



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

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Brain Gear Investments (Pty) Ltd and Others v Buhle Waste (Pty) Ltd and Another (102/2023; 103/2023; 108/2023; 110/2023) [2024] ZASCA 168 (5 December 2024)

Today the Supreme Court of Appeal (SCA) upheld an appeal in part and set aside paragraphs 118.3 to 118.7 of the order of the Mpumalanga Division of the High Court, Mbombela (the high court). Lastly, the SCA dismissed the appeal with costs, including the costs of two counsel where so employed.

The first appellant, Brain Gear Investments (Pty) Ltd (Brain Gear), was appointed as the 28% BBEE shareholder in terms of the impugned decision. The third appellant, Sembcorp Utilities (Netherlands) NV (Sembcorp Netherlands), formerly controlled 100% of the shares in Silulumanzi. The fifth appellant, South African Water Works (Pty) Ltd (SAWW), purchased all the shares in Silulumanzi from Sembcorp Netherlands in terms of a share purchase agreement concluded on 21 February 2018 (the SPA). The sixth appellant, Sembcorp Utilities South Africa (Pty) Ltd (Sembcorp SA), which previously held 52% of the shares in Silulumanzi, is a wholly owned subsidiary of Sembcorp Netherlands. The first respondent was Buhle Waste (Pty) Ltd (Buhle Waste), a company that provides waste management services. The second respondent, ZMG Scientific Services (Pty) Ltd (ZMG), was the second company which participated and was shortlisted, together with Buhle Waste, in the tender process in issue.

On 21 April 1999, Silulumanzi concluded a concession agreement with the Municipality's predecessor (the concession agreement). Silulumanzi was appointed as a concessionaire of water services, in terms of which it would supply potable water and sanitation services to a part of the Municipality's region for a period of 30 years. Clause 7.4.2.1 of the concession agreement provided that no shares in the share capital of Silulumanzi could be transferred to any person or entity, which would result in that person or entity controlling the concessionaire immediately before such transfer, losing such control, unless such transfer of shares is effected with the prior written approval of the Council of the Municipality.

In 2017, the Sembcorp Group decided to exit the South African municipal water market, thus selling its entire shareholding to SAWW in terms of the SPA. On 28 June 2018, the Council of the Municipality adopted a resolution in terms of which it granted conditional consent to the change of control in Silulumanzi (the June 2018 decision). Thereafter, Silulumanzi engaged Price Waterhouse Coopers Advisory Services (Pty) Ltd (PwC), to select and identify a BBEE entity to which the 28% shareholding in Silulumanzi would be sold. On 19 September 2018, Brain Gear and Buhle Waste were informed that Brain Gear had been selected as the 28% shareholder.

On 28 September 2018, after Silulumanzi addressed a letter to the Municipality advising it that the selection process had been completed; that a local BBBEE shareholder had been appointed; and that Silulumanzi had complied with the June 2018 decision, The Acting Municipal Manager was asked to confirm, by signing the letter, that Silulumanzi had complied with that decision and that the consent to the transfer of shares had become unconditional, which he did.

On 14 November 2018, the Municipality and Silulumanzi, entered into an agreement in terms of which the Municipality acknowledged that the transfer of shares would result in a change of control in Silulumanzi and unconditionally and irrevocably consented to that change. The agreement also recorded that Silulumanzi had, to the satisfaction of the Municipality, selected a local BBBEE shareholder and that the Municipality confirmed the fulfilment of the conditions imposed in the June 2018 decision.

On 17 July 2019, Buhle Waste launched an application in the high court to review and set aside the impugned decision, as well as the agreement concluded on 14 November 2018, giving effect to that decision based on the principle of legality under the Constitution and the Promotion of Administrative Justice Act 3 of 2000 (PAJA). Buhle Waste, inter alia, alleged that impugned decision was materially influenced by an error of law or fact; the Municipality considered irrelevant factors and ignored relevant ones; the consent decision was not rationally connected to the material before the Municipality and the purpose for which its conditional consent had been given; the Municipality misconstrued its own powers and considered its role as merely one of 'rubberstamping' the selection process, contrary to the June 2018 decision; and the impugned decision was unreasonable and, in any event, unlawful. On the eve of the hearing in the high court, on 26 May 2022, Buhle Waste and Sembcorp Netherlands entered into a settlement agreement (the May 2022 order) in terms of which Buhle Waste confirmed that it did not seek to impugn the June 2018 decision nor the SPA. The high court reviewed and set aside the impugned decision, holding that Municipality abandoned its oversight role in the process of selecting the 28% BBBEE shareholder and failed to fulfil its role in terms of its own resolution contained in the June 2018 decision and that Municipality failed to ensure that the process was transparent and fair.

The issues before the SCA related to (a) the effect of the decision by the Municipality on 14 November 2018; and (b) whether the impugned decision constituted administrative action.

On the first issue, the SCA found that it was clear from the evidence that the Municipality approved the transfer of shares and the change in the control of Silulumanzi on 14 November 2018, holding that the submission by Sembcorp Netherlands that what happened in November 2018 was the conclusion of an agreement confirming that the conditions had been fulfilled, was wrong and missed the point that the change in the control of Silulumanzi could not be approved without the conditions being fulfilled.

On the second issue, the SCA found that that the impugned decision constituted administrative action as it was a decision by the Municipality, that formed part of the local sphere of government, exercising a power in terms of the Constitution or exercising a public power or public function in terms of legislation, which adversely affected the rights of Sembcorp Netherlands and Silulumanzi. In as far as the review grounds were concerned, the SCA found that the high court was correct in holding that the Municipality had abandoned its duty to oversee the selection process as the Municipality played no role in that process. The Court concluded that Buhle Waste had established that the impugned decision was unreasonable and that the Municipality misconceived the nature and effect of its own decision of 28 June 2018 and thus erred on the facts and the law. Consequently, impugned decision was not rationally connected to the purpose for which it was taken, the information before the Municipality, and the reasons given for the decision.

Lastly, with regards to the relief granted by the high court, which was separate from the review and setting aside order, the SCA set these orders aside as both parties to the appeal had conceded that those orders were unnecessary or tautologous.