IN THE HIGH COURT OF SOUTH AFRICA /ES

(TRANSVAAL PROVINCIAL DIVISION)

CASE NO: 17239A/2007

DATE: 8/1/2008

NOT REPORTABLE

IN THE MATTER BETWEEN

EQUITY AVIATION SERVICES (PTY) LIMITED APPLICANT

AND

SOUTH AFRICAN POST OFFICE LIMITED RESPONDENT

JUDGMENT

VAN DER MERWE, J

The applicant is Equity Aviation Services (Pty) Ltd, a private company with limited liability, duly incorporated and registered in terms of the company laws of the Republic of South Africa. The respondent is the South African Post 0ffice Limited, a public company incorporated in terms of the Post 0ffice Act, 44 of 1958.

In 0ctober 1999 the Airports Company of South Africa Ltd ("ACSA") concluded a lease agreement ("the main lease") with the respondent for the letting of premises at the OR Tambo International Airport, then known as the Johannesburg International Airport. The period of the lease is from 1 0ctober 1999 to 31 May 2015 with an option to renew for two successive periods of five years each. In May 2005 the applicant and respondent concluded a sub-lease agreement ("the sub-lease") in respect of 1 200 square metres of the premises leased in terms of the main lease. 0f importance are clauses 2 and 3 of the sub-lease that read as follows:

"2.1 The sub-lessor (ie the respondent) hereby lets the sub-leased premises to the sub-lessee (ie the applicant) who hereby hires the sub-leased premises for a period of 2 (two) years, commencing on 1 June 2005 and terminating

on 31 May 2007, upon certain conditions hereinafter set forth.

3.1 It is specifically recorded that this agreement of lease, at the expiration of the period of lease referred to in clause 2.1, will not be renewed. In the event that the sub-lessee wish (*sic*) to enter into a new agreement of lease, and provided that the sub-lessor agrees thereto, all terms and conditions is (*sic*) to be agreed upon by both parties."

The applicant states in its founding affidavit that on 14 June 2005, shortly after it had taken occupation of the leased premises, it offered to rent an adjoining site from the respondent. For reasons that will become clear later herein, the applicant contends that a right of first refusal was granted by the respondent to the applicant in respect of this adjoining site.

It is the applicant's case that negotiations to extend the sub-lease or to enter into a new sub-lease were frustrated by the respondent. It furthermore did not honor the applicant's right of first refusal. The detail in respect of both contentions will be discussed in more detail later herein. As a result of the respondent's alleged actions the applicant launched the application and prays for an order in the following terms:

"MAIN RELIEF

1. That it be declared that:

1.1 The respondent's decision not to extend the sub-lease agreement concluded between the parties, as referred to in paragraph 22 *et seq* of the founding affidavit, is invalid and should be set aside.

1.2 The term of the sub-lease agreement has been extended to 31 May 2010 giving rise to a new agreement of lease between the parties, in the terms set out in paragraph 31 of the founding affidavit.

1.3 The applicant's right of first refusal in respect of the adjoining property to the premises referred to in the sub-lease, has become effective and can be exercised forthwith.

2. The respondent is ordered to pay the costs of the application.

ALTERNATIVE RELIEF

3. In the alternative to paragraphs 1 and 2 above, that, pending the

finalisation of the matter referred to in paragraph 4 of this notice of motion.

Interim relief

3.1 It be declared that:

3.1.1 The respondent's decision not to extend the sub-lease concluded between the parties is invalid and should be set aside.

3.1.2 The applicant is entitled to occupy the premises referred to in the sub-lease under the new terms agreed upon.

3.1.3 The applicant is entitled to occupy the adjoining property to the premises referred to in the sub-lease concluded between the parties pursuant to its right of first refusal in respect thereof.

3.2 The respondent be interdicted from evicting the applicant from such premises.

3.3 The respondent is ordered to pay the costs of this application.

Final relief

4. Cumulative to paragraph 3 above, that the applicant be ordered to institute proceedings against the respondent, together with such other persons or entities as it may deem fit, within thirty (30) days from the date of the court order granted pursuant to the notice of motion, in which proceedings the following relief, whether alone or together with other relief, shall be sought, namely that:

4.1 An order do issue declaring that the applicant is entitled to hire the

adjoining property to the sub-leased premises from the respondent for a one (1) year period from the date of occupation and on the further terms and conditions as agreed to between the parties.

4.2 An order do issue declaring that for a period of three years from 1 June 2007, the applicant is entitled to hire the sub-leased premises from the respondent on the terms and conditions of the new agreement of lease concluded between them, being an extension of the sub-lease agreement concluded in May 2005.

4.3 The respondent be ordered to pay the costs of the application."

The reference in paragraph 1.2 of the notice of motion to paragraph 31 should be a reference to paragraph 30.

The facts in respect of the applicant's two contentions referred to above can be summarised as follows.

1. The extension of the sub-lease.

As appears from the aforegoing the sub-lease would have terminated in terms of clause 2 of the sub-lease on 31 May 2007 and was not renewable.

0n 23 March 2006 a meeting took place between the applicant and the respondent. The discussions at that meeting were confirmed in a letter dated 28 March 2006 addressed by the respondent to the applicant. It reads as follows:

"We refer to our meeting dated 23 March 2006.

We have since approached management regarding our discussion with yourselves and management has taken a view that Speed Services would no longer pursue moving into the subject building on the following conditions that:

° Equity Aviation takes over occupation of the whole building.

° Equity Aviation takes over full control of the lease agreement, (be it cancellation of the existing lease with ACSA or a sub-lease arrangement) which currently exists between ACSA and SAPO ie releasing SAPO from its contract obligation to ACSA.

We look forward to hearing from yourselves so that we could finalize the whole arrangement."

Speed Services referred to in the letter of 28 March 2006 is a division of the respondent.

It is clear from the contents of the said letter that the respondent was at the time contemplating consenting to a cancellation of the main lease with ACSA so that the applicant could enter into a lease agreement with ACSA or, with the consent of ACSA, enter into a sub-lease with the respondent in respect of the total area of the main lease.

The applicant in a letter dated 7 April 2006 indicated that it would take over the total area of the main lease but only until 31 December 2007. This was in fact a counter-suggestion or proposal by the applicant to that of the respondent.

It is clear that no new lease agreement was entered into as on 22 June 2006 the respondent rejected the applicant's counter-proposal and confirmed on 19 March 2007 that no new lease agreement was entered into between the parties.

2. The right of first refusal

As stated earlier herein the applicant offered to rent a site adjoining that referred to in the sub-lease. In reaction to this offer the respondent notified the applicant as follows in terms of a letter dated 23 June 2005:

"The South African Post 0ffice Limited hereby accepts your request to secure a right of first refusal on leasing the adjoining site – as soon as it becomes vacant.

Please note that the current tenants may possibly be vacating the premises by 30 June 2005. You will be informed accordingly in due course.

We trust that the above will meet with your requirements and certainly look forward to a continuous and mutually healthy business relationship in future."

From the papers it is clear that the adjoining site was at the time occupied by Speed Services, a division of the respondent and therefore for all practical purposes by the respondent itself. It is also undisputed that Speed Services moved from this adjoining site from the period 31 July 2005 to 30 July 2006 and that during this period the

respondent did not relinquish the adjoining site nor made it available to anybody else. 0n 30 July 2006 Speed Services returned to the very same adjoining site.

In the meantime on 8 November 2005 the respondent proposed a rental for the adjoining site. It also said that the lease for the adjoining site would endure for a twelve month period. In terms of a letter dated 24 February 2006 the applicant states that the right of first refusal was exercised and the rental was agreed upon. From the papers it is clear that that is not correct. The proposal made by the respondent was not accepted by the applicant. It is precisely during this period that the respondent considered vacating the premises completely and therefore wrote the letter of 28 March 2006 referred to earlier herein. The whole of the building would have included the lease of the adjoining site as well. As stated above the applicant reacted to the letter of 28 March 2006 in its letter dated 7 April 2006 with a counter-offer which was not accepted. It is therefore abundantly clear that as at 24 February 2006 the applicant could not have stated that it had exercised its right of first refusal. As stated above no lease agreement was concluded in respect of either the whole building or only part thereof.

It is the respondent's case that it never offered sub-leases in respect of the adjoining site to a third party in preference to the applicant and that, irrespective of the facts referred to above, there was no right of first refusal that could have been exercised by the applicant.

The applicant's case is based on the following legal contentions:

1. The respondent is an organ of state as defined in section 239 of the Constitution of the Republic of South Africa 1996 ("the Constitution"), and is consequently subject to, amongst other provisions, section 195 of the Constitution. It is therefore obliged to adhere to the basic values and principles governing public administration that are contained in the Constitution.

2. The respondent is governed by the provisions of the Promotion of Administration of Justice Act 3 of 2000 ("PAJA"). As such it is obliged to comply with the requirement for procedurally fair administrative action which materially and adversely affects the rights or legitimate expectations of any person.

3. The respondent is obliged to comply with the requirements of section 217(1) of the Constitution and follow a procedurally fair system in its dealing with the applicant, which it failed to do. Hence its decision not to consent to the extension of the sub-lease

is invalid.

The respondent admits that it is an organ of state. It denies, however, that section 3 of PAJA has any application in this matter or that section 217(1) of the Constitution is relevant. It is the respondent's case that section 217(1) of the Constitution relates to procurement and is not relevant to the commercial leasing transactions which form the subject of the application.

Lengthy heads of argument were filed by the applicant's counsel in which it is strenuously argued that the respondent's actions regarding the extension or renewal of the sub-lease amounted to unfair administrative action. I do not intend dealing in any detail with these heads of argument.

In my judgment counsel for the respondent was correct when he submitted that the first and most important enquiry is whether the respondent's conduct is in law conduct which qualifies as administrative action. In this respect it was submitted that since the sub-lease terminates automatically by effluxion of time, it is factually incorrect for the applicant to allege that the respondent has made a decision not to extend the sub-lease. The only decision made by the respondent was not to conclude a new sub-lease on termination of the existing lease. That decision, so it was submitted, is not an administrative law decision subject to the rules of natural justice such as procedural fairness or *audi alteram partem*, or the concept of legitimate expectation.

In a judgment delivered on 28 November 2007 by the constitutional court of South Africa in the matter of *Chirwa v Transnet Ltd and 0thers*, case CCT78/06, NGCOBO J in particular considered in depth what conduct constitutes administrative action.

In paragraph 139 at p74 the learned justice made the following remarks:

"The question whether particular conduct constitutes administrative action must be determined by reference to section 33 of the Constitution. Section 33 of the Constitution confines its operation to 'administrative action', as does PAJA. Therefore to determine whether conduct is subject to review under section 33 and thus under PAJA, the threshold question is whether the conduct under consideration constitutes administrative action. PAJA only comes into the picture once it is determined that the conduct in question constitutes administrative action

under section 33. The appropriate starting point is to determine whether the conduct in question constitutes administrative action within the meaning of section 33 of the Constitution."

In paragraphs 140, 141 and 142 the following is said about administrative action:

"[140] In *SARFU*, this Court emphasised that not all conduct of State functionaries entrusted with public authority will constitute administrative action under section 33. The Court illustrated this by drawing a distinction between the constitutional responsibility of cabinet ministers to ensure the implementation of legislation and their responsibility to develop policy and to initiate legislation. It pointed out that the former constitutes administrative action, while the latter does not. It held that 'the test for determining whether conduct constitutes "administrative action" is not the question whether the action concerned is performed by a member of the executive arm of government'. But what matters is the function that is performed. The question is whether the task that is performed is itself administrative action or not.

[141] Against this background the Court concluded:

'Determining whether an action should be characterised as the implementation of legislation or the formulation of policy may be difficult. It will, as we have said above, depend primarily upon the nature of the power. A series of considerations may be relevant to deciding on which side of the line a particular action falls. The source of the power, though not necessarily decisive, is a relevant factor. So, too, is the nature of the power, its subject-matter, whether it involves the exercise of a public duty and how closely it is related on the one hand to policy matters, which are not administrative, and on the other to the implementation of legislation, which is. While the subject-matter of a power is not relevant to determine whether constitutional review is appropriate, it is

relevant to determine whether the exercise of the power constitutes administrative action for the purposes of section 33. Difficult boundaries may have to be drawn in deciding what should and what should not be characterised as administrative action for the purposes of section 33. These will need to be drawn carefully in the light of the provisions of the Constitution and the overall constitutional purpose of an efficient, equitable and ethical public administration. This can best be done on a case by case basis.' …

[142] The subject matter of the power involved here is the termination of a contract of employment for poor work performance. The source of the power is the employment contract between the applicant and Transnet. The nature of the power involved here is therefore contractual. The fact that Transnet is a creature of statute does not detract from the fact that in terminating the applicant's contract of employment, it was exercising its contractual power. It does not involve the implementation of legislation which constitutes administrative action. The conduct of Transnet in terminating the employment contract does not, in my view, constitute administration. It is more concerned with labour and employment relations. The mere fact that Transnet is an organ of state which exercises public power does not transform its conduct in terminating the applicant's employment contract into administrative action. Section 33 is not concerned with every act of administration performed by an organ of state. It follows therefore that the conduct of Transnet did not constitute administrative action under section 33."

The headnote in the judgment of *Naran v Head of the Department of Local Government, Housing and Agricultural (House of Delegates) and Another* 1993 1 SA 405 is a fair reflection of the judgment and reads as follows:

> "It is apparent from the authorities that the *audi alteram partem* principle is only applicable in cases where a public body exercises a statutory right. The *audi alteram partem* principle is not applicable in the exercise of purely contractual rights. Such cases are governed by the principles of the law of contract.

The Court accordingly held, in an appeal to the Full Bench of a Provincial Division from an ejectment order granted by a single Judge, that the *audi alteram partem* principle did not apply to the termination of the contract of lease between the parties where the contract provided that the 'lease shall be terminable by either party on six months' written notice', where the lessor (the second respondent) was a public body and where the lease to the lessee (the appellant) was not governed by any of the provisions of the statute in terms whereof the lessor was created. The Court held further that the rights and obligations of the parties arose out of 'purely contractual relations' and that the lessor had

no statutory power to terminate the contract with the lessee."

In my judgment the applicant's reliance on procedural fairness is misplaced. The applicant relies on legitimate expectation only in respect of the so-called extension of the sub-lease. The administrative law concept of legitimate expectation plays no part in the issue of extension of the sub-lease for the following reasons:

1. Clauses 2.1 and 3.1 of the sub-lease are clear and unambiguous. The term of the sub-lease is fixed from 1 June 2005 to 31 May 2007. At the last-mentioned day the lease expires and will not be renewed. For any new lease agreement the parties had to agree upon the terms and conditions. The parties did not agree on the terms and conditions and no new lease agreement came into existence.

2. The clear meaning of the two clauses referred to is materially inconsistent with any legitimate expectation that the sub-lease agreement will be extended under any circumstances.

3. Clause 3.1 of the sub-lease is not an enforceable agreement to contract or *pacta de contrahendo*, or even an agreement to negotiate.

I am satisfied that counsel for the respondent's argument that it appears that the applicant has seized on fair procedure and legitimate expectation as a novel and unacceptable method for avoiding the consequences of the automatic termination of the sub-lease by effluxion of time and the absence of any new lease for the period after the termination, is correct.

I am therefore satisfied that the provisions of section 3(1) of PAJA is not applicable. The applicant's reliance on the procurement provision of the Constitution, namely section 217 is also misplaced.

I have dealt hereinbefore with the right of first refusal and the applicant's alleged exercise of that right. As pointed out the respondent never offered a sub-lease in respect of the adjoining site to a third party in preference to the applicant. It was therefore not possible for the applicant to exercise any right of first refusal.

The applicant has not made out a case for the relief sought.

The application is dismissed with costs.

W J VAN DER MERWE
JUDGE OF THE HIGH COURT

17239-2007

HEARD ON: 29/11/2007
FOR THE APPLICANT: ADV M SAWYER
INSTRUCTED BY: HOFMEYR HERBSTEIN & GIHWALA INC, SANDTON
c/o HUGO VAN HEERDEN ATTORNEY, PTA
FOR THE RESPONDENT: ADV A KEMACK
INSTRUCTED BY: MOLEFE KNIGHT ATTORNEYS, RANDBURG
c/o H B MOLEFE ATTORNEYS, PTA