REPUBLIC OF SOUTH AFRICA

THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Reportable
Case Number : 177 / 2006

In the matter between

CITY OF TSHWANE METROPOLITAN MUNICIPALITY **APPELLANT**

and

RPM BRICKS PROPRIETARY LIMITED **RESPONDENT**

Coram : HARMS ADP, FARLAM, LEWIS, PONNAN JJA et MUSI AJA

Date of hearing : 5 MARCH 2007

Date of delivery : 27 MARCH 2007

SUMMARY

Estoppel – raising of against a statutory body – distinction between acts which are ultra vires and non-compliance with internal arrangements – reliance on estoppel in former case – not permissible.

Neutral citation: This judgment may be referred to as :
***City of Tshwane Metropolitan Municipality* v *RPM Bricks (Pty) Ltd* [2007] SCA 28 (RSA)**

J U D G M E N T

PONNAN JA

[1] On 5 July 2001 the council of the present appellant, the City of Tshwane Metropolitan Municipality (the defendant in the court below), resolved to add the respondent, RPM Bricks Proprietary Limited (the plaintiff in the court below), to its list of already approved suppliers for the supply and delivery of coal to its Pretoria West and Rooiwal power stations. For convenience I will refer to the parties by their appellation in the court below.

[2] The plaintiff was thus duly placed on the council's list of approved coal suppliers on inter alia the following terms:

(a) the supply contract was to commence on 1 April 2001 and to endure for a period of three years;

(b) the coal was to be despatched by rail to the railway sidings of the respective power stations;

(c) the total price for all coal delivered during any calendar month was to be paid within 30 days after receipt by the city electrical engineer of a fully specified account;

(d) the price payable for the coal supplied and delivered had two component parts, namely, the free on rail ('FOR') price of the coal per ton (which varied according to the calorific value of the coal) plus the railage cost; and

(e) the FOR and railage prices were to be fixed for the first year of the contract, whereafter prices were to increase in accordance with the producer price index for the previous year.

[3] By letter dated 10 July 2001 the plaintiff was officially informed that it had been added to the list of coal suppliers of the defendant and that it could proceed with the execution of the tender. Nothing happened however until May 2002. The reason for this was that Spoornet, which was buckling under the pressure of existing orders and did not have any available railway carriages, was unwilling to enter into transportation contracts with new clients such as the plaintiff. To address this difficulty, at a meeting with employees of the defendant during May 2002, the plaintiff expressed a willingness to deliver coal by road. Pursuant to that meeting, on 15 May 2002 the plaintiff despatched a letter to one of the defendant's employees indicating that it was willing and able to supply 30 000 tons of coal by road transport. There followed in that letter a schedule of prices for coal of different calorific values.

[4] On 28 May 2002 the defendant placed an initial order with the plaintiff and, after a trial run using road transportation, placed several more orders with the plaintiff for the month of June. On 13 June 2002 the plaintiff despatched a letter to the defendant in which it recorded:

'As you are aware Transnet at present cannot supply rail trucks and this has now forced everybody to turn to road transport which in turn has created a golden opportunity for the owners of trucks to demand very high fees for road transport . . . '.

There followed a schedule of prices. The letter continued

'Be rest assured that the moment that Transnet can supply rail trucks again on a regular basis we trust that we will then be able to reduce our prices as follows . . . '.

A schedule of lower prices then followed. Whilst awaiting a response to that letter the plaintiff continued to deliver coal by road at the price originally agreed with reference to rail transportation.

[5] By letter dated 22 August 2002 the plaintiff was informed that its application for an increase in price had been approved and that the new prices, which would come into effect on 1 July 2002, would be as set out in a document annexed thereto. The plaintiff implemented its terms with retrospective effect to that date and invoiced the municipality for the difference between the original price and the increased price for the months of July and August. These invoices were paid by the defendant. The plaintiff continued thereafter to supply and deliver coal to the defendant at the increased price for the remainder of 2002 and the month of January 2003. It invoiced the defendant and was paid up to and including November 2002.

[6] On 8 January 2003 the plaintiff received a letter from the defendant which read: 'Your final account for December 2002 to the amount of R1 755 485.80 has been settled without alterations.'

The consequent payment anticipated by the plaintiff after receipt of that letter did not materialise. Instead, by letter dated 30 January 2003, the plaintiff was informed that the incorrect annexure had inadvertently been affixed to the municipality's letter of 22 August 2002. The correct annexure which, it was asserted, had to replace the previous annexure, was enclosed.

[7] The plaintiff's subsequent demand for payment for the months of December 2002 and January 2003 elicited the response from the defendant that the plaintiff had been overpaid for the months of July to November 2002. In consequence, so it was asserted by the defendant, the plaintiff was in fact indebted to it (the defendant).

[8] The plaintiff caused summons to be issued out of the Pretoria High Court for payment of the sum of R 2 646 134.40 for what it alleged was the defendant's total outstanding indebtedness to it for coal supplied and delivered to the latter for the months of December 2002 and January 2003. In the alternative the plaintiff alleged that the defendant had retained and utilised the full volume of coal that had been delivered to it and it therefore had been enriched at the expense of the plaintiff in that sum. However, the plaintiff deliberately chose not to pursue its claim based on enrichment in the court a quo.

[9] The first of the various defences raised by the defendant in its plea and the only one that I will in due course consider was the following: 'Defendant pleads that at no time did it resolve to vary the supply contract … as required by s 38(1) of the Gauteng Rationalisation of Local Government Affairs Act 10 of 1998[1] ("the Act") nor did it comply with the formalities prescribed by s 38(3) of the Act at any stage'. The plaintiff replicated that the defendant was precluded by the doctrine of estoppel from relying on s 38 of the Act. Patel J, who heard the matter, granted judgment in favour of the plaintiff. This appeal is with his leave.

[10] Section 38 of the Act provides:

'Extending or varying a tender agreement

(1) Subject to subsection (2), a municipal council on its own initiative or upon receipt of an application from the person, body, organisation or corporation supplying goods or services to the municipal council in terms of this Chapter, may resolve to extend or vary a tender agreement if-
    (a) the circumstances as contemplated in section 35(2)(a) prevail; or
    (b) with due regard to administrative efficiency and effectiveness, the council deems appropriate.

[1] *Rationalisation of Local Government Affairs Act* 10 of 1998, PN 66, *PG* 550, 30 October 1998.

(2) A municipal council may not extend or vary a tender agreement -
  (a) more than once;
  (b) for a period exceeding the duration of the original agreement; or
  (c) for an amount exceeding twenty (20) percent of the original tender value.

(3) Within one month of the resolution referred to in subsection (1), the matters specified in subsection (4) must be -
  (a) published by the municipal council at least in an appropriate newspaper circulating within the boundaries of the municipality; and
  (b) displayed at a prominent place that is designed for that purpose by a municipal council.

(4) The matters to be published or displayed are -
  (a) the reasons for dispensing with the procedure specified in section 36;
  (b) a summary of the requirements of the goods or services; and
  (c) the details of the person, body, organisation or corporation supplying the goods or services.

(5) The functions of a municipal council in terms of this section may not be assigned nor delegated.'

[11] It is important at the outset to distinguish between two separate, often interwoven, yet distinctly different 'categories' of cases. The distinction ought to be clear enough conceptually. And yet, as the present matter amply demonstrates, it is not always truly discerned. I am referring to the distinction between an act beyond or in excess of the legal powers of a public authority (the first category), on the one hand, and the irregular or informal exercise of power granted (the second category), on the other. That broad distinction lies at the heart of the present appeal, for the successful invocation of the doctrine of estopppel may depend upon it. (See T E Dönges & L de van Winsen *Municipal Law* 2ed (1953) pp 38 – 41.)

[12] In the second category, persons contracting in good faith with a statutory body or its agents are not bound, in the absence of knowledge to the contrary, to enquire whether the relevant internal arrangements or formalities have been satisfied, but are entitled to assume that all the necessary arrangements or formalities have indeed been complied with (see for example *National and Overseas Distributors Corporation (Pty) Ltd v Potato Board* 1958 (2) SA 473 (A); *Potchefstroom se*

Stadsraad v Kotze 1960 (3) SA 616 (A)). Such persons may then rely on estoppel if the defence raised is that the relevant internal arrangements or formalities were not complied with.

[13] As to the first category: failure by a statutory body to comply with provisions which the legislature has prescribed for the *validity* of a specified transaction cannot be remedied by estoppel because that would give validity to a transaction which is unlawful and therefore ultra vires. (See for example *Strydom v Die Land- en Landbou Bank van Suid-Afrika* 1972 (1) SA 801 (A); *Abrahamse v Connock's Pension Fund* 1963 (2) SA 76 (W) and *Hauptfleisch v Caledon Divisional Council* 1963 (4) SA 53 (C).)

[14] Patel J found in effect that this case fell into the second category. For the reasons that follow I am in respectful disagreement with the learned judge. In the present case, the defendant's legal capacity to amend the supply contract must be sought in the provisions of the statute. A resolution by the defendant's council was prescribed by s 38(1) as a necessary prerequisite for amending or varying the supply contract. Absent such a resolution, any purported amendment by employees of the defendant was plainly impermissible. Moreover, s 38(5) specifically prohibited the defendant's council from delegating or assigning those functions. Here, of course, we are dealing not merely with the *form* in which the statute requires a transaction to be clothed, but with something more fundamental. The statute expressly confers sole power upon a specified entity, to the exclusion of any other person or entity, to extend or vary an existing tender agreement. The linguistically plain meaning of the

section severely restricts the power (*vires*) to enter into a transaction of that kind to the defendant's council.

[15] Section 217 of the Constitution requires contracts for services or goods by an organ of state such as the defendant to accord with a system that is fair, transparent, competitive and cost-effective. Against that backdrop, the mischief that s 38 of the Act seeks to prevent is plain. It is to eliminate nepotism, patronage, or worse, and to entrust the council of the defendant with a sole power which is to be exercised independently by it to achieve those ends. If the conclusion of contracts were to be permitted without any reference to the defendant's council and without any sanction of invalidity, the very mischief which the legislation seeks to combat could be perpetuated.

[16] There are formidable obstacles to the plaintiff's reliance upon the doctrinal device of estoppel. Assuming in the plaintiff's favour that all of the requirements for its successful invocation have been established, this is not a case in which it can be allowed to operate. It is settled law that a state of affairs prohibited by law in the public interest cannot be perpetuated by reliance upon the doctrine of estoppel (*Trust Bank van Afrika Bpk v Eksteen* 1964 (3) SA 402 (A) at 411H-412B), for to do so would be to compel the defendant to do something that the statute does not allow it to do. In effect therefore it would be compelled to commit an illegality *(Hoisain v Town Clerk, Wynberg* 1916 AD 236).

[17] The amending of the supply contract was at the instance of the defendant's employees who were plainly not authorised to do so. The defendant had thus not

acted in fact nor, for that matter, is it considered in law to have acted at all. No amendment of the supply contract had therefore occurred. The effect of allowing estoppel to operate would be to breathe life into that which has yet to come into being. If the amendment were to be 'validated' by the operation of estoppel, the defendant would be precluded from exercising the powers specifically conferred upon it for the protection of the public interest.

[18] The fact that the plaintiff was misled into believing that the defendant's employees were authorised to vary an agreement that had earlier been lawfully concluded with it can hardly operate to deprive the defendant of that power which had been bestowed upon it by the legislature. To do so would be to deprive the ultra vires doctrine of any meaningful effect.

[19] In finding for the plaintiff, Patel J held that the doctrine of estoppel could be successfully invoked by it in this case. To support this finding he called in aid the judgment of Boruchowitz J in *Eastern Metropolitan Substructure v Peter Klein Investments (Pty) Ltd* 2001 (4) SA 661 (W). In that case Boruchowitz J expressed the view that the Constitution obliged him to reconsider the existing common law rule which precludes the raising of an estoppel where its effect is to prevent or excuse the performance of a statutory duty or discretion, although, as he put it (para 34):

'The difficulty, as I comprehend it, is not with the rule but with its application. The rule itself does not infringe any provision of the Bill of Rights, and is in conformity with the doctrine of legality implied in the Constitution. . . . As the facts of the present case amply demonstrate, the blanket application of the rule may in certain instances run counter to a fundamental rights provision or value which underpins the Constitution.'

Precisely which fundamental rights provision or constitutional value he had in mind, the learned judge did not state. Nor, for that matter, does this emerge with any clarity from the judgment. Boruchowitz J continued (para 40):

'What is required, in the present instance, is not a setting aside of the common-law rule but an incremental change in its application, necessary to ensure that the underlying values and constitutional objectives are achieved. Instead of permitting a barrier to the raising of estoppel against a public authority exercising public power, the common law should be developed to emphasise the equitable nature of estoppel, and its function as a rule allocating the incidence of loss.'

[20] I accept, as did Boruchowitz J, that courts are enjoined to develop the common law, if this is necessary. That power is derived from sections 8(3) and 173 of the Constitution. Section 39(2) of the Constitution makes it plain that, when a court embarks upon a course of developing the common law, it is obliged to 'promote the spirit, purport and objects of the Bill of Rights' (*S v Thebus* 2003 (6) SA 505 (CC) para 25). This ensures that the common law will evolve, within the framework of the Constitution, consistently with the basic norms of the legal order that it establishes (*Pharmaceutical Manufacturers Association of South Africa*; *In re Ex parte President of the Republic of South Africa* 2000 (2) SA 674 (CC) para 49). The Constitutional Court has already cautioned against overzealous judicial reform. Thus, if the common law is to be developed, it must occur not only in a way that meets the s 39(2) objectives, but also in a way most appropriate for the development of the common law within its own paradigm (*Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC) para 55).

[21] Faced with such a task, a court is obliged to undertake a two-stage enquiry. First, it should ask itself whether, given the objectives of s 39(2), the existing

common law should be developed beyond existing precedent. If the answer to that question is a negative one, that should be the end of the enquiry. If not, the next enquiry should be how the development should occur and which court should embark on that exercise. (See *S v Thebus* para 26.)

[22] Had that exercise been undertaken by Boruchowitz J, the first enquiry would, in my view, have yielded a negative response. With respect to the learned judge, his reasoning fails to draw the crucial distinction between the two categories to which I have already alluded. The dicta of this court in *Hoisain* v *Town Clerk, Wynberg,* on the one hand, and *National and Overseas Distributors Corporation (Pty) Ltd v Potato Board,* on the other, exemplify that distinction. In *Hoisain,* Innes CJ stated (at 240):

'It is sought to compel the Town Clerk to place the applicant's name upon the statutory list; he can only do that upon the grant of a certificate by the Council, which that body has definitely refused to give. Such a certificate is not in truth in existence. So that the Court is asked to compel the Town Clerk to do something which the Statute does not allow him to do; in other words we are asked to force him to commit an illegality. There can be no question of estoppel as far as he is concerned. His negligence cannot be a substitute for the Council's approval, nor can he by virtue of his mistake be compelled to bring about a position which he has no power in law to create by his own free will.'

In *Potato Board,* Schreiner JA stated (at 48A-E):

'We were referred to the case of *Hoisain* v *Town Clerk, Wynberg*, 1916 A.D. 236, where a town clerk had in error issued a certificate for the transfer of a business to the wrong person. INNES, C.J., at p. 240, dealt with an argument based on the rule in *Royal British Bank* v *Turquand*, 119 E.R. 474, and said that it had no application to such a situation as the one before the Court, which was being asked to force the town clerk to commit an illegality by placing Hoisain's name on a statutory list which could include only the names of persons to whom the council had granted certificates. The present is an entirely different kind of case. For here although Mr. Rust had no right as against the respondent to enter into a contract for the respondent which had not been approved by the Board there was no illegality if in fact he did so.

The contract being one which the respondent could lawfully enter into and Mr. Rust having been the proper person to make contracts when an approving resolution by the Board had been passed, it seems to follow that so far as the outside world was concerned he bound the respondent when he made a contract without such a resolution. (*cf*. *S.A.I.F. Co-operative Society* v *Webbe*r, 1922 T.P.D. 49). The rule in *Royal British Bank* v *Turquand*, *supra*, which was followed in *Mine Workers' Union* v *J.J. Prinsloo*, 1948 (3) S.A. 831 (A.D.), applies and any mistake that may have occurred and led to the appellant's tender being accepted without a supporting resolution by the Board could not prejudice the appellant. So far as it was concerned there was a properly made contract binding on the respondent.'

[23] Boruchowitz J concluded (para 40) that:

' . . . the proper approach, consistent with s 39(2) is that the Court should balance the individual and public interests at stake and decide on that basis whether the operation of estoppel should be allowed in a specific case'.

That approach with respect to the learned judge is fallacious. Estoppel cannot, as I have already stated, be used in such a way as to give effect to what is not permitted or recognised by law. Invalidity must therefore follow uniformly as the consequence. That consequence cannot vary from case to case. 'Such transactions are either all invalid or all valid. Their validity cannot depend upon whether or not harshness is discernible in a particular case.' (per Marais JA in *Eastern Cape Provincial Government v Contractprops 25 (Pty) Ltd* 2001 (4) SA 142 (SCA) para 9). Boruchowitz J, I should perhaps add, sought support for his view in the judgment of *Laker Airways Ltd v Department of Trade* [1997] 2 All ER 182 (CA), where Lord Denning MR stated (at 194 D-F):

'…It [the Crown] can, however, be estopped when it is not properly exercising its powers, but misusing them; and it does misuse them if it exercises them in circumstances which work injustice or unfairness to the individual without any countervailing benefit for the public:…'.

Significantly the view expressed by Lord Denning MR has subsequently been overruled by the House of Lords in *R v East Sussex County Council, ex parte Reprotech (Pebsham) Ltd; Reprotech (Pebsham) Ltd v East Sussex County Council* [2002] 4 All ER 58 para 35.

[24] With respect to Boruchowitz J, what he postulates is, in my view, the antithesis of that demanded by the Constitution. Section 173 of the Constitution enjoins courts to develop the common law by taking into account the interests of justice. The approach advocated by the learned judge, if endorsed, would have the effect of exempting courts from showing due deference to broad legislative authority, permitting illegality to trump legality and rendering the ultra vires doctrine nugatory. None of that would be in the interests of justice. Nor, can it be said, would any of that be sanctioned by the Constitution, which is based on the rule of law, and at the heart of which lies the principle of legality.

[25] I accordingly can find no warrant for the approach postulated by Boruchowitz J. Neither, I must add, do I agree with the conclusion reached by him. It follows that on this aspect, Boruchowitz J was wrong, as indeed was the learned judge in the present case. The appeal must therefore succeed. This result may well be perceived to be an unpalatable one. It is, however, not so. For it must be remembered that someone in the position of the plaintiff has, in principle, an enrichment action and will thus not be entirely remediless. In this case, as I have already mentioned, the plaintiff consciously elected at the trial not to pursue its enrichment claim. It must therefore bear the consequences of that election.

[26] In the result:

(a) The appeal succeeds with costs.

(b) The judgment of the court a quo is altered to one of absolution from the instance with costs.

V M PONNAN
JUDGE OF APPEAL

CONCUR:

HARMS ADP
FARLAM JA
LEWIS JA
MUSI AJA