THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 102/2023;103/2023;108/2023;110/2023

In the matter between:

BRAIN GEAR INVESTMENTS (PTY) LTD	**FIRST APPELLANT**
SEMBCORP SILULUMANZI (RF) (PTY) LTD	**SECOND APPELLANT**
SEMBCORP UTILITIES (NETHERLANDS) NV	**THIRD APPELLANT**
MUNICIPAL MANAGER: CITY OF MBOMBELA MUNICIPALITY	**FOURTH APPELLANT**
SOUTH AFRICAN WATER WORKS (PTY) LTD	**FIFTH APPELLANT**
SEMBCORP UTILITIES SOUTH AFRICA (PTY) LTD	**SIXTH APPELLANT**
THE CHAIRPERSON: COUNCIL OF THE CITY OF MBOMBELA MUNICIPALITY	**SEVENTH APPELLANT**
THE CITY OF MBOMBELA MUNICIPALITY	**EIGHTH APPELLANT**
and	
BUHLE WASTE (PTY) LTD	**FIRST RESPONDENT**
ZMG SCIENTIFIC SERVICES (PTY) LTD	**SECOND RESPONDENT**

Neutral citation: *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)

Coram: MOCUMIE, SCHIPPERS, WEINER and MOLEFE JJA and COPPIN AJA

Heard: 20 August 2024

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, published on the Supreme Court of Appeal website, and released to SAFLII. The date and time for hand-down is deemed to be 11h00 on

5 December 2024.

Summary: Administrative law – review under Promotion of Administrative Justice Act 3 of 2000 – decision by Municipality to approve shareholding in water services provider subject to oversight by the Municipality of 28% BBBEE shareholder – oversight condition not complied with – decision reviewable.

ORDER

On appeal from: Mpumalanga Division of the High Court, Mbombela (Legodi JP, sitting as a court of first instance):

1 The appeal is upheld in part.

2 Paragraphs 118.3 to 118.7 of the order of the high court are set aside.

3 Save as aforesaid, the appeal is dismissed with costs, including the costs of two counsel where so employed.

JUDGMENT

Mocumie and Schippers JJA (Weiner and Molefe JJA and Coppin AJA concurring):

Introduction

[1] This is an appeal, with the leave of this Court, against an order of the Mpumalanga Division of the High Court, Mbombela (the high court) which reviewed and set aside a decision taken by the eighth appellant, the City of Mbombela Municipality (the Municipality), on 14 November 2018 (the impugned decision). In terms of that decision, the Municipality: (a) finally consented to a change in the shareholding and control of the second appellant, Sembcorp Silulumanzi (RF) (Pty) Ltd (Silulumanzi), a water services provider under the Water Services Act 109 of 1997 (the Water Services Act); and (b) confirmed that the conditions imposed in terms of the Municipality's conditional consent granted on 28 June 2018, had been fulfilled. These conditions were, inter alia, the following:

(a) that 28% of the shares in Silulumanzi should be acquired by a black economic empowerment (BBBEE) shareholder based in Mbombela;

(b) in a process overseen by the Municipality, represented by the Executive Mayor and the Acting Municipal Manager; and

(c) that the selection of the BBBEE shareholder should take place in consultation with the Municipality's representatives (the conditions).

[2] The first appellant, Brain Gear Investments (Pty) Ltd (Brain Gear), was appointed as the 28% BBBEE 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.

[3] The first respondent is Buhle Waste (Pty) Ltd (Buhle Waste), a company that provides waste management services. In July 2019, the respondent launched the application to review and set aside the impugned decision. The second respondent, ZMG Scientific Services (Pty) Ltd (ZMG), is the second company which participated and was shortlisted, together with Buhle Waste, in the tender process in issue. ZMG has not participated in these proceedings.

Factual background

[4] The background to the impugned decision is the following. On 21 April 1999, Silulumanzi (then known as the Greater Nelspruit Utility Company (Pty) Ltd) concluded a concession agreement with the Municipality's predecessor, Nelspruit Transitional Local Council (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.

[5] In 2010, Sembcorp Netherlands acquired 48% of the shares in Silulumanzi, and its wholly owned subsidiary, Sembcorp SA acquired the remaining 52%. Sembcorp Netherlands thus controlled 100% of the shares in the concessionaire – Silulumanzi.

[6] 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.[1]

[7] In 2017, the Sembcorp Group decided to exit the South African municipal water market. In 2018, Sembcorp Netherlands sold its entire shareholding to SAWW in terms of the SPA, which contained a suspensive condition requiring Sembcorp Netherlands to obtain consent from the Municipality as required by clause 7.4.2.1 of the concession agreement.

[8] On 2 March 2018, Sembcorp Netherlands applied to the Municipality to approve the change in the control of Silulumanzi, and 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). The resolution stated the following:

'(a) Council approve[s] and grant[s] conditional consent, in accordance with clause 7.4.2 of the Water Sanitation Concession Agreement dated 21 April 1999, as amended, between the municipality; as Water Services Authority and Sembcorp/Silulumanzi (RF) Pty Ltd, as a Water Services Provider; pertaining to the change of control;

(b) conditional consent to be granted for the transfer of all the shares held by Sembcorp Utilities (Netherlands) NV in the Concessionaire (in conjunction with the transfer of its 100% shareholding in Sembcorp Utilities South Africa Pty Ltd) to SA Water Works Pty Ltd. . .;

'(c) conditional consent be granted with the specific suspensive condition that SAWW and Silulumanzi immediately after this Council resolution, commence with the process of obtaining a 28% Mbombela-based BBBEE shareholder in Silulumanzi and conclude the process within the prescribed 90 days from the date of the Council resolution;

(d) the City of Mbombela, represented by the Executive Mayor and the Acting Municipal Manager, oversees the process administered by SAWW and Silulumanzi regarding the 28% BBBEE Mbombela-based shareholder;

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[1] The said clause in the concession agreement is phrased as follows:

'7.4 Nothing withstanding anything to the contrary contained in this contract –

7.4.1 . . .; and

7.4.2 no shares in the share capital of the concessionaire may be transferred to any person or entity that will have the effect that the entity or person controlling the concessionaire immediately before such transfer, loses such control, save for any such further transfer or change in control –

7.4.2.1 that is effected with the prior written approval of the COUNCIL and the lenders. . .'

(e) SAWW and Silulumanzi to select the final 28% Mbombela-based BBBEE shareholder, in consultation with the representatives of the City of Mbombela;
(f) the Acting Municipal Manager, as Accounting Officer, be mandated to confirm that the requirements above have been met as per the terms of the conditions of the Conditional Consent granted;
(g) the Accounting Officer be authorised to sign all documents and do all things necessary in order to implement the above;
(h) should the suspensive stipulated in (c) above not be met within 90 days from the date of the Council resolution and written confirmation not having been issued by the Acing Municipal Manager, confirming that all suspensive conditions for the conditional consent have been met, the Conditional Consent will automatically lapse and be of no further cause or effect and may not be relied upon by any party.'

[9] Silulumanzi appointed Price Waterhouse Coopers Advisory Services (Pty) Ltd (PwC), to select and identify a BBBEE entity to which the 28% shareholding in Silulumanzi would be sold. Various entities were invited to participate in a selection process to acquire the 28% shareholding. Buhle Waste, Brain Gear and ZMG were the only entities that participated in the selection process. Only Buhle Waste and Brain Gear complied with the primary evaluation criteria and were identified as preferred bidders.

[10] The selection process was completed within 90 days as required in terms of the June 2018 decision. 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, Silulumanzi wrote 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. The Municipality's confirmation, signed by the Acting Municipal Manager, reads as follows:
'The City of Mbombela Local Municipality (duly authorised Mr Neil Diamond) confirms by its signature hereto that, Silulumanzi has complied with the terms of Council's Resolution an extract of which is set out above, and that the consent referred to therein, has become

unconditional.'[2]

[11] On 14 November 2018, the Municipality, represented by the Acting Municipal Manager, 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 records 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.

[12] The impugned decision is confirmed in both the answering affidavits of the Municipality and Silulumanzi. The Municipality's affidavit states:

'On 14 November 2018, the municipality, gave its approval of the transfer of shares in Silulumanzi to SAWW.'

Similarly, Silulumanzi's affidavit states the following:

'As envisaged in clause 7.4.2.1 of the concession agreement, the SPA was subject to approval by the Municipality of the Change in Control of the fourth respondent. The Municipality granted such approval on 14 November 2018, as the parties formally recorded.' (Emphasis in the original.)

The proceedings in the high court

[13] 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.

[14] In its amended notice of motion filed in January 2021, Buhle Waste sought an order that the Municipality's consent to the change in control, be reviewed and set aside. It also sought an order of substitution directing Silulumanzi and SAWW to effect the transfer of the 28% BBBEE shareholding in Silulumanzi to Buhle Waste, against payment of the price of those shares. The substitution order was not granted and there is no cross-appeal against the refusal of that order. No more need be said about it.

[2] Although the duly authorised official is noted as Mr Neil Diamond, it is clear that the resolution was signed by someone else with a different surname who signed on behalf of Mr Neil Diamond who as the letter of SAWW and Silulumanzi later revealed, was not in that meeting.

[15] Buhle Waste sought the review of the impugned decision based on the principle of legality under the Constitution and the Promotion of Administrative Justice Act 3 of 2000 (PAJA), on the following grounds: The 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.

[16] The further review grounds advanced in the supplementary founding affidavit, are that the Municipality's stance in the selection of a BBBEE partner disregards the principles underlying the concession agreement; Silulumanzi and SAWW 'ignored relevant considerations and were influenced by irrelevant considerations', and were conflicted in the process of selecting Brain Gear; and the process adopted by the respondents in the identification of a 28% BBBEE shareholder was neither fair nor transparent.

[17] 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 that agreement, Buhle Waste confirmed that it did not seek to impugn the June 2018 decision nor the SPA. The agreement which was made an order of court reads as follows:

'1. The relief sought by the applicant in this application does not extend to the following:

1.1. The sale of shares agreement [SPA] concluded on 21 February 2018 between [Silulumanzi], [SAWW], [Sembcorp Netherlands] and [Sembcorp South Africa], in terms of which [Sembcorp Netherlands] sold:

1.1.1. Its shares in the ninth respondent;

1.1.2. Its shares in the fourth respondent to the seventh respondent (the SembCorp Netherlands SPA).

1.2. The third respondent's council resolution passed on 28 June 2018, conditionally approving and consenting to the change of control in the fourth respondent (June 2018 resolution);

2. The Sembcorp Netherlands SPA and the June 2018 resolution are valid, enforceable and binding;

3. Each party, as between the applicant and the eighth respondent, shall pay its own costs.'

[18] The high court reviewed and set aside the impugned decision. Its main findings may be summarised as follows:

(a) The Municipality abandoned its oversight role in the process of selection of the 28% BBBEE shareholder and failed to fulfil its role in terms of its own resolution contained in the June 2018 decision – this was fatal to the validity of the impugned decision.

(b) The Municipality failed to ensure that the process was transparent and fair – Mr John Shongwe, the Chairman and a director of Silulumanzi, and a director of Brain Gear, was involved in the selection process of Brain Gear as the 28% BBBEE shareholder. So too, Mr Eddy Mabuza, the Head of Economic Relations in Silulumanzi, and a director of Brain Gear.

(c)The Municipality failed to carry out its duties under the Constitution, the Water Services Act and the June 2018 decision. The BBBEE shareholder was required to have strong technical knowledge and experience in the water sector because Silulumanzi has to fulfil the Municipality's constitutional and legislative obligations to provide clean water and sanitation services to a part of the Mbombela area. Brain Gear did not meet this requirement: it had no experience in the water sector and was incorporated only on 16 April 2018 – five months before it was selected as the preferred BBBEE shareholder. PwC had raised concerns about Brain Gear's track record and stated that it had misrepresented its contributor level rating as level 1 in its proposal, whereas a certificate obtained from the relevant rating agency specified a level 2 rating. The high court found that the Municipality's answer to this 'is that it played no role in the selection process and in the same breath it came to the conclusion that all suspensive conditions had been met and that it was satisfied that everything was above board'.

(d)

The selection of Brain Gear as the preferred shareholder was not made in consultation with the Municipality. The selection process was meant to be reported not only to Silulumanzi and SAWW but also to the Municipality, as contemplated in the June 2018 decision.

[21] On 17 August 2022, the high court granted the following order:

‘118.1 The decision taken by the Municipality on 14 November 2018 in terms of which it consented to a change in control of Silulumanzi is declared unlawful and is hereby reviewed and set aside.

118.2 The request for the consent regarding change in control of Silulumanzi is hereby remitted to the Municipality for reconsideration of its decision of 14 November 2018.

118.3 In reconsidering its consent to a change in the control of Silulumanzi, the Municipality shall take into account all what has been alluded to in this judgment regarding the process that led to the appointment of 28% BBBEE shareholder, its failure to exercise an oversight role as per its resolution of 28 June 2018 regarding the adjudication process, issues of concern raised in this judgment leading to the appointment of [Brain] Gear Investment as a successful 28% BBBEE shareholder in Silulumanzi including the transfer of shares to another entity after the consent was granted on 14 November 2018 and any other relevant factor and alluded to in this judgment.

118.4 A decision [regarding] the reconsideration of its consent to a change in the control of Silulumanzi should be concluded and delivered by not later than 17 October 2022.

118.5 Such a decision and the reasons thereof should be filed with the court registrar of this court and by email at . . ..

118.6 The appointment of [Brain] Gear Investments Pty Ltd as a successful 28% BBBEE shareholder in Silulumanzi and the effective date of the transfer of 28% BBBEE shareholding in Silulumanzi to either [Brain] Gear Investments (Pty) Ltd or to [Brain] Gear Investment South Africa (Pty) Ltd based on the decision of 14 November 2018 is hereby suspended pending the reconsideration of the decision to grant consent for a change in the control of Silulumanzi.

118.7 It is hereby declared that pending the reconsideration of the municipal decision of 14 November 2018, the suspensive conditions in the resolution of 28 June 2018, have not been fulfilled.

118.8 The first, second, third, fourth, fifth, seventh and ninth respondents are hereby ordered to pay the costs of the application including reserved costs and costs of employment of two counsel for the applicant, such costs to be paid jointly and severally the one paying the other to be absolved.’

In this Court

[22] The Municipality did not participate in the appeal. Sembcorp Netherlands submitted that the high court granted an order reviewing and setting aside the impugned decision, despite the May 2022 order confirming that Buhle Waste was not challenging the June 2018 decision nor the SPA. The former order, so it is submitted, 'had the effect of undoing the operation of the Sembcorp Netherlands SPA', which was an error; and 'the May [2022] Order ought to be reinstated'.

[23] In the alternative, Sembcorp Netherlands submitted that 'Buhle Waste's review application was stillborn from the start because Buhle Waste attacked a non-existent decision'. The Municipality, Sembcorp Netherlands says, did not take a decision on 14 November 2018. Instead, it had already decided to consent to a change of control in the concessionaire in June 2018; the condition attached to the consent was fulfilled in September 2018 (when Brain Gear was selected as the BBBEE shareholder); and the transaction had become unconditional and fully operative.

[24] The remaining appellants contended that Buhle Waste should have exhausted an internal remedy provided in s 62 of the Local Government: Municipal Systems Act 32 of 2000 (the Municipal Systems Act), and that it delayed unreasonably in launching the review application. They endorsed the submissions of Sembcorp Netherlands and contended that no decision was taken on 14 November 2018: all that happened on that date was that the fulfilment of a condition in the June 2018 decision was recorded. The appellants submitted that the impugned decision did not constitute administrative action, because the consent to the change of control of Silulumanzi was given in terms of a provision in the concession agreement; the fact that the agreement concerned the provision of water services did not mean that any action taken in terms of the agreement is administrative action; and the imposition of the condition that a BBBEE shareholder should be selected is 'purely a contractual matter'.

[25] Buhle Waste submitted that the contention that the Municipality took no decision on 14 November 2018, was incorrect. It contended that, once that was accepted, the appeal should fail. It is further submitted that the lawfulness of the process in selecting the BBBEE shareholder must be determined in light of the conditions imposed by the Municipality in the June 2018 decision. It is common cause

that the Municipality was not involved in the selection process and on this ground alone, the impugned decision was correctly reviewed and set aside. Buhle Waste further submitted that the high court exercised a discretion in granting just and equitable relief and that this Court should not interfere with the exercise of that discretion.

An internal remedy?

[26] The appellants' contention that Buhle Waste should have exhausted the internal remedy contained in s 62(1) of the Municipal Systems Act, can be dealt with summarily. It has no merit. Section 62 provides, inter alia, that a person whose rights are affected by a decision taken by a councillor or staff member of a municipality in terms of a power duly delegated, 'may appeal against that decision by giving written notice of the appeal and reasons to the municipal manager within 21 days of the date of the notification of the decision'.

[27] Section 62(3) provides:

'The appeal authority must consider the appeal, and confirm, vary or revoke the decision, but no such variation or revocation of a decision may detract from any rights that may have accrued as a result of the decision.'

[28] Brain Gear was notified of its selection as the BBBEE shareholder in September 2018 and was aware of this selection when the impugned decision was taken on 14 November 2014. By then, it had already acquired rights as a result of that decision and any internal remedy would have been ineffective.[3] Moreover, there was no point in Buhle Waste pursuing an internal remedy,[4] given the Municipality's stance that the selection of the BBBEE shareholder was the exercise of a contractual power which 'has nothing to do with any conduct on the part of the municipality'.

Delay

[29] The appellants' contention that Buhle Waste delayed unreasonably in launching the review application, likewise, has no merit. Even if there was any delay,

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[3] *Basson v Hugo and Others* [2018] ZASCA 1; [2018] 1 All SA 621 (SCA); 2018 (3) SA 46 (SCA) paras 56-57.

[4] *Koyabe and Others v Minister for Home Affairs and Others* [2009] ZACC 23; 2009 (12) BCLR 1192 (CC); 2010 (4) SA 327 (CC) para 45.

Buhle Waste sought and obtained condonation from the high court. Condonation was granted, essentially on the grounds that the Municipality and the other parties hindered Buhle Waste's requests for information, which 'actually contributed to the delay'; that the proceedings were instituted less than two months after the expiry of the 180 days calculated from 28 November 2018 (when Buhle Waste became aware of the impugned decision); that, during the two-months period, none of the appellants claimed that they had suffered prejudice; and that the Municipality's conduct regarding the requests for access to information was obstructive and dilatory. And nothing turns on the fact that Buhle Waste asked for condonation in 'an informal prayer', as the appellants put it.

[30] The appellants failed to make out a case that in granting condonation, the high court failed to exercise its discretion judicially.[5] They contended that '[t]he Court should have considered the lack of an adequate explanation for the delay together with the poor merits of the application and dismissed the application on that basis alone'. This contention is however unsustainable on the evidence, specifically in relation to the prospects of success of the review application, one of the factors to be considered when deciding whether it is in the interests of justice that any delay should be condoned.

The impugned decision

[31] The appellants contend that no decision was taken by the Municipality on 14 November 2018, and that Buhle Waste should have reviewed the June 2018 decision. Therefore, the first issue that must be determined is what, precisely, was decided by the Municipality on 14 November 2018.

[32] In terms of the June 2018 decision, the Municipality granted conditional consent for the transfer of shares held by Sembcorp Netherlands to SAWW. That consent was expressly rendered subject to fulfilment of the conditions. As stated above, the Municipality's version is that it finally approved the transfer of shares in Silulumanzi to SAWW on 14 November 2018. This is admitted by Silulumanzi. It is also admitted by SAWW, which says that the SPA was subject to approval by the Municipality as

[5] *TWK Agriculture Holdings (Pty) Ltd v Hoogveld Boerderybeleggings (Pty) Ltd and Others* [2023] ZASCA 63; 2023 (5) SA 163 (SCA) para 13.

envisaged in clause 7.4.2.1 of the concession agreement; and that the Municipality 'gave its approval on 14 November 2018'.

[33] It is thus clear from the evidence that the Municipality approved the transfer of shares and the change in the control of Silulumanzi on 14 November 2018 – not on 28 June 2018, when it gave conditional consent. The submission by Sembcorp Netherlands that all that happened in November 2018 was the conclusion of an agreement confirming that the conditions had been fulfilled, is wrong. It also misses the point that the change in the control of Silulumanzi could not be approved without the conditions being fulfilled. That is the complaint by Buhle Waste, and why it brought an application to review the decision of 14 November 2018.

[34] Thus, the May 2022 order is unaffected by the high court's order reviewing and setting aside the impugned decision. As stated in the May 2022 order, the SPA and the June 2018 decision are valid and enforceable. That must be so, otherwise Buhle Waste would have no grounds to challenge the decision of 14 November 2018 on the basis that the Municipality failed to comply with the conditions. In addition to this, paragraph 1.2 of the May 2022 order makes it clear that the Municipality 'conditionally approved and consented' to the change of control of Silulumanzi. It follows that the submission by Sembcorp Netherlands that Buhle Waste 'attacked the wrong decision', is incorrect and there is no inconsistency between the May 2022 order and the high court's order reviewing and setting aside the impugned decision.

[35] The next issue is whether the impugned decision constitutes administrative action. In deciding whether a decision constitutes administrative action, the focus is not on the functionary but the function. Other considerations are the nature of the power being exercised, its source, its subject matter, whether it involves the exercise of a public duty, and how closely it is related to the implementation of legislation.[6] Whether a decision is administrative action must be assessed in the light of the facts of the case.[7]

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[6] *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* [1999] ZACC 11; 2000 (1) SA 1; 1999 (10) BCLR 1059 paras 141 and 143.
[7] *Viking Pony Africa Pumps (Pty) Ltd t/a Tricom Africa v Hydro-Tech Systems (Pty) Ltd and Another* [2010] ZACC 21; 2011 (2) BCLR 207 (CC); 2011 (1) SA 327 (CC) para 37.

[36] The source and the subject matter of the impugned decision is public law. The origin of the conditions is the Municipality's June 2018 decision. Further, Silulumanzi is a concessionaire under the Water Services Act and, as such, exercises a public duty. As this Court stated in *Umgeni Water v Sembccorp Siza Water (Pty) Ltd and Others*:[8]

'. . . Siza is discharging a constitutional obligation resting upon Ilembe in the same manner and in terms of the same constitutional and statutory obligations as those resting on Ilembe.

. . .

In summary, it performs exactly the same function as every other municipal customer purchasing bulk water from Umgeni Water. It is like them, a water services provider subject to the same constitutional and statutory obligations as the municipalities. The fact that it is a private entity is irrelevant.'

[37] There is no debate that the June 2018 decision constitutes administrative action. It is a decision by the Municipality, that forms part of the local sphere of government,[9] exercising a power in terms of the Constitution or exercising a public power or public function in terms of legislation,[10] which adversely affected the rights of Sembcorp Netherlands and Silulumanzi.[11] When the Municipality granted conditional consent to the change of ownership of Silulumanzi, it imposed the conditions, ie that a Mbombela-based BBBEE shareholder should acquire 28% of the shares in a process overseen by the Mayor and Acting Municipal Manager; and that the selection should take place in consultation with them. In fact, the Municipality stated that, when imposing the condition that a BBBEE shareholder should acquire 28% of the shares in Silulumanzi, it was 'influenced by the provisions of the Broad-Based Black Economic Empowerment Act 53 of 2003'.

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[8] *Umgeni Water v Sembcorp Siza Water (Pty) Ltd and Others; Minister of Water and Sanitation v Sembcorp Siza Water (Pty) Ltd and Others* [2019] ZASCA 133; [2019] 4 All SA 700 (SCA); 2020 (2) SA 450 (SCA) paras 10 and 46.

[9] Section 151(1) of the Constitution.

[10] The Municipal Systems Act; the Water Services Act; and the BBBEE Act 53 of 2003.

[11] Section 1 of PAJA defines 'administrative action' as follows:

"Administrative action" means any decision taken, or any failure to take a decision, by-

(a) an organ of state, when-

(i) exercising a power in terms of the Constitution or a provincial constitution; or

(ii) exercising a public power or performing a public function in terms of any legislation; or

(b) a natural or juristic person, other than an organ of state, when exercising public power or performing a public function in terms of an empowering provision, which adversely affects the rights of any person and which has a direct, external legal effect . . ..'; see also *Grey's Marine Houtbay (Pty) Ltd and Others v Minister of Public Works and Others* [2005 ZASCA 43; [2005] 3 All SA 33 (SCA); 2005 (6) SA 313 (SCA); 2005 (10) BCLR 931 (SCA) para 21-24.

[38] It follows that if the imposition of the conditions constitutes administrative action, then a decision as to whether those conditions have been fulfilled, cannot be anything other than administrative action. The appellants' submission that the imposition of the condition that a BBBEE shareholder be selected is a contractual matter, is also incorrect. Further, it is at odds with their contention that Buhle Waste should have reviewed the June 2018 decision – the appellants acknowledge that the imposition of the conditions is administrative action and not the exercise of a contractual power.

The review grounds

[39] The review grounds can be dealt with briefly. In terms of the conditions, although the selection process had to be administered by SAWW and Silulumanzi, the Municipality, represented by the Mayor and the Acting Municipal Manager, was required to oversee the process; and the selection had to be done in consultation with the Municipality's representatives.

[40] However, the Municipality's representatives were not involved in the selection process at all. In the Municipality's answering affidavit made by Mr Mojaki Mosala, its Senior Manager, Legal Services, he states:

'. . . I must immediately point out that the municipality did *not in any way, either directly or indirectly, influence the appointment* of the eventual successful local partner, Brain Gear. The entire process was conducted by PwC at the instance and behest of Silulumanzi.

. . .

The Municipality did not take part in the RFP [request for proposal] processes, including the selection and appointment of Brain Gear.' (Emphasis added.)

[41] In their answering affidavit, Silulumanzi, SAWW and Sembcorp SA state:

'It is correct that the report prepared by PwC was not given to the Municipality. As set out in the letter by SAWW to the Municipality dated 16 July 2018 as well as the minutes of the steering committee, *the choice of the BBBEE partner was within the sole and absolute discretion of SAWW*'. (Emphasis added.)

[42] Nothing could be clearer. The Municipality played no part in the selection process; neither was it consulted when Brain Gear was selected as the BBBEE shareholder. Consultation was both necessary and important. As was stated by the

Court of Appeal in *R (MP) v Secretary of State for Health and Social Care*,[12] approved by this Court in *Independent Regulatory Board for Auditors*:[13]

'"[C]onsultation must be undertaken at a time when proposals are still at a formative stage; it must include sufficient reasons for particular proposals to allow those consulted to give intelligent consideration and an intelligent response; adequate time must be given for this purpose, and the product of consultation must be conscientiously taken into account when the ultimate decision is taken".'

[42] The high court was thus correct in holding that the Municipality had abandoned its duty to oversee the selection process. The Municipality played no role in that process. The letter dated 19 September 2018, advising of the selection of Brain Gear as the BBBEE shareholder, and purportedly confirming that SAWW and Silulumanzi had complied with the conditions, was presented to the Municipality as *a fait accompli*. Consequently, the impugned decision, in terms of which the Municipal Manager, acting on behalf of the Municipality, purportedly confirmed: (a) that Silulumanzi, to the satisfaction of the Municipality, had selected a local BBBEE shareholder; and (b) that the conditions had been fulfilled, is unlawful and invalid.

[43] What is more, the Municipality misconceived its own decision of 28 June 2018 and acted in complete disregard of the conditions it had imposed. In the answering affidavit Mr Mosala states:

'It is evident from Buhle Waste's papers, this answering affidavit and a record of these proceedings that this matter involves a private contractual sale of shares which has nothing to do with any conduct on the part of the municipality. . .'

and

'[T]his application stands to be dismissed with costs as there is no administrative action to be reviewed and set aside.'

[44] It goes without saying that, if the Municipality was not involved in the selection process at all, then the selection of Brain Gear as the 28% locally based BBBEE shareholder, was not made in consultation with the Municipality's representatives. Indeed, that is the Municipality's version. Again, on this ground, the high court cannot

[12] *R (MP) v Secretary of State for Health and Social Care* [2020] EWCA Civ 1634 para 29.
[13] *Independent Regulatory Board for Auditors and Others v East Rand Member District of Chartered Accountants and Others* [2024] ZASCA 114; [2024] 4 All SA 23 (SCA) para 83.

be faulted.

[45] The high court also rightly found that Brain Gear did not qualify for selection as the BBBEE shareholder because it had no experience nor any track record in the provision of water services. It was a shelf company purchased by Mr Mabuza and Mr Shongwe, solely 'for the purpose of bidding for the shares in Silulumanzi'. Despite this, Brain Gear was described in the selection process as an 'existing operator in the water sector' and that it has 'strong technical knowledge and experience in the water sector'. These alleged qualities were attributed to Brain Gear by Mr Shongwe, the Chairperson of the Board of Directors of Silulumanzi and Mr Mabuza, the Head of Economic Relations of Silulumanzi. Their personal interests in Brain Gear were plainly incompatible with those of Silulumanzi, which, according to the PwC report, had engaged in the selection process with the following objective:

'. . . to manage the end-to-end process *in a transparent manner and objectively adjudicate identified participants* which would lead to the selection of the most suitable final participant to conclude the final transaction'. (Emphasis added.)

[46] Buhle Waste therefore established that the impugned decision is unreasonable: no reasonable person could have approved the sale of shares in Silulumanzi without compliance with the conditions. The Municipality misconceived the nature and effect of its own decision of 28 June 2018 and thus erred on the facts and the law. The impugned decision is not rationally connected to the purpose for which it was taken, the information before the Municipality, and the reasons given for the decision. Additionally, the Municipality ignored relevant considerations and took into account irrelevant ones. The high court correctly reviewed and set aside the impugned decision.

[47] What remains is the relief granted by the high court, apart from the order reviewing and setting aside the impugned decision and the costs order. The parties conceded that the following orders are unnecessary or tautologous: the declaratory order that the conditions have not been fulfilled; the order suspending the impugned decision, pending the taking of a new decision; and the order that the Municipality must take into account what is stated in the high court's judgment when taking the new decision. The parties further conceded that the order that a fresh decision must be

taken by a certain date and that it should be filed with the registrar is likewise unnecessary. Accordingly, the unnecessary orders will be set aside.

[48] In the result the following order issues:

1 The appeal is upheld in part.

2 Paragraphs 118.3 to 118.7 of the order of the high court are set aside.

3 Save as aforesaid, the appeal is dismissed with costs, including the costs of two counsel where so employed.

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BC MOCUMIE

JUDGE OF APPEAL

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A SCHIPPERS

JUDGE OF APPEAL

Appearances

For the first appellant:	J Whitaker
Instructed by:	Van der Schyff and Associates Inc, Cape Town Webbers Attorneys, Bloemfontein
For the second appellant:	R Stelzner SC with D Van Reenen
Instructed by:	Van der Schyff and Associates Inc, Cape Town Webbers Attorneys, Bloemfontein
For the third appellant:	K Hofmeyr with M Salukazama
Instructed by:	Norton Rose Fullbright South Africa Inc, Johannesburg Webbers Attorneys, Bloemfontein
For the first respondent:	J G Wasserman SC with S Tshikila
Instructed by:	Malatji and Co Attorneys, Johannesburg Phatshoane Henney Inc, Bloemfontein.