THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case no: 633/2011
Reportable

In the matter between

CITY OF CAPE TOWN **Appellant**

and

FAIZEL HENDRICKS **First Respondent**

MOGAMAT SMITH **Second Respondent**

Neutral citation: *City of Cape Town v Hendricks* (633/11) [2011] ZASCA 90 (31 May 2012)

Coram: **NUGENT, VAN HEERDEN, SNYDERS, MHLANTLA JJA and SOUTHWOOD AJA**

Heard: **10 May 2012**

Delivered: **31 May 2012**

Summary: Warning/compliance notice of contravention of By-Law and demand that recipient comply to avoid legal action not 'administrative action' for purposes of Promotion of Administrative Justice Act 3 of 2000.

JUDGMENT

SOUTHWOOD AJA (NUGENT, VAN HEERDEN, SNYDERS and MHLATLA JJA concurring)

[1] On 10 May 2012 when this appeal was called only the appellant was present. The court made an order that the appeal was upheld and that the order of the court a quo was set aside and replaced with an order that 'the application is dismissed'.[1] The court indicated that reasons would follow and these are the reasons.

[2] The appellant, the City of Cape Town (the City), appealed against the order of the court a quo (Mantame AJ) –

(1) Reviewing and setting aside the City's decision of April 2010 to compel the respondents to remove and rebuild their business structures daily on their trading sites;

(2) Reviewing and setting aside the City's notices served on the respondents on 23 April 2010 to remove their business structures from their trading sites;

(3) Declaring that the respondents are entitled to remain in their existing structures until the City has afforded the respondents sufficient opportunity to make representations as to why their trading pattern cannot be altered.

The issues before the court a quo were whether the City took the first decision, whether the City's decision to issue the notices on 23 April 2010 was administrative action for the purposes of the Promotion of Administrative Justice Act 3 of 2000 (PAJA), and, if so, whether the City was entitled to depart from the provisions of s 3(2) of PAJA. The court a quo granted leave to appeal.

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[1] On 19 and 20 April 2012 the appellant's attorney served notices of set down on the respondents personally and on their attorneys of record and the respondents did not file heads of argument or appear at the hearing.

[3] The first and second respondents are informal traders who conduct their businesses from large, sturdy, temporary structures erected on pavements at the corners of, respectively, Vanguard Drive and Highlands Drive and Vanguard Drive and Morganster Street, in Mitchells Plain. A portion of each structure (and each business) encroaches onto a neighbouring property where the Westgate Mall is situated. The owner of the property, Vusani Investments (Pty) Ltd, objects to this encroachment and has called on the respondents to remove their structures.

[4] The City is the owner of the property where the respondents' structures stand. The structures were erected there without the City's consent or authorisation and contravene a number of the City's by-laws. Despite having conducted their businesses in the structures for a number of years the respondents have not sought the City's consent or authorisation. On 23 April 2010, Constable Swartbooi, a member of the City's Specialised Law Enforcement Unit, issued and handed to each respondent a written notice in which each respondent was informed that the structure placed on the City's property at the relevant intersection had been placed there without the necessary consent or authorisation of the City; that the respondent was instructed to immediately remove the offending structure from the City's property and, that in the event of the respondent failing to comply with the instruction by 10 May 2010, a fine could be imposed and the offending structure removed by the City at the respondent's expense. When serving the notices Constable Swartbooi informed the respondents that the notices did not prohibit the respondents from trading on the property and (although no such decision had been taken by the City) that the respondents could erect temporary structures at the beginning of the day but that they would have to dismantle them at the end of the day. It is clear that the respondents would become entitled to erect such structures only if the City granted permission.

[5] After receiving the notices the respondents did not seek the City's consent or authorisation. Instead, on 10 May 2010 the respondents urgently sought and were granted in the high court a rule nisi interdicting and restraining the City from removing their structures or interfering with the respondents' right to trade from those structures. On 17 June 2010 this order was confirmed. Curiously both orders were

sought and granted in the absence of the City which had no knowledge of the proceedings, so it is not surprising that, when the City applied for the rescission of these orders, the respondents did not oppose its application and ultimately abandoned their application for an interdict.

[6] The respondents still did not seek to regularise their position regarding the structures. On 16 August 2010 they launched their review application which the City opposed. The respondents did not file a replying affidavit or insist on the production of the record of the proceedings sought to be corrected.

[7] In their founding affidavit the respondents state that their right to trade on the relevant sites is not being challenged or assailed by the City. They say that the apparent purpose of the notices was ‘to require us to demolish our business structures at the end of the day and to re-erect the same at the start of the following day.’ Their main ground of review was that the City was obliged to give them notice and give them an adequate opportunity to make representations before taking the decision to act against them (i.e. by delivering the notices to them). It is not necessary to deal with the other grounds alleged.

[8] At the hearing before the court a quo the City pointed out that the City had not taken a decision that the respondents must remove and rebuild their structures daily and argued that the issue and delivery of the notices did not constitute administrative action for the purposes of PAJA and merely constituted notification to the respondents of the City’s intention to enforce compliance with the relevant By-law. The City contended that the issue and service of the notice was not reviewable as the notices do not constitute a final decision; do not adversely affect the rights of any person and have no direct, external legal affect.

[9] The court a quo found that the notices were issued and served on the respondents after the City had taken a decision; that the notices themselves qualified as a decision; that the decisions threatened the respondents’ right to trade and accordingly that the decisions constituted administrative action and were reviewable.

The court a quo also found that the City was obliged to afford the respondents sufficient opportunity to make representations prior to the issue of the notice and had not done so. The court a quo further found that the decisions violated the respondents' legitimate expectations (which was not part of the respondents' case).

[10] It is clear that the City did not take a decision that the respondents are obliged to remove and rebuild their business structures daily on their trading sites and that the notices cannot reasonably be construed to mean that. The notices simply informed the respondents that they must comply with the law (i.e. remove the structures which contravene the by-laws and the Ordinance) and informed them of the consequences should they fail to do so. This was not administrative action as defined in PAJA.

[11] As contended by the City, by issuing and delivering the notices to the respondents, the City's conduct did not have direct and immediate consequences for the respondents[2]; it was a preliminary step by the City (a notification or warning that it would enforce the by-laws)[3]; and did not adversely affect the respondents' rights or have any direct or external legal effect[4]. The City was doing no more than it was entitled to do in terms of the section of the relevant by-law.[5] The provisions of PAJA therefore did not apply and all the orders were wrongly granted by the court a quo.[6]

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[2] *Greys Marine Hout Bay (Pty) Ltd v Minister of Public* works 2005 (6) SA 313 (SCA) para 24.
[3] *Eastern Metropolitan Substructure v Peter Klein Investments* 2001 (4) SA 661 (W) para 15.
[4] *Greys Marine Hout Bay (Pty) Ltd v Minister of Public Works* 2005 (6) SA 313 (SCA) paras 29 to 30; *Joseph v City of Johannesburg* 2010 (4) SA 55 (CC) para 27; *City of Cape Town v Bouley Properties (Pty) Limited* [2010] ZAWHC 650 (21 December 2010) para 32; J de Ville *Judicial Review of Administrative Action in South Africa* LexisNexis Butterworths (2003) para 2 1 6 p 54.
[5] The section provides:
"THE CITY MAY ACT AND RECOVER COSTS
22. (1) Notwithstanding any other provision of this by-law, the City may –
(a) where the permission of the City is required before a person may perform a certain action or build or erect anything, and such permission has not been obtained; and
(b) where any provision of this By-law is contravened under circumstances in which the contravention may be terminated by the removal of any structure, object, material or substance, serve a written notice on the owner of the premises or the offender, as the case may be, to terminate such contravention, or to remove the structure, object, material or substance, or to take such other steps as the City may require to rectify such contravention within the period stated in such notice.
(2) Any person who fails to comply with a notice in terms of subsection (1) shall be guilty of an offence, and the City may, without prejudice to its powers to take action against the offender, take the necessary steps to implement such notice at the expense of the owner of the premises or the offender, as the case may be."
[6] *Joseph v City of Johannesburg* 2010 (4) SA 55 (CC) para 27.

B R SOUTHWOOD

ACTING JUDGE OF APPEAL

APPEARANCES:

FOR APPELLANT:	A. Katz SC
Instructed by:	Fairbridges Attorneys, Cape Town; McIntyre & Van Der Post Attorneys, Bloemfontein.
FOR RESPONDENTS:	No appearance
Instructed by:	Petersen's Attorneys, Cape Town.