [22]). The same policy considerations do not necessarily apply to both situations and the requirement of accountability (contained in s 41(1)(c) of the Constitution) is not common to both to the same extent. I find it unnecessary to seek to define the concept of 'rights' as contemplated in paragraph (b) because in my view the TYC had a legitimate expectation to be heard if the first respondent was contemplating not renewing the lease. That legitimate expectation flows from the following facts.

[22] The TYC had been the lessee of the relevant foreshore for thirty years in terms of successive leases. In that time it had constructed substantial improvements which would be difficult (to put it at its lowest) to remove and which included a crane attached to a concrete foundation used to hoist yachts with fixed hulls in and out of the dam; and the construction of a higher and a lower embankment with retaining walls and

(in the case of the lower embankment) a concrete apron. The leases subject to which the TYC occupied the relevant foreshore provided that:

'10. The LESSEE may improve the premises for the purposes indicated in clause 4 [yachting and related purposes]. All improvements, e.g. alterations, additions, excavations, etc. to the premises shall be subject to the prior written approval of the LESSOR and shall be at the expense of the LESSEE. The LESSOR shall have the right to remove all unapproved improvements upon the premises and recover his expenses from the LESSEE.

12. Unless the LESSEE and the LESSOR agree otherwise in writing, all approved improvements shall become the property of the LESSOR at the termination of this agreement and the LESSOR shall not be liable to pay compensation to the LESSEE and/or any other person or body.'

But it does not follow that these clauses were a bar to the TYC being heard as to whether its occupancy should be renewed. On the contrary, the nature and scale of the improvements in themselves go a long way to establishing a legitimate expectation of the nature for which the TYC contended in both the founding and the replying affidavits delivered on its behalf. The improvements may have been approved in writing by the first respondent's predecessors in title (the affidavits are silent on this point) but if they were not, they were obvious for all to see and there is no suggestion that there was ever any objection to them. And then finally, and perhaps most importantly, negotiations for a new lease were far advanced ─ a draft lease had been forwarded to the TYC (although the amount of

the rental had been left blank as the parties had not yet reached agreement on this point). It is not relevant that one branch of government did not appreciate that another branch of government had already taken a decision inimical to the renewal of the lease: The legitimate expectation that the TYC would be heard, had been created. The fact, emphasised by the first respondent's counsel, that the negotiations for the renewal of the lease took place after the Premier had made his irregular decision to grant the servitude, is irrelevant because the TYC does not have to rely upon its legitimate expectation to have that decision set aside.

[23] For these reasons I conclude that under the circumstances of this case, the dictates of fairness require that the TYC be afforded the opportunity to make representations to the first respondent before a decision whether or not to renew the lease is made: *Administrator Transvaal and Others v Traub and Others* 1989 (4) SA 731 (A) at 761A–G; *Premier, Mpumalanga* paras [32] to [36].

[24] To sum up: The decision by the Premier to grant the second respondent a lease over the relevant foreshore was administrative action within the meaning of that phrase in s 33, read as set out in item 23 of schedule 6, of the Constitution. That decision was based upon incorrect advice and therefore liable to be set aside in terms of paragraph (d) of those transitional constitutional provisions. The TYC had the necessary

standing in terms of paragraph (d) to have the decision set aside; and the TYC has a legitimate expectation as contemplated in paragraph (b) to make representations before the first respondent decides whether or not to renew its lease over the relevant foreshore.

[25] The following order is made:

(1) The appeal is allowed with costs, including the costs of two counsel.

(2) The order of the court *a quo* is set aside and the following order is substituted therefor:

'(a) The decision of the first respondent to register a notarial deed of servitude, in terms of the notarial deed of servitude annexure HVW20 to the first respondent's answering affidavit, over the remaining extent of Portion 28 (a portion of Portion 1) of the Farm Hartebeestpoort 482─JQ, in favour of the second respondent in his capacity as owner of Erf 463, Schoemansville and his successors in title, is set aside.

(b) The first respondent is directed to pay the applicant's costs of the application, including the costs of two counsel.'

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T D CLOETE
JUDGE OF APPEAL

Concur: Howie P

Conradie JA
Jones AJA
Southwood AJA