IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case number 43247/2014

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED
DATE: .....
SIGNATURE:.....

In the matter between:

TRUDON (PTY) LTD (formerly

TDS DIRECTORY OPERATIONS) Plaintiff

-and-

THE NATIONAL PROSECUTING AUTHORITY 1st Defendant

THE NATIONAL DIRECTOR OF

PUBLIC PROSECUTIONS 2nd Defendant

JUDGMENT

BHOOLA AJ:

Background facts

[1] The plaintiff brought an action against the defendants claiming payment of an amount of R 3, 525, 632. 00 (three million, five hundred and twenty-five thousand six hundred and thirty-two rand) as a result of five written agreements ("the agreements") purportedly entered into between the plaintiff and defendants on or about 11 July 2012. The agreements relate to placement of advertising in a publication known as "The Yellow Pages" during 2012.

[2] In July 2018 the defendants pleaded that the agreements were unlawful and constitutionally invalid and sought a declarator to this effect. There was however no formal application for a declarator and instead the issue was raised by means of an amendment to the defendants' plea, in which they state that "..*the purported conclusion of any agreement…is in breach of the provisions of the aforementioned legal prescripts and …..[is] declared unconstitutional, and of no force and effect".*

[3] In support the defendants allege that the agreements were allegedly concluded by an employee of the Department of Justice and Constitutional Development without authorization and in violation of a "Departmental Financial Instruction", which was developed to give effect to the defendants' obligations in terms of section 217 of the Constitution of the Republic of South Africa, 1996 ("the Constitution") and the Public Finance Management Act 1 of 1999 ("the PFMA").

[4] Defendants are both Organs of State as contemplated in section 239 of the Constitution, and are required by section 217 (1) of the Constitution to contract for goods and services in accordance with a system which is fair, equitable, transparent, competitive and cost-effective. The amounts that had already been paid to the plaintiff were disclosed to the National Treasury as irregular expenditure, in compliance with the PFMA.

[5] The defendants, upon discovery of the allegedly unlawful agreements, gave notice of cancellation to the plaintiff, and gave as the reason for the cancellation the fact that there were no supporting documents or approval to extend the services of the plaintiff any further.

[6] Following a pre-trial conference held on 10 July 2018 the parties agreed to a separation of issues in terms of Rule 33 (4) of the Uniform Rules of Court and an order to this effect was granted at the commencement of the hearing and the merits postponed *sine die*.

[7] As a consequence of the separation this court is called upon to determine the following legal issue: "*Is it legally permissible for the Defendants to raise the unconstitutionality and invalidity of the alleged Agreements in the manner the defendants did, in the absence of an application to review and set aside the alleged Agreements?*"

Analysis of the legal issue

[8] Counsel for the plaintiff, Mr Girdwood, submitted that the issue raises two core questions, which this court is required to determine:

8.1 Firstly, whether the defendants are entitled to ignore their own decision to conclude the agreements on the basis that, in their own view, the agreements are unlawful, in circumstances in which they have failed to take proper steps to have a court confirm their view through a "direct review"; and

8.2 Second, whether the defendants are entitled, in the absence of a direct review, to wait until the plaintiff sought to enforce its rights under the agreements before raising their constitutional argument as a defence to the plaintiff's claims through a 'collateral challenge'.

[9] In relation to the first question Mr Girdwood submitted, in the absence of instituting a formal, direct review application, the agreements stand until they are reviewed and set aside by a court in accordance with the well-established

principle developed in *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2004 (6) SA 222 (SCA). This is so because an administrative act, even if invalid and unlawful stands as fact and has legal consequences until and unless it is set aside by a court as invalid. This involves key questions related to the rule of law and the principle of legality. In *Oudekraal* (at para 1) the Supreme Court of Appeal framed the question as follows: "*This appeal raises important questions for the rule of law. It raises the question whether, or in what circumstances, an unlawful administrative act might simply be ignored, and on what basis the law might give recognition to such acts*".

[10] The *Oudekraal* principle was confirmed by the Constitutional Court in *MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd t/a Lazer Eye Institute* 2014 (3) SA 481 (CC) para 103 ("Kirland"), in which the Court emphasised the principle that "*the courts alone, and not public officials, are the arbiters of legality*". The principle is therefore based on the need for built in protection to prevent abuse by the State of its obligation to review its own decisions.

[11] Accordingly, in *Kirland,* the Constitutional Court found that where a government department did not bring a review of the invalid licence granted to a plaintiff, it could not simply raise the invalidity of the licence in its opposition to the plaintiff's application to enforce it. The court asked the question directly: "*Can a decision by a state official, communicated to the subject, and in reliance on which it acts, be set aside by a court even when government has not applied (or counter-applied) for the court to do so? Differently put, can a court exempt government from the burdens and duties of a proper review application, and deprive the subject of the protections these provide, when it seeks to disregard one of its own official's decisions?*" (para 64). [Emphasis added]. The Court immediately answers this question in the negative:

"*Even where the decision is defective...government should generally not be exempt from the forms and processes of review. It should be held to the pain and duty of proper process. It must apply formally to a court to set aside the defective decision, so that the court can properly consider its effects on those subject to it*". [Emphasis added]

[12] The following crucial *dictum* from the majority judgment in *Kirland*, the plaintiff's counsel submitted, is of particular importance in the present matter even though the Promotion of Administrative Justice Act, 3 of 2000 ("PAJA") is not applicable:

"PAJA requires that the government respondents should have applied to set aside the approval, by way of a formal counter-application. They must do the same if PAJA does not apply. To demand this of government is not to stymie it by forcing upon it a senseless formality. It is to insist on due process, from which there is no reason to exempt government. On the contrary, there is a higher duty on the state to respect the law, to fulfil procedural requirements and to tread respectfully when dealing with rights. Government is not an indigent or bewildered litigant, adrift on a sea of litigious uncertainty, to whom the courts must extend a procedure-circumventing lifeline. It is the Constitution's primary agent. It must do right, and it must do it properly [Emphasis added].

[13] The Court in *Kirland* proceeded to reject the government's argument that *Oudekraal* should be reconsidered, and in affirming the principle it pointed out that anything to the contrary would amount to:

"a licence to self-help. It invites officials to take the law into their own hands by ignoring administrative conduct that they consider incorrect. That would spawn confusion and conflict, to the detriment of the administration and the public. And it would undermine the court's supervision of the administration" (para 89).

[14] Indeed, as plaintiff's counsel submitted, the majority judgment in *Kirland* has been affirmed in a number of cases, hence by implication also affirming the *Oudekraal* principle: see for instance *Economic Freedom Fighters v Speaker, National Assembly and Others* 2016 (3) SA 580 (CC) para 74, *President of the Republic of South Africa and Others v South African Dental Association and Another* 2015 (4) SA BCLR 388 (CC) para 12.

[15] The reasoning underpinning *Kirland* was also expressly affirmed by Cameron J, writing for the majority, more recently in *Merafong City Local Municipality v AngloGold Ashanti Limited* 2017 (2) SA 211 (CC). Cameron J stated categorically once again that – "*government cannot simply ignore an apparently binding ruling or decision on the basis that it is invalid. The validity of the decision has to be tested in appropriate proceedings. And the sole power to pronounce that the decision is defective, and therefore invalid, lies with the courts…It remains legally effective until properly set aside.*" (para 41). [Emphasis added].

[16] I have to consider however, the submission by defendants' counsel, Mr Erasmus, relying on the minority judgment of Jafta J, in *Merafong,* which held that to insist on a counter application as the procedure for an organ of state to challenge the validity of an administrative act would be to put form above substance. Counsel submitted that it had been settled since *Municipal Manager: Quakeni Local Municipality and Another v FV General Trading CC* 2010 (1) SA 356 (SCA) at para 11 and 14, that it was unnecessary for a formal review to set aside an agreement concluded without following the required procurement process, and a declaration of invalidity was made by the Court.

[17] However, in *Quakeni* while there was no direct review, the constitutional challenge of invalidity was raised by way of opposition to a main application and by way of relief sought in a counter-application, which is not the case in the present matter and even if *Quakeni* is applicable it is distinguishable on this ground. This is clear from the court's dictum to the following effect (at para 26) :

"If the second respondent's procurement of municipal services through its contract with the respondent was unlawful, it is invalid and this is a case in which the appellants were duty bound not to submit to an unlawful contract but to oppose the respondent's attempts to enforce it. This it did by way of its opposition to the main application and by seeking a declaration of unlawfulness in the counter-application. In so doing it raised the question of the legality of the contract fairly and squarely, just as it would have done in a formal review. In these circumstances, substance must triumph over form. And while my observations

should not be construed as finding that a review of the award of the contract to the respondent could not have been brought by an interested party, the appellants' failure to bring formal review proceedings under PAJA is no reason to deny them relief".

[18] Hence there is clear authority, by which this court is bound, for the principle that even an allegedly unlawful administrative act stands as fact unless it is set aside on review by the organ of state in question. This has been reaffirmed by the Constitutional Court in *Department of Transport and Others v Tasima (Pty) Ltd 2017* (2) SA 622 (CC) at para 147, which held that *"until a court is appropriately approached and an allegedly unlawful exercise of public power is adjudicated upon, it has binding effect merely because of its factual existence".*

[19] This answers the first question to be determined in deciding the issue with a resounding "no". Hence, the defendants are not entitled to ignore their own decision to conclude the agreements on the basis that, in their own view, the agreements are unlawful, in circumstances in which they have failed to take proper steps to have a court confirm their view through a review, or at the very least by way of an application for a declarator.

[20] This brings me to the issue of whether, in the absence of a formal review, application or counter-application, as in this matter, the defendants could nevertheless proceed by way of a collateral challenge (referred to in *Tasima* as a "reactive" challenge and commonly as a "defensive" challenge), as a defence of invalidity in proceedings that are not in themselves designed to impeach the validity of the act or agreement in question. The collateral challenge is recognised in our law as an exception to the *Oudekraal/Kirland* principle.

[21] This question has been answered in the affirmative by the Constitutional Court. In *Merafong City Local Municipality v AngloGold Ashanti Limited* 2017 (2) SA 211 (CC) both the majority and minority judgments confirmed that it is open to an organ of state to launch a reactive or collateral challenge as a defence against invalid administrative action. The court referred to its own decision in *Bengwenyama Minerals (Pty) Ltd v Genorah (Pty) Ltd* 2011 (4) SA 113 (CC),

where it held that it would be imprudent to pronounce any inflexible rule on collateral challenges. Thus, the permissibility of a reactive challenge by an organ of state depends on a variety of factors "invoked with a pragmatic blend of logic and experience"(at para 56).

[22] Prior to *Merafong* it was unclear whether an organ of state could avail itself of the collateral challenge doctrine, but since *Merafong* and following it, *Tasima*, it is clear that the collateral challenge is available to an organ of state where justice requires it. However, it is notable that in confirming the *dicta* of *Merafong* permitting collateral challenges by an organ of state, Khampepe J in *Tasima* emphasised that these may only be brought and entertained *"in appropriate circumstances"*. The court held (at para 140) that:

"it is both a logical and pragmatic consequence of the aforementioned developments in our jurisprudence to allow state organs to challenge the lawfulness of exercises of public power by way of reactive challenges in appropriate circumstances."

[23] This raises the question of whether the present matter constitutes such appropriate circumstances. In this regard Mr Girdwood submitted that *Merafong* (at para 44) expressly recognized that *Kirland* and *Oudekraal* do not in all circumstances impose an "absolute degree of proactivity" on the part of the state, and this will depend on the circumstances of the case. He submitted however that the following issues should be relevant to determining when the circumstances for bringing a collateral challenge are appropriate:

23.1 Firstly, in *Merafong* the applicant had instituted a counter-application for declaratory relief, even though this fell short of a direct review and was delayed. This was already distinguishable on the facts from *Kirland* where absolutely no attempt was made to impugn the administrative act in issue. Similarly, in *Tasima* the Department of Transport had filed a counter-application in which it sought to institute a direct review and sought condonation for the delay, as well as bringing a collateral challenge.

23.2 Second, whilst the court emphasized the need for flexibility in application of the collateral challenge doctrine, it only determined that an organ of state may avail itself of the challenge in limited circumstances i.e. where compliance with another organ of state's administrative act is sought to be enforced.

23.3 Third, *Merafong* says nothing about whether a collateral challenge is available to an organ of state against the enforcement of its own decision.

23.4 Fourth, the other elements of the collateral challenge doctrine remain unchanged, i.e. there must still be a subject (which could be an organ of state), being coerced into complying with an administrative act by a public authority.

23.5 Fifth, the *Merafong* court considered and determined the collateral challenge largely for purposes of convenience.

[24] In these circumstances, I agree that a collateral challenge does not avail the defendants on the facts *in casu*. Furthermore, as Mr Girdwood submitted, relying on *Kwa Sani Municipality v Underberg/Himeville Community Watch Association* [2015] ZASCA 24 (20 March 2015), the defendants could not invoke the collateral challenge doctrine to justify their failure to approach the court timeously and seek judicial review. In my view the only remedy available to them to invalidate and set aside the agreements, would be to institute a direct review or at the very least bring an application for a declarator. To simply raise a collateral issue, as they do here by way of a special plea, cannot on any of the authorities cited above be countenanced. The key point moreover, as pointed out by Mr Girdwood, is that the collateral challenge is permitted as a defence in enforcement proceedings related to an unlawful administration act. Such proceedings are not intended to consider the validity of the act (or, as *in casu,* the agreements) being disputed.

[25] Furthermore, if the challenge being brought by way of the special plea were to be entertained it would prejudice the plaintiff and deny it the normal safeguards applicable in the case of a review (or an application), which include at the very least the record related to the decision; the explanation for the delay in

challenging the unlawfulness of the agreements; and the benefit of the application of the *Plascon-Evans* rule (See *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A)), as submitted by Mr Girdwood.

[26] Indeed it might have been the fear of being met by the rule against unreasonable delay that prevented the defendants from seeking a review or other remedy and prompted the decision to opt for a special plea. However, delay does not necessarily present an insurmountable obstacle as is shown by *Gijima* (*State Information Technology Agency SOC Limited v Gijima Holdings (Pty) Ltd* 2018 (2) SA (CC)), where the Constitutional Court ultimately exercised its discretion against the applicant in regard to condonation, but nevertheless used its just and equitable discretion under section 172 of the Constitution not to set the contract aside.

[27] In this regard however, *Kirland* (para 65) has the final word on the issue of the absence of a direct, formal review (or application or counter-application) and, by implication, the limitations of a collateral challenge brought as in the present matter:

"The evidence is not all before us. And it would be fundamentally unfair to Kirland to set aside the decision now, without requiring government to bring a proper application, in which it explains the history of the decision, its shifting attitudes towards it and its delay in dealing with it. In response, Kirland is entitled to be heard on whether it has been prejudiced and why it would be unfair to it to set the decision aside now. This is a protection the Constitution itself affords Kirland".

[28] Accordingly, in my view the answer to the second question raised by the separated issue must also be a resounding "no", and the issue must be decided in favour of the plaintiff. It is not appropriate for the defendants to seek to invalidate the agreements on the basis of a constitutional challenge raised by way of a special plea without enabling the plaintiff to benefit from the procedural and substantive safeguards that would be available in a review or an application. This approach is simply not countenanced by the rule of law and the principle of legality, which is a foundational principle of the Constitution, nor by the exceptions permitted by the authorities as discussed above.

Order

[26] In the circumstances, I make the following order:

1. The separated issue is determined in favour of the plaintiff.

2. The defendants are to pay the costs occasioned by the determination of the separated issue, such costs to include costs of two counsel.

U BHOOLA
Acting Judge of the High Court of South Africa
Gauteng Local Division, Johannesburg

Date of hearing: 30 August 2018

Date of judgment: 23 November 2018

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