

REPORTABLE



THE REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NO: 9376/2010

In the matter between:

**FAIZEL HENDRICKS
MOGAMAT SMITH**

First Applicant
Second Applicant

versus

THE CITY OF CAPE TOWN

Respondent

Judgment:

MANTAME, AJ

Counsel for Applicant:

Adv. D. Filand

Instructing Attorney:

Petersens Attorneys
Ref: Mr. D Petersen

Counsel for Respondents:

Adv. N. Mayosi

Instructing Attorney:

Fairbridges Attorneys
Ref: A Torr

Date of Hearing:

12 April 2011

Date of Judgment:

24 June 2011



Republic of South Africa

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And

CITY OF CAPE TOWN

Respondent

JUDGMENT : 24 JUNE 2011

MANTAME, AJ:

[1] In this application the Applicants seek a review of the Respondent's decision directing them to remove their permanent business structures and rebuild their business structures daily on their trading sites. The notices to this effect were served on them on the 23 April 2010. The said Notices are the subject of these

review proceedings.

[2] The application was preceded by interdict proceedings of which a *rule nisi* issued in favour of the Applicants was granted on the 10 May 2010 and extended to the date of the hearing of the review application.

[3] Both the interdict and review applications were opposed by the Respondent.

[4] Applicants were represented by Mr. Filand and Respondent was represented by Ms. Mayosi.

[5] On the day of the hearing of this matter, Applicants advised that they were abandoning the interdict application. The effect thereof was that *rule nisi*, previously issued was discharged.

[6] It is common cause that the issues to be decided relate to the review application and no record has been filed by Applicants in terms of Rule 53 of the Uniform Rules of court. The crux of the matter rests on the “*notices*” that were served on the Applicants by the Respondent asking them to change their trading process.

[7] First applicant is the sole proprietor of an informal business trading in the sale of fruit and vegetables at the corner of Vanguard and Highlands Drives, Mitchell's Plain since 2002. He has been an informal trader in the Mitchell's Plain area for more than 30 years.

[8] Second Applicant is also an informal trader in the sale of fruit and vegetables at the corner of Vanguard Drive and Morgenster Street, Mitchell's Plain. He has been an informal trader in the Mitchell's Plain area since 1998.

[9] Mr. Filand, who appeared for the Applicants, contended that over a long period of time, Applicants enjoyed a good working relationship with the Respondent's officials, more particularly the Area Manager of Mitchell's Plain. Their interaction was for the purposes of improving business.

[10] In 2008, First Applicant was approached by Respondent's officials to move his business 50 metres back from where it was then situated to its present location. First applicant fully complied with this request.

[11] Applicants further complied with the request by Respondent to neaten up their trading structures and made use of refuse bins provided by the Respondent at its own expense.

[12] The cordial relationship with the Applicants continued until they were served with notices unexpectedly on the 23 April 2010. These notices read as follows:

"XXX

CITY OF CAPE TOWN
ISIZEKO SASEKAPA
STAD KAAPSTAD

CONTAINER/CARAVAN/STRUCTURE PRIVATE AND COUNCIL
PROPERTY 2 Nd NOTICE

Container / Caravan
City of Cape Town or Private

XXXX

/Structure Illegally Placed on
Property

TEL NO: 021 951 5390
 SPECIALISED LAW ENFORCEMENT SERVICES INFORMAL TRADING
 UNIT:

Dear Sir / Madam

You are hereby informed that the caravan / container / structure placed on City of Cape Town or Private

Property c/o VANGUARD DRIVE & HIGHLANDS DRIVE

Has been place there with out the necessary consent or authorisation of the City of Cape Town. You are hereby instructed to immediately remove the offending caravan / container from the City of Cape Town or private property to return to its normal state.

Failing to comply with this instruction by: 10/05/2010

May result in fines being issued and the offending caravan / container / structures being impounded and

Removed by the City of Cape Town at your expenses per Streets and Public Places and

Nuisance by Law xxxxxxx2007 from City Land or from xxxxxx purpose xxxxx property

Placed there without permission as per Land Use and Planning Ordinance 15/1985 (39) (2)

(a) (l)

Notice issued by Officer: R. Swartbooi Staff no: 10018908

Date: 23/04/2010 Time: 15:40

Received by: Imraan Hendricks

Date: 23/04/2010 Time: 15:40

Address: xxxxx Cresent, Morgenster"

[13] Mr. Filand submitted that these notices stand to be reviewed and set aside on the following basis:

- The Respondent has not given any of the Applicants "*notice*" of the proposed action to be taken against them or any opportunity to make representations prior to taking action against them on the 23 April 2010.

- The notices as they stand, allege that Applicants placed their structures on the City of Cape Town's property without being authorised to do so. Applicants have therefore been requested to move under threat of being fined, or else their stalls would be impounded or removed by the Respondent.
- Though the right to trade is not being challenged, but it has been threatened by the said notices.
- The effect of these notices is that their trading pattern / process have to be changed. Applicants are now required to erect and remove the structures, every trading day. This therefore renders this "*instruction*" irrational.
- Such conduct is in breach of the requirement of Section 3(1) of the **Promotion of Administrative Justice Act 3 of 2000 ("PAJA")**: in that
"any administrative action which materially and adversely affects the rights of any person must be procedurally fair..." Similarly, so ran the argument, it is contrary to the rule of natural justice, i.e. *audi alteram partem*, in that the said Notices were issued without first giving a hearing to the affected parties, the Applicants.

[14] The notice of the 23 April 2010 requiring the Applicants to remove their stalls which constitutes their sources of livelihood, materially and adversely

affected their rights to trade.

[15] Applicants contention is that these notices had a direct and legal effect as they required compliance. The Respondent's contention that no decision was taken is without substance and or untenable.

[16] It is wholly irrational to require the Applicants to conduct their business from temporary structures which are erected at the beginning of the day and dismantled at the end of the day, given the size and weight of these structures.

[17] It was Mr. Filand contention that the decision of the Respondent's is so unreasonable, impractical and meaningless for the Applicants to trade in that it would seriously affect the quality of the produce which the Applicants sell and cannot handle them excessively.

[18] These stalls have been created in such a way that they are suited to withstand the weather conditions of the Cape Flats where the Applicants are trading.

[19] Ms. Mayosi, Counsel for the Respondent, argued that:

- The notices do not adversely affect the rights of any person and have no direct, or external legal effect and do not constitute an administrative action in terms of PAJA.
- Applicants did not try to resolve the matter with Respondent before

approaching the court.

- The notices issued against Applicants in terms of the by-law regulating the streets, public places and the prevention of nuisance promulgated on the 28 September 2007, entitle the Respondent to take action necessary to pursue the objectives contained therein, including the action taken in *casu*.
- Respondent's notices merely constitute notification to the Applicants of its intention to enforce compliance with the relevant by-law. Notices do not constitute a final decision, and do not require finality in the determination of the right.
- Ms. Mayosi further argued that Applicants do not have the right to trade illegally on property that belongs to the Respondent and to private individuals. Furthermore, she submitted the Respondent has the right and an obligation to enforce the provision of its by-laws in the interest of local community.

[20] In turn, she contended that by-laws are legal instructions that the Respondent acted on to manage and control the public places.

[21] Reference was made to **Bitou Municipality v Timber Two Processors CC**

and Another;¹ Nelson Mandela Metropolitan Municipality and Others v Greyvenouw CC and Other;² Huisamen and Others v Port Elizabeth Municipality.³ where the right and responsibility of a local authority to enforce the provisions of its statutory instruments was emphasised, so well as the duty of the courts to refuse to condone or sanction unlawful conduct.

[22] Ms Mayosi submitted further that Applicants' prayer for an order reviewing, correcting and setting aside the Respondent's decision to compel them to remove and rebuild their business structures daily on their trading sites is misconceived. No such decision was taken by the Respondents.

[23] Respondent's counsel re-iterated that notices merely constituted notification to the Applicants of Respondent's intention to enforce compliance with the relevant by-law. The notices do not constitute a final decision. They are merely "*preliminary or interlocutory steps having no determinate effect on the parties' rights...*" See Eastern Metropolitan Substructure v Peter Klein Investments.⁴

[24] Further reference was made to the decision of Cleaver J, who considered, inter-alia, the review of a similar notice issued by the City of Cape Town in terms of its Outdoor Advertising and Signage By-Law in The City of Cape Town v Bouley Properties (Pty) Ltd.⁵ Cleaver J held that "*the notice does not have any direct legal effect for it does not require finality on the determination of rights...*" In this

1 2009 (5) SA 618 (C)

2 2004 (2) SA 81 (SE)

3 1998 (1) SA 477 (E)

4 2001 4 SA 661

case Bouley Properties was requested to remove outdoor advertising signage which it had unlawfully affixed to a building on its property situated at 6A Marine Drive, Paarden Island, because Bouley had not obtained prior approval from the City of Cape Town for the erection of the sign in terms of the by-law.

[25] This court is therefore requested to determine whether the “*notices*” as they stand constitute a decision for purposes of review in terms of PAJA.

[26] Further, though there has been no record filed in terms of Rule 53, but only “*notices*” were dispatched to Applicants, determination has to be made whether there is a decision to be reviewed.

[27] For the purposes of the proceedings in *casu*, it is important to first define the administrative action in terms of PAJA.

“Section 1 (i) of PAJA defines administrative action as any decision taken or any failure to take a decision by an organ of state, when exercising a power in terms of the constitution or a provincial constitution or exercising public power or performing a public function in terms of an empowering provision, which adversely affects the rights of any person and which has a direct, external legal effect..”

[28] This section defines a decision as any decision of an administrative nature made, proposed to be made, or required to be made, as the case may be, under an empowering provision, including a decision relating to: (e) *making a declaration, demand or requirement.*

[29] It is my view that, the notice that has been sent by the Respondent to the Applicants to comply with the by-law qualifies as a decision within the meaning of PAJA, in that the notices is making a demand or a requirement to be complied with. In the notice itself, there are obviously certain consequences if the demand by the Respondent is not met. The notices were issued and served on the Applicants after a decision was taken by the Respondent. Regard has to be made to the fact that Applicants should have been given an opportunity to reply to the decision as the Respondent will take action once they do not comply with the notice.

[30] PAJA requires an administrative action that is procedurally fair. In **Du Preez and Another v Truth and Reconciliation Commission**,⁶ the court said that:

"the audi principle is but one facet, albeit an important one, of the general requirement of natural justice that in the circumstances postulated the public official or body concerned must act fairly... The duty to act fairly, however, is concerned only with the manner in which the decisions are taken, it does not relate to whether the decision itself is fair or not."

[31] Section 3(1) of PAJA provides that administrative action which materially and adversely affect the rights or legitimate expectations of any person must be procedurally fair.

- (a) A fair administrative procedure depends on the circumstances of each case.
- (b) In order to give effect to the right to procedurally fair administrative action, an administrator, subject to subsection (4), must give a

⁶ 1997 (3) SA 204 (A)

person referred to in subsection (1) –

- (i) adequate notice of the nature and purpose of the proposed administrative action;
- (ii) a reasonable opportunity to make representation;
- (iii) a clear statement of the administrative action;
- (iv) adequate notice of any right of review or internal appeal, where applicable, and;
- (v) adequate notice of the right to request reasons in terms of Section 5 of PAJA.

[32] Ms. Mayosi argued that the Applicants have no rights in which to base this application to have the “*notices*” to be reviewed and set aside in terms of PAJA. I am unable to agree with Ms Mayosi. Although the Respondent does not challenge Applicants right to trade, but at the same time, it is threatened. Therefore, Applicants correctly pointed out that their right to trade will be affected by these notices, as the said notices will introduce change in the way they are currently trading.

[33] Section 22 of the Constitution guarantees Applicants a right to trade. I am not in agreement with Respondent’s argument that Applicants have no rights on which to base this review application.

[34] In **Platinum Asset Management (Pty) Ltd v Financial Services Board and Others; Anglo Rand Capital House (Pty) Ltd and Others v Financial**

Service Board and Others ⁷ the court said, Section 33 (1) of the Constitution provides that:

"everyone has the right to administrative action that is lawful, reasonable and procedurally fair."

[35] Section 22 of the Constitution provides that:

"every citizen has the right to choose the trade, occupation or profession freely."

[36] The practice of a trade, occupation or profession may be regulated by law, but may not be regulated in such a way that it deprives one of such a right, as is the case in this matter. Section 33 of the Constitution, coupled with PAJA, apply to and bind the entire administration, at all levels of government. It provides a set of coherent rules and principles for the proper performance of all administrative action within its ambit, it requires the giving of reasons for administrative action, and it sets out the remedies that are available if these rules are not complied with. The principle of legality requires the exercise of administrative power to be authorised by law. In other words, a law must authorise the administrator. Administrative action must also comply with the general requirements of PAJA. In the **Platinum Asset Management (Pty) Ltd v Financial Services Board and Others; Anglo Rand Capital House (Pty) Ltd and Others v Financial Service Board and Others**, the decision of the registrar constituted an administrative action and therefore reviewable.

[37] While it is true that the right to choose a trade may be regulated by law, at

⁷ 2006 (4) SA 73 (W)

least the Applicants can rely in that right in support of their application to have the “*notices*” reviewed and set aside. Their right is, as in these proceedings, regulated by the law that Applicants are alleged to have contravened. It therefore depends on further argument, in this case there has been none, on whether a limitation is justifiable in terms of Section 36 of the Constitution.

[38] In my view, this matter is an administrative action, since the “*notices*” that have been issued to the Applicants constitute a decision that is instructing and making a demand or a requirement as defined in Section 1 of PAJA. The notice instructs, demands or requires the Applicants to comply with the by-law, failing which an action will be taken against them.

[39] It is therefore the duty of the Respondent to afford the Applicants sufficient opportunity to make representation, as their decision affects the day to day running of Applicants business and their right to trade. The contrary argument is clearly untenable.

[40] The authorities that have been referred to by the Respondents counsel do not address the issue at hand, as outlined above, though they might have come closer.

[41] Even if I am wrong in coming to the conclusion that the Respondent’s decision adversely affected the Applicants’ right to trade, nevertheless such decision affected the Applicants legitimate expectation. It is well recognised in our law that a decision affecting a party’s expectation must be preceded by a fair

hearing. See **Administrator, Transvaal, & others v Traub & others⁸**, the Respondents herein were not given an opportunity to make representations in accordance with the *audi alteram partem* rule before their applications for appointments as Senior House Officers, "SHOs" were rejected. Thus, the Respondents applied to the Witwatersrand Local Division of the Supreme Court for an order setting aside the decision of the Director to refuse their applications. Goldstone J granted the order setting aside the decision of the Director for want of a procedural fairness or natural justice. The doctrine of legitimate expectation was dealt with further by Hlophe J in **UWC v MEC FOR HEALTH AND SOCIAL SERVICES⁹**

[42] In casu, the Applicants legitimate expectation is justified since First Applicant has been trading thereat for a period of some thirty years and Second Respondent has been trading thereat since 1998.


[43] Consequently, I make the following order:

- Respondents decision taken on or about April 2010 to compel Applicants to remove and rebuild their business structures daily on their trading sites situated at the corners of Vanguard and Highlands Drive and Vanguard Drive and Morgenster Street, Mitchell's Plain, Western Cape is reviewed and set aside;
- Respondent's notices served on the Applicants on the 23 April 2010 to

⁸ 1989 (4) SA 731 (A)

remove their business structures situated at the corners of Vanguard and Highlands Drive and Vanguard Drive and Morgenster Street. Mitchell's Plain, Western Cape are reviewed and set aside;

- Applicants are entitled to remain in their existing structures, up until Respondents afford the Applicants sufficient opportunity to make representations as to why their trading pattern cannot be altered;
- Respondents are ordered to pay Applicants costs.



MANTAME, AJ