Reportable
Case No: 10/99

In the matter between:

THE CAPE METROPOLITAN COUNCIL Appellant

and

METRO INSPECTION SERVICES WESTERN CAPE CC 1st Respondent

METRO INSPECTION SERVICES CC 2nd Respondent

ZENO VENTER 3rd Respondent

Coram: Hefer, ACJ, Marais, Streicher, Cameron and Navsa, JJA

Heard: 1 March 2001

Delivered: 30 March 2001

S 33 and 32 of the Constitution - whether cancellation of a contract constitutes 'administrative action' - entitlement to information.

J U D G M E N T

STREICHER JA:

[1] In the matter of *Metro Inspection Services (Western Cape) CC and Others v Cape Metropolitan Council* 1999 (4) SA 1184 (C) the Cape Provincial Division ("the court *a quo"*) set aside a decision by the Cape Metropolitan Council ("the appellant") to terminate a contract with Metro Inspection Services (Western Cape) CC ("the first respondent") and reinstated the contract. The court *a quo* also ordered the appellant to afford the first respondent or its nominated representative access to the written information contained in certain documents, to furnish reasons for its decision and to pay the costs of the application. The reference in the court *a quo*'s order to the second respondent, Metro Inspection Services CC, was erroneous. With the leave of the court *a quo* the appellant appeals against these decisions. In respect of the appeal against the setting aside of the appellant's cancellation of the contract and the order that the appellant should furnish reasons for its decision to cancel the contract, the main issue to be decided is whether such cancellation constituted 'administrative action' within the meaning of that phrase in

the Constitution of the Republic of South Africa Act 108 of 1996 ("the Constitution"). The appeal against the order granting the first respondent access to certain written information turns on the application to the relevant facts of the provisions of s 32 of the Constitution.

[2] The appellant was, by Proclamation 18 of 1995 (Province of Western Cape), established as a transitional metropolitan council in terms of the Local Government Transition Act 209 of 1993 ("the LGTA"). As such it is an 'organ of state' as defined in s 239 of the Constitution. It is thus, in terms of s 8 of the Constitution, subject to the provisions of the Bill of Rights in chap 2 of the Constitution.

[3] In terms of s 7 of Proclamation 17 of 1995 (Province of Western Cape) the appellant became the successor in law of the Western Cape Regional Services Council within the metropolitan area defined in s 2 thereof and, during the currency of an agency arrangement referred to in s 6(2) of the proclamation, within the region of the Winelands Regional Services Council. All levies payable to the Western Cape Regional Services Council became payable to the appellant and all other rights,

powers and privileges and all liabilities, duties and obligations of the Western Cape Regional Services Council vested in and devolved upon the appellant. As a result the appellant became obliged to levy and claim the regional services and regional establishment levies provided for in s 12 of the Regional Services Councils Act 109 of 1985.

[4] A metropolitan council may in terms of s 10C(7)(a) of the LGTA enter into an agreement with any other person in terms of which that person undertakes, on behalf of the metropolitan council, to exercise a power or perform a duty which the metropolitan council may exercise or perform, subject to such conditions as may be agreed upon. During 1997 the appellant invited tenders for the registration of people liable to pay a regional services or regional establishment levy and for the collection of arrear levies. Tenders by the second respondent and SDR Inspection Services CC ("SDR") were successful in that each of them received an appointment for a specific area. The original appointment was for the year 1997 but it was subsequently extended to the end of 1998. At the beginning of 1998 the appellant and the second respondent agreed that the first respondent be substituted

for the second respondent.

[5] In terms of its contract with the appellant the first respondent was entitled to a commission in respect of arrear levies collected and also to an amount in respect of each new registration of a levy payer.

[6] During about August or September 1998 the appellant prepared tender documentation to be released or published on 21 September 1998 with a view to making an appointment for the 1999 year. The first respondent understood the position to be that only one appointment, as opposed to the joint appointment of the first respondent and SDR, would be made. In the event an invitation to tender was not published in September. At about that time SDR made allegations of irregularities on the part of the first respondent. One Karien du Plessis, who was associated with SDR, wrote to the appellant and made allegations to the effect that Metro had been overpaid by an amount of approximately R1,4m in commissions. The appellant thereupon launched a full internal investigation, to be conducted by two internal auditors in its employ, of the claims which had been submitted by the

first respondent.

[7] On 30 October 1998 the appellant summarily terminated the first respondent's appointment by letter, signed by Dr Fisher, the chief executive officer of the appellant. The letter read as follows:

> "Please take note that your agreement with the Cape Metropolitan Council in respect of the identification of non-paying levy payers and the collection of outstanding levies is terminated with immediate effect.
>
> This termination is due to your material breach of contract which involves substantial fraudulent claims, the full extent of which is still under investigation.
>
> Please also note that no further payments will be made to yourselves and you are requested to return any property which Council may own."

[8] On 4 November 1998 Dr Fisher released the following statement:

> "Since 1996 the CMC has employed outside levy inspection contractors to assist in the identification of business concerns that are not paying RSC levies to the Council, or who are in arrears with their levy payments. These contractors are paid a commission based on any additional levy income accruing to the Council.
>
> Around the end of September, allegations were made of possible irregularities in the commission claims of one of the levy inspection contractors. Possible staff complicity in the irregularities was also alleged.

> External forensic auditors were immediately appointed by the Chief Executive Officer to investigate these allegations. This initial investigation substantiated the concerns, and further investigations continue.
>
> Evidence arising from this investigation has resulted in two senior staff members being suspended from duty, pending further possible disciplinary action. In addition, the contractual arrangement with one levy inspection firm was summarily terminated on 30 October, owing to evidence of fraudulent claims for commission.
>
> Further extensive internal and external investigations are continuing, and further action will be taken based on the results thereof. This will include criminal charges, where indicated , the recovery of any monies that have been fraudulently obtained, and severe disciplinary action against any staff member implicated. In the meantime, control measures have been put in place to prevent any recurrence of this alleged fraud."

The first respondent thereupon applied for the setting aside of the termination of its appointment on the ground that its constitutional right to lawful, procedurally fair administrative action and administrative action which was justifiable in relation to the reasons given for it, was violated by such termination. It contended that the appellant should have made a full disclosure of the case upon which it proposed to act and should have given it a reasonable opportunity to state its case, by way of written or oral representations, before terminating its appointment. The first respondent also applied for an order that it be furnished with written reasons for the appellant's decision to terminate the agreement; an order granting it access to

certain documents; and certain other relief.

[9] The appellant denied that its cancellation of the contract constituted 'administrative action' entitling the first respondent to procedural fairness and reasons in terms of s 33 of the Constitution. It contended that it was entitled to summarily cancel the contract in that the first respondent submitted numerous claims for commissions to which it was not entitled. According to the appellant more than R2m was paid by it to the respondent in respect of such claims. The appellant alleged that the first respondent's claims for commissions to which it was not entitled were of such an extent that it clearly showed that a systematic fraud had been perpetrated on it. The first respondent denied that it had made itself guilty of any material breach of contract or of the lodging of substantial fraudulent claims as alleged by the appellant. In respect of the specific allegations of false claims the first respondent alleged that some of them were not incorrect; that some incorrect claims and payments were subsequently rectified; and that some were corrected after the cancellation. It denied, furthermore, that, to the extent that it claimed and received commissions to which it was not entitled, the inference could be drawn that it acted

fraudulently and, therefore, denied that the appellant was in law entitled to cancel the contract. It was not contended by the first respondent that it would not have constituted a material breach of contract, entitling the appellant, in terms of the law of contract, to summarily terminate the contract, had fraudulent claims been submitted by it. Whether that was the case is not a matter that could be decided in application proceedings and neither the court *a quo* nor we were requested to do so. The court *a quo* stated that the issue was not whether the appellant had sufficient reason to terminate the contract, but whether the procedure adopted by the appellant in adopting and implementing its decision to terminate the contract was correct or not. That was also the basis on which the matter was argued before us.

[10] The court *a quo* found that when the appellant made the decision to terminate its contract with the first respondent the principles of administrative law applied to that decision. It stated that the appellant was a public authority which derived its authority to appoint the first respondent from a public power from which it followed, applying the rationale expounded in *Administrator, Transvaal, and*

Others v Zenzile and Others 1991 (1) SA 21 (A), that its authority to terminate the agreement with the first respondent similarly derived from a public power (at 1195A-B).

[11] *Zenzile* is no authority for the proposition that, if a public authority derives its authority to enter into a particular contract from a public power, its authority to terminate the contract similarly derives from a public power, entitling the other contracting party to the benefit of the application of the principles of natural justice before cancellation of the contract. In *Zenzile* a contract of employment was summarily terminated because of misconduct on the part of the employees, being their participation in a work stoppage. The employees had not been given a hearing prior to their summary dismissal. Although the administration was statutorily empowered to so terminate the contracts of employment, it was submitted that the contractual relationship of the parties was governed exclusively by the common law. Furthermore, it was argued that the employees' participation in the work stoppage amounted to an unlawful repudiation of their contractual obligation to work, or a fundamental breach of that obligation, which entitled the employer to

dismiss them summarily. The decision to dismiss therefore fell beyond the purview of administrative law, so it was submitted. This court did find that the decision to dismiss involved the exercise of a public power (at 34C). However, that power was not derived from the power to contract; it was a statutory power to dismiss, which power, according to the court, was "not deprived of its intrinsic jural character simply because a corresponding right to dismiss (existed) at common law or that provision for it (might have been) made in a contract" (at 36G).

[12] Similarly, in *Administrator, Natal, and Another v Sibiya and Another* 1992 (4) SA 532 (A), in which it was said that the decision by a public authority to dismiss employees involved the exercise of a public power, the employees' employment was governed by statutory provisions (at 534E).

[13] The court *a quo* also found, in the present case (at 1193B-E), that the peculiar content of the agreement rendered it an administrative agreement being an agreement relating to the provision of public services. In this regard it relied on Burns *Administrative Law under the 1996 Constitution* at 113 where agreements

relating to the provision of public services are listed as administrative agreements. It serves little purpose, in the present case, to classify the agreement between the first respondent and the appellant as an administrative agreement. The question remains whether the cancellation of the agreement constituted 'administrative action'.

[14] Another factor which weighed with the court *a quo* was that it was not in dispute on the papers that the first respondent's competitor exerted influence on the appellant to terminate the agreement with the first respondent. That fact, according to the court *a quo*, gave considerable cogency to the first respondent's plea that it should have been afforded procedurally fair administrative action before its agreement with the appellant was cancelled (see 1195C-F). It is not quite correct to say that it was not in dispute that the first respondent's competitor exerted influence on the appellant to terminate the agreement. The evidence established that the first respondent's competitor drew alleged irregularities in respect of commission claims and payments to the attention of the appellant. In any event, if the cancellation of the contract because of a breach thereof would not otherwise

have constituted 'administrative action' it could not have been transformed into 'administrative action' by reason of influence exerted on the appellant, by a third party, to cancel the contract.

[15] Guidance was also found by the court *a quo* in the decision in *Ramburan v Minister of Housing (House of Delegates)* 1995 (1) SA 353 (D) (see 1193H-1194G). The court decided in that case that the *audi* principle applied in respect of a decision to cancel an agreement of lease. The court was of the view that decisions by government institutions to grant Ramburan, a displaced trader, a 'right'[1] to purchase a shop and a flat were taken in the course of the implementation of government policy; that they amounted to the exercise by public bodies of their public powers; that the decision to terminate the agreements of lease had the effect of terminating the 'right' to purchase the shop and flat; and that the latter decision was therefore of the same nature as the decisions to grant the 'right' to purchase the shop and the flat i.e. that it was also taken in the course of the implementation of government policy and also amounted to the exercise by a public body of its

[1]In the sense of a well-founded belief and expectation on Ramburan's part that he would be afforded an opportunity to buy the shop and the flat, the subject of the agreements of lease.

public power. In the present case it cannot be said that the decision to cancel was taken in the course of the implementation of government policy.

[16] At the relevant time s 33 of the Constitution was deemed to read:

> "Every person has the right to -
>
> a. lawful administrative action where any of their rights or interests is affected or threatened;
> b. procedurally fair administrative action where any of their rights or legitimate expectations is affected or threatened;
> c. to be furnished with reasons in writing for administrative action which affects any of their rights or interests unless the reasons for that action have been made public; and
> d. administrative action which is justifiable in relation to the reasons given for it where any of their rights is affected or threatened."

The section is not concerned with every act of administration performed by an organ of state. It is designed to control the conduct of the public administration when it performs an act of public administration i.e. when it exercises public power (see *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 2000 (1) SA 1 (CC) ("*Sarfu*") at para 136 and *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

paras [20], [33], [38] to [40]). In para [41] and [45] of the *Pharmaceutical Manufacturers Association* case Chaskalson P said:

> "[41] Powers that were previously regulated by common law under the prerogative and the principles developed by the courts to control the exercise of public power are now regulated by the Constitution. . . ."
>
> "[45] Whilst there is no bright line between public and private law, administrative law, which forms the core of public law, occupies a special place in our jurisprudence. It is an incident of the separation of powers under which courts regulate and control the exercise of public power by the other branches of government. It is built on constitutional principles which define the authority of each branch of government, their interrelationship and the boundaries between them. . . . Courts no longer have to claim space and push boundaries to find means of controlling public power. That control is vested in them under the Constitution, which defines the role of the courts, their powers in relation to other arms of government and the constraints subject to which public power has to be exercised.. . ."

[17] It follows that whether or not conduct is 'administrative action' would depend on the nature of the power being exercised (*Sarfu* at para 141). Other considerations which may be relevant are the source of the power, the subject matter, whether it involves the exercise of a public duty and how closely related it is to the implementation of legislation (*Sarfu* at para 143).

[18] The appellant is a public authority and, although it derived its power to enter into the contract with the first respondent from statute, it derived its power to cancel the contract from the terms of the contract and the common law. Those terms were not prescribed by statute and could not be dictated by the appellant by virtue of its position as a public authority. They were agreed to by the first respondent, a very substantial commercial undertaking. The appellant, when it concluded the contract, was, therefore, not acting from a position of superiority or authority by virtue of its being a public authority and, in respect of the cancellation, did not by virtue of its being a public authority, find itself in a stronger position, than the position it would have been in, had it been a private institution. When it purported to cancel the contract, it was not performing a public duty or implementing legislation; it was purporting to exercise a contractual right founded on the consensus of the parties, in respect of a commercial contract. In all these circumstances it cannot be said that the appellant was exercising a public power. S 33 of the Constitution is concerned with the public administration acting as an administrative authority exercising public powers not with the public administration acting as a contracting party from a position no different from what it would have

been in, had it been a private individual or institution.

[19] In support of the contention that the appellant's cancellation of the contract constituted 'administrative action' the first respondent's counsel, in argument before us, referred to the decision in *Umfolozi Transport (Edms) Bpk v Minister van Vervoer en Andere* [1997] 2 B All SA 548 (SCA) at 552*j*-553*a* in which this court held that the State Tender Board's handling of tenders for transport for the government constituted administrative action. They also referred to the decision in *Transnet Ltd v Goodman Brothers (Pty) Ltd* 2001 (1) SA 853 (SCA) at 870D-F in which this court held that the actions of Transnet in calling for and adjudicating tenders constituted administrative action. In those cases the court reasoned that the conclusion of a contract was preceded by purely administrative actions and decisions by officials in the sphere of the spending of public money by public bodies in the public interest. Different considerations apply in those circumstances. S 217(1) of the Constitution specifically provides that when an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance

with a system which is fair, equitable, transparent, competitive and cost-effective.

[20] Counsel for the first respondent submitted that in the light of the provisions of r 22(1) of the Financial Regulations for Regional Services Councils R 1524 of 28 June 1991 the contract was not a purely commercial contract and that the cancellation thereof, therefore, constituted 'administrative action'. R 22(1) provides as follows:

> "22(1) If the council is satisfied that any person, firm or company-
>
> (a) is executing a contract with the council unsatisfactorily;
>
> (b) has offered, promised or given a bribe or other remuneration to the chairman, a council member, an official or an employee of the council in connection with the obtaining or execution of a contract;
>
> (c) has acted in a fraudulent manner or in bad faith or in any other unsatisfactory manner in obtaining or executing a contract with any Government department, provincial administration , public body, company or person, or that he or it has managed his or its affairs in such a way that he or it has in consequence been found guilty of an offence;
>
> (d) has approached a chairman, council member, an official or an employee before or after tenders have been invited for the purpose of influencing the award of the contract in his favour;
>
> (e) has withdrawn or amended his tender after the specified date and hour;
>
> (f) when advised that his tender has been accepted, has given notice of his inability to execute the contract or fails to execute or sign the contract or fails to execute or sign the contract to furnish the security required,

> the council may, in addition to any claim which it may have in terms of regulation 20 and in addition to any other legal recourse, decide that any contract between the council and such person, firm or company shall be cancelled ant that no tender from such person, firm or company shall be considered for a specified period."

In my view there can be no question that had the appellant purported to cancel the contract in terms of the provisions of r 22 (1) it would have been exercising a public power which would have constituted 'administrative action' in respect of which a fair procedure in terms of s 33 of the Constitution would have required compliance with the *audi* rule. That would have been the case even if the provisions had been incorporated into the contract (see *Zenzile* at 36G-I). However, the appellant did not purport to cancel the contract on any of the grounds referred to in r 22. It purported to cancel the contract, not on the ground of being satisfied of the existence of any of the circumstances referred to in r 22, but on the ground that substantial fraudulent claims had actually been submitted and that such fraudulent claims constituted a material breach of contract entitling the appellant to cancel in terms of the law of contract.

[21] Before us it was also submitted that the cancellation constituted

'administrative action' inasmuch as the collection of levies and the registration of levy payers by the appellant was 'administrative action' in respect of which the first respondent had stepped into the shoes of the appellant. The relationship between the appellant and the respondent on the one hand and levy payers on the other hand should , however, be distinguished from the relationship between the appellant and the respondent. The collection of levies is regulated by statute whereas the relationship between the appellant and the first respondent, in so far as it is relevant in this case, is regulated by an agreement between the appellant and the respondent.

[22] I conclude that the appellant's cancellation of its contract with the first respondent did not constitute 'administrative action'. The court *a quo* erred in setting aside the appellant's cancellation of its contract with the first respondent and in ordering the appellant to furnish written reasons for its decision to cancel the contract.

[23] It remains to deal with the court *a quo*'s order that the first respondent be afforded access to the following written information:

1 The report by Karien du Plessis to the appellant during or about September 1998 regarding the performance of the levy inspection firms appointed by the appellant.

2 Any written complaints by SDR Inspection Services or persons attached to it or any third parties in relation to the present investigation into the alleged fraudulent claims.

3 Any memoranda or reports by the appellant's internal or external auditors containing provisional or final findings.

6 Any information upon which Dr Fisher relied for his decision to terminate the agreement.

7 A copy of Dr Fisher's report to the executive committee of the appellant.

8 The minutes of the executive committee meeting at which the alleged fraudulent claims were discussed.

[24] The first respondent alleged in its founding affidavit that the access was reasonably required, in terms of s 32 of the Constitution, for the exercise or

protection of its rights and in particular to consider whether it had a contractual or delictual claim for damages against the appellant or a claim for damages against SDR or any other party, or to exercise its constitutional rights to equality or to protect its business reputation and good name by obtaining an interdict or otherwise.

[25] The appellant did not deny the existence of these documents and did not allege that it did not have them in its possession. The only submission made by the appellant in this regard was that no attempt had been made in the founding papers to analyse the documents and that the first respondent accordingly failed to meet the test imposed by s 32 read with item 23(2)(a) of schedule 6 of the Constitution, in that it did not demonstrate why the information in those documents was required for the exercise or protection of any of its rights.

[26] At the relevant time s 32 of the Constitution was deemed to read:

> "Every person has the right of access to all information held by the state or any of its organs in any sphere of government in so far as that information is required for the exercise or protection of any of their rights."

[27] In terms of the section the first respondent was entitled to information required for the exercise or protection of any of its rights. In *Van Niekerk v Pretoria City Council* 1997 (3) SA 839 (T) at 844A-846G Cameron J held that 'rights' in s 23 of the interim Constitution included all rights and not only fundamental rights as set out in chap 3 of the interim Constitution. S 23 was for all intents and purposes identically worded to s 32 of the Constitution. I agree with Cameron J's conclusion and reasoning which apply with equal force to s 32.

[28] Information can only be required for the exercise or protection of a right if it will be of assistance in the exercise or protection of the right. It follows that, in order to make out a case for access to information in terms of s 32, an applicant has to state what the right is that he wishes to exercise or protect, what the information is which is required and how that information would assist him in exercising or protecting that right.

[29] Although the first respondent did not expressly say so, it is clear that the

information required is the particulars of allegations that it claimed and received commissions to which it was not entitled. All the documents referred to would probably contain such information. The right which the first respondent wishes to protect is its right to a good name and reputation. It denies that it submitted fraudulent claims. In order to protect its good name and reputation it obviously has to have particulars of the specific allegations made against it. It follows that the court *a quo* correctly ordered that the first respondent be given access to the aforesaid documents.

[30] In the result the appeal is substantially successful. The main issue in the appeal as well as in the court *a quo* was whether the cancellation of the contract constituted 'administrative action'. In respect of that issue the first respondent has not succeeded. In the circumstances it would be fair to order that the first respondent should pay 75% of the appellant's costs on appeal and in the court *a quo*.

[31] Before us the first respondent applied for, and was granted, condonation of

its failure to forward with its heads of argument, a copy of a judgment which was not readily available and copies of subordinate legislation relied upon. All the costs of that application should be paid by the first respondent.

[32] The appeal succeeds to the extent indicated in the following order.

1 The following order is substituted for the order of the court *a quo*:

"1.1 The respondent is ordered to afford the first applicant or its nominated representative access forthwith to the written information contained in items 1, 2, 3, 6, 7 and 8 of the annexure to applicants' notice of motion dated 16 November 1998.

1.2 Save as aforesaid, the application is dismissed.

1.3 The first applicant is ordered to pay 75% of the respondent's costs including the costs of the application for the postponement of the matter on 25 November 1998. Such costs to include the costs consequent upon the employment of two

counsel."

2 The first respondent is ordered to pay 75% of the appellant's costs of appeal including the costs of two counsel.

3 The first respondent is ordered to pay the costs of its application for condonation.

_____

P E STREICHER
JUDGE OF APPEAL

Hefer, ACJ)
Marais, JA)
Cameron, JA)
Navsa, JA) concur