IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO:29177/2020

(1) REPORTABLE:
(2) OF INTEREST TO OTHER JUDGES:
(3) REVISED.

02/03/2022
DATE

[redacted]
SIGNATURE

In the matter between:

MACBERTH ATTORNEYS INCORPORATED	APPLICANTS
And	
SOUTH AFRICAN FORESTRY COMPANY SOC, LTD (Registration Number: 1992/005427/30)	FIRST RESPONDENT
KOMATILAND FORESTS SOC, LTD (Registration number: 2000/023152/30)	SECOND RESPONDENT
TSEPO MONAHENG	THIRD RESPONDENT
SIYABONGA MPONTSHANA	FORTH RESPONDENT

JUDGMENT

MBONGWE J:

SUMMARY

[1] This is an application wherein the Applicant seeks, as a primary relief, the review and setting aside of the decision of the First and Second Respondents or, alternatively the Forth Respondent, to terminate the mandate they had given to it. The main relief is sought on the premise that the said decision constitutes an administrative action, by virtue of the First and Second Respondents being organs of state, and, therefore, reviewable in terms of the provisions of the Promotion of Administrative Justice Act 3 of 2000 (PAJA).

[2] As an alternative to the main relief sought, and in the event of a finding that the impugned decision does not constitute an administrative action the Applicant seeks that the decision be set aside in terms of the common law on the grounds that the decision is irrational and arbitrary.

[3] The application is opposed by the First and Second Respondents ("the Respondents")

[4] HELD THAT: Neither the provisions of the legislative instrument upon which the Applicant relies for the main relief (PAJA), nor the common law principles of irrationality and illegality find application in this matter. The Application is dismissed with costs.

THE PARTIES

[5] The Applicant is a firm of Attorneys based in Pretoria.

[6] The First Respondent is the South African Forestry Company SOC Limited, a State owned company duly incorporated in terms of the Company laws of the Republic of South Africa.

[7] The Second Respondent is Komatiland Forests SOC Limited, a State owned company duly incorporated in terms of the Company laws of the Republic of South Africa. The Second Respondent is a wholly owned subsidiary of the First Respondent. Consequently, both the First and Second Respondents are managed by the same Executive Management, which includes the Third and Forth Respondents.

[8] The relationship between the Applicant and the First and Second Respondents is one based on the employment of legal services of the Applicant by the Respondents through a tender process.

THE LEGAL FRAMEWORK

[9] It is mandatory for the First and Second Respondents, as State owned entities, to procure services in accordance with the provisions of section 217 of the Constitution of the Republic of South Africa, 1996. This section requires that the process of procurement of services be transparent, fair, equitable, competitive and cost effective. Non- compliance with these mandatory requirements constitutes an irregularity in terms of the provisions of the Preferential Procurement Policy Framework Act 5 of 2000, and any expenditure incurred constitutes wasteful expenditure in terms of the Public Financial Management Act.

[10] It is not in dispute that the First and Second Respondents had complied with these requirements in procuring the services of the Applicant.

[11] The varying nature of the services that may be required and procured necessitate that state owned entities conclude purpose related agreements with approved service providers. The services rendered fall to be monitored and

reviewed by the legal department in the First and Second Respondents headed by the Fourth Respondent.

[12] The Applicant was among a panel of legal services providers appointed to provide services to the First and Second Respondents following its successful bid to an open and competitive tender issued by the Respondents. The appointment of the Applicant was conveyed in a letter dated 2 May 2017 which stated, inter alia, that; the appointment was effective immediately and was to endure for a period of three years, renewable for a further two years, subject to an annual review of the services provided. The letter further stated that the appointment did not per se guarantee the supply of work and that the services will be required as and when the need arose. Thus the appointment came with the relevant terms of engagement between the Respondents, on the one hand and the Applicant, on the other.

[13] Subsequent to the appointment, the Applicant was mandated to represent the First and Second Respondents in three matters, according to the First and Second Respondents, or five matters according to the Applicant, being;

1. Clara Margarita Caseletti N.O and Others v SAFCOL & Others ("the Caseletti matter");

2. Florence Guest Farm and Wedding Venues v SAFCOL ("the Florence Guest Farm matter");

3. Komatiland Forests SOC Limited v Diggers Rest Timber Company ("the Diggers Rest matter");

4. Komatiland Forests SOC Limited v Gildehuys Matjila Incorporated ("the Gildenhuys Matjila matter").

5. Ravapro v Komatiland Forests SOC Limited ("the Ravapro matter").

The First and Second Respondents deny ever giving the Applicant a mandate to represent them in the last two mentioned matters.

THE DISPUTES AND TERMINATION OF MANDATE

[14] Disputes in relation to the above matters arose between the First and Second Respondents, represented by the head of their legal department (Forth Respondent), on the one hand and the Applicant, on the other. The disputes are described as overcharging, concealment of a settlement offer to generate more fees, charging for matters in which no mandate had been given. Hereunder I quote the details of the disputes as set out by Respondents.

OVERCHARGING

[15] The First and Second Respondents cited overcharging by the Applicant for work it had done in each of the matters referred to it resulting in the termination of the Applicant's mandate. The following instances of overcharging have been given;

> *"3.2 In the Casaletti matter, the applicant rendered an invoice on 8 November 2018 amounting to R132 723.65. In this invoice, the first respondent was charged –*
>
> *3.2.1 an hour's fee for preparing a notice to defend,*
>
> *3.2.2 five hours for perusing an application that comprised of 73 pages (58 pages of which consisted of annexures that included the main and ordinary trust document to establish locus standi);*
>
> *3.2.3 an hour for arranging a consultation with the first respondent's Thabiso Maseko; and*

3.2.4 *two hours (on the same day) for a consultation with advocate Lunga Siyo and Thabiso Maseko at the first respondent's office.*

3.3 *In the Florence Guest Farm matter, which related to a simple summons for payment of the sum of R12, 200,00 the applicant billed the first respondent an amount of R49, 823, 07.*

3.5 *The Diggers Rest matter involved a summary judgment application in terms of which the second respondent sought to recover an amount of R9 million from the defendant. On 30 October 2019, the fourth respondent received an invoice from the applicant dated 12 September 2019 for the amount of R1 042 879, 47.*

3.6 *In the Gildenhuys Malatji matter, the applicant was instructed to claim damages in the amount of R300 000,00. However, the applicant charged the second respondent R262, 669,62. The invoices issued by the applicant contained duplicated attendances and despite request for revision of the invoices, the applicant in fact increased the amount invoiced."*

CONCEALMENT OF SETTLEMENT OFFER

"3.7 *On 27 September 2019, the fourth respondent received a letter from Casaletti Inc, the attorneys acting on behalf of Casaletti N.O, regarding the Casaletti matter. The letter stated that the applicant was insisting on setting the matter down despite their client being willing to withdraw the matter. Casaletti Inc., also noted in this letter that it had made various telephonic enquiries to the applicant to no avail. The letter explained that the effect of withdrawing the Casaletti matter would be that both parties would be spared from incurring any further legal costs.*

3.8 *This was the first time that the first respondent came to know of the settlement of the matter. The applicant had prioritised keeping the matter alive in order to derive a fee instead of acting in the best interests of the first respondent. The applicant is obliged to act in the best interest of the first and second respondents in terms of the Code. It was duty bound to bring the proposed settlement/withdrawal of the Casaletti matter to the first respondent's attention. Instead of doing this, it pushed for the matter to be set down in order to line its pockets. This conduct is not only unprofessional it is abhorrent and justified a termination of the applicant's mandate."*

ACTING WITHOUT MANDATE

"3.10 *On 5 March and 15 April 2019 the applicant furnished the second respondent with two invoices in respect of the Gildenhuys Malatji matter in amounts of R162 471,61 and R102 198,01 respectively. The invoice dated 5 March 2019 was marked as relating to the Rivapro matter.*

3.11 *On 13 May 2019, pursuant to an arranged meeting relating to the first and second respondent's concerns about the exorbitant fees that the applicant was charging. The fourth respondent advised the applicant's Mr Ncongwane that the applicant had received no instructions or mandate on behalf of the second respondent on the Rivapro matter and accordingly no charges should have been raised against it as per its invoice dated 5 March 2019. There seems to be a dispute of fact on this issue, to the extent that the dispute of fact is bona fides, it is submitted that the court should apply Plascon Evans and dismiss the application.*

3.12 *As it relates to the invoice dated 15 April 2019, it was again explained to Mr Ncongwane that this invoice would not be paid as it was unreasonably exorbitant and that there were various duplications in the invoice.*

3.13 Notwithstanding this meeting, on 14 May 2019, the applicant furnished the fourth respondent with a revised invoice in the Gildenhuys Malatji matter, which had increased from R102, 198,01 to R114, 043,01. Having removed certain items from the applicant's invoice, an amount of R88,168,01 was paid to the applicant.

3.14 On 16 May 2019, Mr Maseko addressed an e-mail to Mr Ncongwane of the applicant in which he indicated that all further correspondence should be directed to him. This e-mail also implored the applicant to keep a very close eye on the fees as the respondents loathed the fees escalating out of control."

UNSUCCESSFUL RESOLUTION OF DISPUTE

[16] Numerous consultations and other forms of engagement between the Forth Respondent and another legal advisor, representing the Respondents, and the Applicant failed to resolve the disputes between the parties, resulting in the Respondents referring the Applicant's bills to the Legal Practice Council for assessment by its fees committee and/or paying the Applicant, after deduction of duplicate items charged for.

TERMINATION OF MANDATE

[17] On 5 January 2020 the First and Second Respondents wrote to the Applicant terminating its mandate. This gave rise to the present proceedings in which the Applicant is seeking a review and setting aside the decision to terminate its mandate.

CONSIDERATION OF THE MATTER

[18] There are at least two aspects of primary consideration in the determination of this case. Firstly is propriety of the nature of the proceedings instituted viewed in light of the decision challenged; Secondly, is the mootness of the relief sought by the Applicant.

[19] I must hasten to state in passing that the manner in which the Applicant conducted itself towards the Respondents, its own clients, left me in utter dismay. However, while the relevant conduct played a role in the institution of these proceedings, it is peripheral in relation to the determination this court is presently called upon to make.

THE LAW

[20] It is trite that the exercise of public or statutory power is subject to the observance of values enshrined in the Constitution. To this end section 33(1) of the Constitution provides that an administrative action has to be lawful, reasonable and procedurally fair. In terms of Section 33(2), everyone whose rights have been adversely affected by the exercise of administrative action has a right to be given written reasons for the action. PAJA was enacted to give every person adversely affected by an administrative action / decision the right to challenge the decision by way of review proceedings. Section 1 of PAJA defines an administrative action in the following terms:

> *''administrative action means;*
> *'any judicial decision taken, or any failure to take a decision, by –*
> *(a) An organ of state, when –*
>
> *(i) Exercising a power in terms of the Constitution or a provincial constitution; or*
> *(ii) Exercising a public power of performing a public function in terms of any legislation; or*
>
> *(b) A natural or juristic person, other than an organ of state, when*

exercising a public power or performing a public function in terms of an empowering provision, which adversely affects the rights of any person or which has a direct, external legal effect, but does not include the listed exclusions"

[21] Explaining what the concept of 'administrative action' entails, the Court in the matter of *Minister of Defence and Military Veterans v Motau and Others* 2014 (5) SA 39 (CC) at paras [33] and [34] said the following;

"[33] The concept of 'administrative action' , as defined in section 1 of PAJA, is the threshold for engaging in administrative – law review. The rather unwieldy definition can be distilled into seven elements: there must be (a) a decision of an administrative nature; (b) by an organ of state or a natural or juristic person; (c) exercising a public power or performing a public function; (d) in terms of any legislation or an empowering provision; (e) that adversely affects rights; (f) that has a direct, external legal effect; and (g) that does not fall under any of the listed exclusions.

.....

*[34] To determine what constitutes administrative action by asking whether a particular decision is of an administrative nature may, at first blush, appear to presuppose the outcome of that enquiry. But the requirement has two important functions. First, it obliges courts to make a 'positive decision in each case whether a particular exercise of public power..... is of an administrative character"(**see Sokhela id at para 61)** ....Second, it makes clear that a decision is not administrative action merely because it does not fall within one of the listed exclusions in section 1(i) of PAJA. In other words, the requirement propels a reviewing court to undertake a close analysis of the nature of the power under consideration".*

[22] Whether conduct is administrative action or not depends on the nature of the power being exercised. Other relevant considerations include the source of the power, the subject matter, whether it involves the exercise a public duty and its

proximity to the furtherance of the provisions of legislative instrument [see *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 2001 SA 1 (CC)].

ANALYSIS

[23] Is apparent from the afore-going exposition of the law that the decision to terminate the Applicant's mandate was not taken pursuant to the provisions of any legislative instrument. It is consequently not susceptible to scrutiny in terms of PAJA and is, consequently, not reviewable. The termination of the Applicant's mandate stems from the contract / agreement setting out the terms of engagement between the parties. The terms of engagement set out in the letter of appointment of the Applicant as a service provider to the applicants appear nowhere in the empowering statutory provision governing the First and Second Respondents.

[24] In the matter of *Cape Metropolitan Council v Metro Inspection Services (Western Cape) CC and Others* 2001 (3) SA 1013 (SCA) the Court laid out the position in the following terms:

> '' [18] *The appellant is a public authority and, although it derived its power to enter into the contract with the first respondent from statute, it derived its power to cancel the contract from the terms of the contract and the common law. Those terms were not prescribed by statute and could not be dictated by the appellant by virtue of its position as a public authority. They were agreed to by the respondent, a very substantial commercial undertaking. The appellant, when it concluded the contract, was, therefore, not acting from a position of superiority or authority by virtue of its being a public authority and, in respect of the cancellation, did not by virtue of its being a public authority, find itself in a stronger position, than the position it would have been in, had it been a private institution. When it purported to cancel the contract, it was not performing a public duty or implementing legislation; it was*

purporting to exercise a contractual right founded on the consensus of the parties, in respect of a commercial contract. In all these circumstances it cannot be said that the appellant was exercising a public power. S 33 of the Constitution is concerned with the public administrative action as an administrative authority exercising public power not with the public administration acting as a contracting party from a position no different from what it would have been in, had it been a private individual or institution."

[25] In Cape Metro matter the Court distinguished the relationship between the Appellant and the Respondent, on the one hand, and the levy payers, on the other hand. The mere fact that the collection of levies was regulated by statute whereas the relationship between the Appellant and the First Respondent, insofar as it was relevant to that case, was regulated by an agreement between the Appellant and the Respondent, the Court found the cancellation not to be administrative action.

[26] In *Logbro Properties CC v Bedderson N.O and Others 2003 (1) All SA 424 SCA* at para [10] the Court stated the following;

"[10] The case [Cape Metropolitan] is thus not authority for the general proposition that a public authority empowered by statute to contract may exercise its contractual rights without regard to public duties of fairness. On the contrary [Cape Metropolitan] establishes the proposition that a public authority's invocation of a power of cancellation in a contract concluded on equal terms with a major commercial undertaking, without any element of superiority or authority deriving from its public position, does not amount to an exercise of public power".

[27] The Constitutional Court upheld the principle in the Logbro matter in *Joseph and Others v City of Johannesburg and Others* 2010 (4) SA 55 (CC). In that matter the supply of electricity to a residential building had been disconnected because the landlord was in arrears with his payments for services. The City

had failed to give prior notice to the residents before the disconnections. The Court found that the disconnections of electricity was not simply a contractual matter due to the special relationship that exists between a local authority and its citizens; administrative law principles, beyond the law of contract, had to be adhered to.

[28] The principles in the matters referred to above clearly show that the Applicant in the present matter has misunderstood the difference between the source of the rights of the Respondents to terminate the contract and that of the authority of the Respondents to enter into a contract. The decision to terminate the Applicant's mandate was founded on the contract itself as a result of breach by the Applicant. The application must, therefore, fail.

MOOT CASE

[29] There is no doubt that the Applicant was aware, at the institution of these proceedings in July 2020, that the tenure of its contract with Respondents had come to an end some two months earlier. The institution of the proceedings in July 2020 was, therefore, ill-conceived. There applicable legal principle in this circumstance was enunciated in *National Coalition for Gay & Lesbian Equity and Others v Minister of Home Affairs 2002 (1) SA (CC),* where the Court held that a case is moot and therefore not justiciable if it no longer presents an existing or live controversy which should exist if the Court is to avoid giving advisory opinions on abstract propositions of law.

COSTS

[30] The Applicant has pleaded the Biowatch principle, that is, that even if it is not successful in these proceedings, it should not be ordered to pay the costs on the ground that it was pursuing its constitutional rights. It is, on the contrary, a commercial/ financial interest that the Applicant Is pursuing in circumstances where the Applicant's unprofessionalism and greed resulted in

a premature termination of its mandate. The financial prejudice caused to the Respondents cannot be allowed to continue in respect of the costs of this application. The Applicant must, as a matter of course, pay the costs of these proceedings.

ORDER

1. The application is dismissed.
2. The Applicant is ordered to pay the costs on the opposed scale.

[redacted]

MBONGWE J
THE JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

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Date of hearing: 09 September 2021

JUDGEMENT ELECTRONICALLY TRANSMITTED TO THE PARTIES/ LEGAL REPRESENTATIVES ON THE 02ND MARCH 2022.