IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN

Case no.s: 20599/21 & 4517/22

Before: The Hon. Mr Justice Binns-Ward
Hearing: 28 February 2023
Judgment: 6 March 2023

In the matter between:

MA-AFRIKA HOTELS (PTY) LTD Applicant

and

CAPE PENINSULA UNIVERSITY OF TECHNOLOGY Respondent

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JUDGMENT
(Application for leave to appeal)

BINNS-WARD J:

[1] The applicant has applied for leave to appeal from the judgment of this court ('the principal judgment')[1] dismissing its application in case no. 4517/22 for the following substantive relief in terms of Part B of its notice of motion (as amended):

Orders –

> 5. Reviewing and setting aside the decision of the respondent on or after 7 March 2022 to cancel the tender process under tender number PUR 5500/9.
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> 5A Reviewing and setting aside the decision of the respondent on or after 7 March 2022 not to award the tender to the applicant as the student

[1] Listed on SAFLII, sub nom. *Ma-Afrika Hotels (Pty) Ltd v Cape Peninsula University of Technology* [2023] ZAWCHC 4 (19 January 2023).

accommodation and hotel building operator of the premises under tender number PUR 5500/9 ("*the decision*") after the respondent rescinded the award of the tender to @Baobab Hospitality (Pty) Ltd on 7 March 2022.

6 Substituting the decision of the respondent with a decision awarding the tender under tender number PUR 5500/9 to the applicant.

[2] The application is opposed by the respondent; but the parties are agreed that if leave is granted, the appeal should lie to the Supreme Court of Appeal ('SCA').

[3] The application for leave to appeal is extensive, running to all of 34 paragraphs over 10 pages. The document speaks for itself, and it is not necessary to traverse it in detail. Suffice it to record that I have taken its content fully into account, together with the very full written argument filed by the applicant's counsel in support of the application. In essence, it is contended that this court erred in not upholding the second and third grounds on which the applicant brought its judicial review application.

[4] Those grounds were identified at para 10 of the principal judgment, viz.:

(i) That the respondent had failed to comply with Regulation 13 of the Preferential Procurement Regulations, 2017. The applicant contended that, in the context of the applicant having made an acceptable tender, the CPUT had not been entitled to cancel the tender and, upon a proper construction of the regulation, had been obliged to award it to the respondent as the only compliant tenderer. The applicant indicated in its supporting papers that its application was founded on s 6(2)(b) of the Promotion of Administrative Justice Act 3 of 2000 ('PAJA') in this regard. Section 6(2)(b) provides that an administrative action is susceptible to judicial review if '*a mandatory and material procedure or condition prescribed by an empowering provision was not complied with'*.

(ii) That the respondent's decision not to award the tender to the applicant after it rescinded the award to the initially successful tenderer (@Baobab) was

not rationally related to the information before it, as the applicant's tender satisfied all the requirements stated in the tender invitation. In this regard, the applicant relied on s 6(2)(f)(ii)(cc) of PAJA. Section 6(2)(f)(ii)(cc) provides that an administrative action is susceptible to judicial review if '*the action itself is not rationally connected to the information before the administrator*'.

[5] The enquiry at this stage is whether (i) the contemplated appeal would have a reasonable prospect of success or (ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration. It is only if a positive opinion is formed on either or both of those propositions that this court (or the SCA on 'petition') is empowered to give leave to appeal; see s 17(1)(a) read with s 17(2)(b) of the Superior Courts Act 10 of 2013. In its recent judgment on an application for leave to appeal in *Ramakatsa and Others v African National Congress and Another* [2021] ZASCA 31 (31 March 2021),[2] the SCA held that '*The test of reasonable prospects of success postulates a dispassionate decision based on the facts and the law that a court of appeal could reasonably arrive at a conclusion different to that of the trial court. In other words, the appellants in this matter need to convince this Court on proper grounds that they have prospects of success on appeal. Those prospects of success must not be remote, but there must exist a reasonable chance of succeeding. A sound rational basis for the conclusion that there are prospects of success must be shown to exist.*' In *Caratco (Pty) Ltd v Independent Advisory (Pty) Ltd* [2020] ZASCA 17 (25 March 2020); 2020 (5) SA 35 (SCA), which also concerned an application for leave to appeal, Cachalia JA observed that '*A compelling reason includes an important question of law or a discreet issue of public importance that will have an effect on future disputes. But here too, the merits remain vitally important and are often decisive*. [The applicant] *must satisfy this court that it has met this threshold*'.[3]

[6] If the treatment of the grounds of review in the principal judgment appears to have been relatively cursory, that was because the focus of the argument on both sides at the hearing of the review application was on whether or not the entire procurement process in issue, and more particularly the impugned decision by the

[2] In para 10.
[3] In para 2.

respondent to cancel the tender, was '*administrative action*' within the meaning of PAJA. That question having been determined in the applicant's favour, the focus of the argument in the leave to appeal proceedings has understandably shifted to the whether this court's reasons for nevertheless dismissing the review application bear scrutiny. It has therefore become necessary in this judgment to address the refocused argument in some detail.

[7] As to the abovementioned second ground of review relied upon by the applicant, the wording of Regulation 13 is set out at para 57 of the principal judgment. The contextual setting of the Regulations within the relevant statutory framework is elucidated at para 58-59 of the principal judgment. The correctness of the conclusion stated in the last sentence of para 59 (namely that the legislation is *not* applicable to the respondent) is not disputed by the applicant. It maintains, however, that the adoption by the respondent of the '*provisions and spirit*' of the Regulations in its procurement policy rendered the respondent bound by them.

[8] It is accordingly the respondent's adoption of the Regulations in its procurement policy that the applicant contended made Regulation 13 '*a mandatory and material procedure or condition*' with which the respondent had to comply. As the respondent's counsel pointed out, however, for the applicant's argument to hold good for the purpose of a ground of review premised on s 6(2)(g) of PAJA it would have to be accepted that the respondent's procurement policy was an '*empowering provision*' in terms of which the impugned '*administrative action*' had been taken. He contended that it plainly was not.

[9] The term '*empowering provision*' is quite widely defined in s 1 of PAJA. It is defined to mean '*a law, a rule of common law, customary law, or an agreement, instrument or other document in terms of which an administrative action was purportedly taken*'. The applicant has contended in its application for leave to appeal that this court erred by failing to appreciate, having regard to the broadness of the defined meaning of the term, that the respondent's procurement policy fell to be acknowledged as an '*empowering provision*' that was applicable to the respondent's decision.

[10] As Mr *Magardie* for the respondent pinpointed, the fatal flaw in the applicant's argument is that it overlooks the import of the distinguishing effect of paragraphs (a) and (b) of the defined meaning of '*administrative action*' in PAJA. In relevant part, the definition of '*administrative action*' goes as follows:

> '"**administrative action**" means any decision taken, or any failure to take a decision, by –
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> (a) An organ of state, when –
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> (i) exercising a power in terms of the Constitution or a provincial constitution; or
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> (ii) exercising a public power or 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'.
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> It is therefore only decisions by natural or juristic persons <u>who are not organs of state</u> when exercising a public power or performing a public function <u>in terms of an empowering provision</u> that are amenable to characterisation as '*administrative action*'. (Underlining for emphasis.) That the position in respect of organs of state has been distinguished is clear when one contrasts para (a) with para (b) of the definition of '*administrative action*'.

[11] It is undisputed that the respondent is an '*organ of state*' as defined in PAJA (with reference to s 239 of the Constitution). It follows that one must look to paragraph (a) of the definition to determine whether the impugned action was '*administrative action*'. One must therefore ask whether the impugned decision entailed the exercise by the respondent of a power in terms of the Constitution or a provincial constitution or the exercise of a public power or performance of a public function in terms of any legislation. If it did not, then it did not then it was <u>not</u>

'*administrative action*' as defined, and consequently would not be susceptible to judicial review in terms of s 6 of PAJA.

[12] The Constitution, a provincial constitution and any legislative instrument (viz. '*legislation*') certainly qualify as '*a law*' within the defined meaning of '*empowering provision*', but they cannot by any stretch of imagination be characterised as '*a rule of common law, customary law, or an agreement, instrument or other document*' in terms of which an administrative action could be taken. The respondent's procurement policy, on the other hand, might qualify as an '*instrument or other document*', but it clearly could not be characterised as any of the legal instruments referred to in para (a) of the definition of '*administrative action*' in PAJA. It is not '*legislation*', nor '*a law*'.

[13] This court held that the procurement of student accommodation services by the respondent constituted the exercise of a public function undertaken in the context of the constitutional and legislative framework provided by s 29 of the Constitution, the Higher Education Act 101 of 1997 and the Cape Peninsula University of Technology Institutional Statute.[4] It was on that basis that this court characterised the impugned decision as '*administrative action*'; see para 28-51 of the principal judgment. This court's characterisation was consistent with para (a) of the definition of '*administrative action*'. If the court had found itself unable to characterise the decision in that manner, it would have had to uphold the respondent's argument in the principal case that the action was not '*administrative action*', and consequently dismiss the application for not being amenable to review in terms of s 6 of PAJA.

[14] This court held that the respondent's policy document did not govern the respondent's relevant decision-making power but served merely as a guide as to how it would ordinarily be exercised; see the principal judgment at para 60 and compare, for example, *Britten v Pope* 1916 AD 150 and *Kemp and Others v Wyk and Others* [2005] ZASCA 77 (19 September 2005); [2008] 1 All SA 17 (SCA), para 1. The applicant, however, contends that this court should have found that the respondent's policy was the empowering provision in terms of which the impugned

[4] Promulgated in GG 46382 dated 20 May 2022. The Institutional Statute is published in terms of s 33 of the Higher Education Act after approval by the Minister.

decision fell to be made. As I have sought to demonstrate, if that were so the impugned decision would not qualify as '*administrative action*', and the application for judicial review in terms of PAJA would be disqualified at the starting blocks.

[15] The applicant in its heads of argument in this application (at para 20) sought to confront this difficulty by contending that the relevant '*legislative and regulatory framework*' included the respondent's Procurement Policy. The submission was fundamentally misconceived. Whereas the Policy arguably may fall within the broader range of instruments comprehended within the definition of '*empowering provision*', it was not adopted by the type of legislative body or functionary that would be necessary to bring its character within the meaning of '*legislation*' in para (a) of the definition of '*administrative action*'.[5]

[16] The point is not a novel one. The issue was identified and comprehensively discussed in the minority judgment of Rogers AJA in *South African National Parks v MTO Forestry (Pty) Ltd and Another* [2018] ZASCA 59 (17 May 2018); 2018 (5) SA 177 (SCA) from para 41. What the learned judge said at para 49-50 was especially pertinent to the argument advanced by the applicant in the current matter:

> '[49] This takes one to the definition of 'administrative action'. Since it is common cause that SANParks is an 'organ of state' for purposes of para *(a)* of the definition of 'administrative action', one requirement imposed by the definition is that SANParks' decision should have been one taken in terms of the Constitution or a provincial constitution or any legislation. The fact that the decision was taken in terms of the broader range of instruments comprehended within the definition of 'empowering provision' is insufficient. It is necessary that the 'empowering provision' be located in the Constitution or in a provincial constitution or in legislation.
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> [50] That, I would have thought, should be the end of the matter. 'Parkscape's' counsel, seeking to avoid this conclusion, submitted that the phrase 'in terms

[5] In oral argument, Mr *Magardie* for the respondent, with reference to clause 5.17 of the Procurement Policy (a copy of which was included in the Rule 53 record), pointed out that the Policy contained provisions that were inconsistent with the Preferential Procurement Regulations.

of an empowering provision' in para *(b)* of the definition of 'administrative action' should be read as applying to para *(a)* as well. The majority does not embrace this conclusion and it cannot be reached by any legitimate process of statutory interpretation. The lawmaker chose to deal with organs of state on the one hand, and natural and juristic persons on the other, in separate paragraphs of the definition, joined by the disjunctive 'or'. When identifying the source of power applicable to organs of state in para *(a)*, the lawmaker, which could have used the term 'empowering provision' if that is what it meant, instead selected a specific subset of empowering sources. The fact that in para *(b)* of the same definition the lawmaker chose the term 'empowering provision' demonstrates that it deliberately refrained from using that term in para *(a).*'

There is nothing to the contrary in the majority judgment. The dicta in para 50 of Rogers AJA's judgment were subsequently cited with approval in the unanimous judgment of the SCA in *Advertising Regulatory Board NPC and Others v Bliss Brands (Pty) Ltd* [2022] ZASCA 51 (12 April 2022); [2022] 2 All SA 607 (SCA); 2022 (4) SA 57 (SCA) in para 16, footnote 7.

[17] The applicant contends, however, that this court erred by failing to take into consideration that the 'Request for Proposal' issued by the respondent made it an express condition of the tender that it was subject to the Procurement Policy. The factual premise for that statement is misplaced (see para 60 of the principal judgment), but, more importantly, the provisions of the Request for Proposal quoted in para 52 of the principal judgment[6] are diametrically at odds with Regulation 13. When I raised this with Mr *Elliot* SC for the applicant in argument, he responded that those provisions of the RFP should be regarded as 'pro non scripto'. Really? Why then should the references in the RFP to respondent's Procurement Policy not also be disregarded? The applicant has not identified any law that binds the respondent to comply with its Procurement Policy. The terms in the RFP quoted at para 52 were an integral feature of the invitation to tender. They could not be ignored, as

[6] The quoted text is marred by several typographical errors introduced as a result of the use of a dictation program when that part of the judgment was written. The errors were unfortunately not detected when the judgment was proofread prior to delivery. SAFLII will be requested to post a typographically corrected version on its website.

contended by the applicant.[7] Their incorporation served, if anything, as confirmation that the Procurement Policy, including its inclusion by reference of the Preferential Procurement Regulations, was merely a guide to decision-making in the sense described at para 60 of the principal judgment and para 14, above, of this judgment. The applicant did not impugn the legality of the RFP.[8] It was content to participate unqualifiedly in the tender process subject to all the terms thereof.

[18] For all these reasons, I consider that the contemplated appeal against this court's dismissal of the applicant's second ground of review does not enjoy any prospect of success. There is no other compelling reason why an appeal on that aspect should be heard because the issue of principle involved has already been determined in the SCA's jurisprudence.

[19] As to the applicant's abovementioned third ground of review, there may be some substance in the applicant's counsel's criticism that the principal judgment approached the rationality test in a manner more in accordance with the ground of review provided in s 6(2)(h) of PAJA than that applicable in s 6(2)(f)(ii), which was the provision on which the applicant relied. (Having regard to the facts of this matter, I question whether the review application was appositely niched under s 6(2)(f)(ii), rather than s 6(2)(h),[9] but I shall nevertheless shoehorn it in there for the purpose of discussion.)

[20] The test in s 6(2)(f)(ii) was described by Howie P in *Trinity Broadcasting, Ciskei v Independent Communications Authority of SA* [2003] ZASCA 119 (21 November 2003); [2003] 4 All SA 589 (SCA); 2004 (3) SA 346 (SCA) at para 21 as follows: *'... the reviewing court will ask: is there a rational objective basis justifying the connection made by the administrative decision maker between the material made available and the conclusion arrived at?*' Para 21 of *Trinity Broadcasting* was cited with approval by the Constitutional Court in the majority judgment of Khampepe J in *Bapedi Marota Mamone v Commission on Traditional Leadership Disputes and Claims and Others* [2014] ZACC 36 (15 December 2014); 2015 (3)

[7] At para 26.9 of its heads of argument in this application.
[8] Despite in its heads of argument in this application (at para 26.8) making the submission that '*The RFP itself is irrational.*'.
[9] As suggested, for example, by the content of para 32 of the Application for Leave to Appeal.

BCLR 268 (CC) at para 76, footnote 37. There, discussing the nature of the ground of review provided by s 6(2)(f)(ii)(cc) and (dd) of PAJA, the learned judge stated, '*In essence, the ground of review requires that a decision be rationally justified and supported by the information before the decision maker and the reasons given by it*.'[10] As Chaskalson P observed in *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 para 90, a '*decision that is objectively irrational is likely to be made only rarely'*.

[21] In the current case, the answer to the question framed by Howie P in *Trinity Broadcasting* loc. cit. would clearly be in the affirmative. The basis for the respondent's decision to cancel the tender process, notwithstanding that an acceptable tender had been submitted by the applicant, lay in the right reserved to it to do that in terms of the clauses in the 'Request for Proposal' quoted at para 52 of the principal judgment. Of course, as noted in para 53 of the principal judgment, with reference to *Logbro Properties CC v Bedderson NO and Others* [2002] ZASCA 135 (18 October 2002); [2003] 1 All SA 424 (SCA); 2003 (2) SA 460 (SCA) at para 7-8, the respondent could not exercise its contractual rights arbitrarily or capriciously because the principles of administrative justice governing the respondent's procurement decisions obliged it, when exercising its contractual rights in the tender process, to act lawfully, procedurally and fairly. It was in that context that the respondent's reasons for cancelling the tender rather than awarding the contract to the applicant would have been germane and, as discussed at para 63-65 of the principal judgment, the applicant might have been well advised to have obtained them. It was not possible to determine the alleged illegality of the respondent's decision to cancel the tender, whether on the grounds in s 6(2)(f)(ii) or that in s 6(2)(h) of PAJA, without insight into its reasons for doing so.

[10] In para 21 of its Application for Leave to Appeal, the applicant seeks to draw a material distinction between the ground of appeal in s 6(2)(f)(ii)(cc) and s 6(2)(f)(ii)(dd). It is significant that no such distinction was acknowledged in the Constitutional Court's judgment in *Bapedi Marota Mamone* loc.cit.. *Trinity Broadcasting* also suggests that a single test is applicable under s 6(2)(f)(ii) of PAJA read as a whole.

[22] I have consequently also been unable to come to the opinion that the contemplated appeal against this court's dismissal of the applicant's third ground of review enjoys reasonable prospects of success.

[23] The application for leave to appeal is therefore dismissed with costs.

A.G. BINNS-WARD
Judge of the High Court

APPEARANCES

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