REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

(1) REPORTABLE: ~~YES~~/NO
(2) OF INTEREST TO OTHERS JUDGES: ~~YES~~/NO
(3) REVISED: ~~YES~~/NO

10/10/23 .....

DATE SIGNATURE

Case No: 30098/2022

In the matter between:

CASPER DANIEL KASSELMAN N.O.	**FIRST APPLICANT**
GERTRUIDA SUSANNA KASSELMAN N.O	**SECOND APPLICANT**
BDV ADMINISTRATION OF ESTATE (PTY) LTD Represented by BRONWYN CLAIRE VERSTER N.O (In their Capacity as Trustees of the Cornerstone Trust)	**THIRD APPLICANT**
LOXODONTA (PTY) LTD	**FOURTH APPLICANT**
and	
THE SOUTH AFRICAN NATIONAL ROAD AGENCY SOC LIMITED ("SANRAL")	**FIRST RESPONDENT**
THE MINISTER, DEPARTMENT OF TRANSPORT	**SECOND RESPONDENT**

THE MINISTER, DEPARTMENT OF MINERALS RESOURCES AND ENERGY **THIRD RESPONDENT**

JUDGEMENT

FRANCIS-SUBBIAH J:

[1] This is an application for judicial review to determine whether the decision taken by the first respondent, South African National Road Agency Soc Limited (SANRAL), was an administrative decision under the provisions of the Promotion of Administrative Justice Act 3 of 2000 (PAJA), alternatively the principle of legality. In a contractual negotiation between the applicants and SANRAL, a dispute relating to the percentage to be levied by SANRAL gave rise to the question whether SANRAL is exercising a public power in performing a public function or contracting on the basis as between private entities exercising contractual powers in a purely commercial transaction.

Background to the Decision

[2] The first to third applicants intend to construct a service and filling station along a national road, next to the N12 between Klerksdorp and Wolmaransstad. The fourth respondent will operate the filling and service station. Applicants sought authorisation, approval, or permission from SANRAL, being the registered servitude holder of the road reserve next to the N12, to build access and egress routed to and from the filling station over the road reserve for purposes of the filling station. SANRAL, in principle approves of the application subject to specific terms and conditions. SANRAL is an incorporated

company, established for the purpose of taking charge of the financing, management, control, planning, development, maintenance, and rehabilitation of South African National Roads. In terms of section 26(g) of the SANRAL Act, SANRAL has the right to charge a levy, fee or rent for construction and operation over a national road. The second and third respondents have not opposed the application.

[3] The negotiations between the parties had broken down as the applicant takes issue with the terms and conditions which have been proposed by SANRAL for granting the applicant the necessary authorisation and permission. These terms include a percentage levy. When the negotiations commenced the percentage levy was 0,5% on the gross turnover value (excluding VAT) of the petroleum products sold on the property and 1% on all other sales on the property. SANRAL took the decision in terms of its 2021 policy guideline to increase the percentage levy from 0,5% to 2,5% on petroleum products and from 1% to 6% on all other sales on the property. SANRAL contends that this is a business decision and not reviewable under PAJA.

[4] Through this application, the applicants seek to review and set aside SANRAL's decision to increase the fee percentage levied by SANRAL. Applicants' review is intended at what they consider to be an irrational percentage increase of the levy. Whilst accepting that SANRAL has the right to levy a fee for using national roads and servitudes, the applicants contend that SANRAL is bound to levy a rate that has been in place when it commenced with the negotiations following its application on 12 October 2016.

[5] SANRAL argues that this levy rate is in existence for more than 22 years and it has become economically unsustainable. It further submitted that the applicants in seeking the relief sought, are *de facto* requesting the court to draft an agreement on behalf of the parties, as it inter alia seeks an order directing SANRAL to reduce and fix the percentage levy it must impose on the applicant. SANRAL contends that it is acting as a contracting party from a position no different from what it would have been in had it been a private individual transacting on a commercial basis. And even in terms of the principle of legality if applicable, the impugned "decisions" are not irrational. There is a rational connection between the decision to levy the rate which SANRAL considers to be viable, market related, and for the purpose of generating revenue for its established purpose including the maintenance and rehabilitation of national roads.

[6] The applicants contend that the impeached decision is an administrative action and is therefore subject to judicial review in terms of section 6 of PAJA. SANRAL and the National Roads Act 7 of 1998 provide for the establishment of an Agency, incorporated as a company to perform the functions specified in section 25 relating to the national roads of the Republic. Section 12 (1) of the SANRAL Act provides that the Agency is governed and controlled in accordance with the Act, by a Board of Directors. The Boad of Directors represents the Agency, and all acts of or under the authority of that Board will be the acts of the Agency. Section 44(2) of the SANRAL Act provides:

"*Only the Board and any person acting on its written authority may provide or authorize an entrance to or an exit from a national road.*"

[7] Subsection (3) further sets out:

"*Such an authorization must be reduced to writing and may be granted by the agency on any conditions that it considers desirable, including conditions with regard to the nature of the entrance or exit that is authorized the place where or manner in which the entrance or exit may be erected, constructed or otherwise provided, or its use. The Agency may at any time alter, substitute or cancel such a condition or impose a new condition and insert it in the authorization.*" (Emphasis underlined)

[8] Flowing from these provisions read with section 48 of the SANRAL Act, it is established that SANRAL through its Board is commissioned with the responsibility to perform the functions relating to the national roads of the Republic and is empowered at any time to alter, substitute, or cancel a condition or impose a new condition. The extent to which the Board remains accountable for its decisions is to be considered.

Legal principles

[9] In ***Sokhela v MEC FOR Agriculture and Environmental Affairs (KwaZulu-Natal)***[1] Wallis J expressed as follows:

"*There is accordingly no mechanical process by which to determine whether a particular exercise of public power or performance of a public function will constitute administrative*

[1] 2010 (5) SA 574 (KZP).

action. That will have to be determined in each instance by a close analysis of the nature of the power or function and its source or purpose."[2]

[10] In considering what is public power and public function, the nature of the action or task is the determining factor. It was held in ***President of the Republic of South Africa and others v South African Rugby Football Union and others***[3] that the task must be administrative and explained as follows:

> *"In s33 the adjective 'administrative' not 'executive' is used to qualify 'action'. This suggests that the test for determining whether conduct constitutes administrative action is not the question whether the action concern is performed by a member of the executive arm of government. What matters is not so much the functionary as the function. The question is whether the task itself is administrative or not."*[4]

[11] The Board of Directors of SANRAL are legislatively conferred a discretion which is exercised in terms of its policy document. The policy document provides for a levy charge as compensation, paid by developers to SANRAL. The policy is aimed at generating its own revenue in structuring funding solutions which it is tasked to do. The policy determines the levy to be charged by SANRAL as a condition for approval for access to and egress from the national road. The rate of the levy is determined at the sole discretion of the Board.

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[2] Ibid at para 61.
[3] 2000 (1) SA 1 (CC).
[4] Ibid at para 141.

[12] In terms of the policy in respect of the development of 'Service and Rest Areas alongside National Roads Class C Facilities,' a 'rating services facilities rate card' was developed and approved by the Board in January 2021 (2021 policy document). This resulted in an increase in the percentage rates after a period of more than 22 years. The new policy envisages an annual review. The rate card also introduced staggered rates for different classes of facilities taking into account traffic on rural areas in comparison to urban areas and the size of the facility as opposed to the previous one-size-fits-all approach that was adopted in the previous policy.

[13] SANRAL submits that the percentage rates are negotiable between the parties. This is based on the staggered rates that are applicable for different classes of facilities. It is therefore proposed to be a negotiation between parties rather than an enforcement of the pre-approved rates.

[14] The factual matrix indicates that there are four stages of the application process. Stage 2 was completed and stage 3 and 4 was still pending. On 10 December 2019 the applicants advised that it accepts financial compensation as stipulated in the 2016 policy document being at the percentage rates of 0,5% and 1% respectively.

[15] On 8 June 2020 the stage 3 application documents were formally submitted to SANRAL. On 30 July 2020 the Cornerstone Trust, 3rd applicant concluded a contract with Engen for the development of the filling station on the property. In January 2021 SANRAL furnished the draft contract to the applicants for consideration with the new

applicable rates being 2,5% and 6% respectively. Dissatisfied with the increase in percentage rates the applicants on 25 January 2021 send a letter to SANRAL to inquire why the compensation was amended in contradiction to what was in the 2016 policy document. The next day SANRAL responded that the 2.5% and 6% are the latest percentages payable as approved by SANRAL's executive committee.

[16] A meeting with SANRAL was arranged for 13 April 2021 to discuss the complaint. A further meeting with the CEO of SANRAL was held on 5 October 2021. At the meeting the applicants were invited to make a counter proposal on what they considered to be a reasonable percentage rate other than the outdated rate that has been in place since 1998. It was envisaged that the proposal must make business sense to all the parties. Accordingly, the proposed rate by the applicants would then be considered by the SANRAL Board to confirm its economic and market relatability. The applicants refused to propose a revised rate.

[17] Applicants refusal to offer an alternative is based on their profit margins being very small and that the project will not be viable at the increased rates. These rates represent an increase of 500% and 600% respectively.

[18] SANRAL submits that for this very reason the matter is not about administrative law or principles of fairness it is about contracting parties that reached a stalemate in negotiation. SANRAL argues that it cannot be forced to contract at a rate that is outdated and has not been revised since 1998. SANRAL takes the position that when it grants

the private sector access to its facilities it does so as a party to a purely commercial transaction and is entitled to negotiate market-related percentage rates to be levied.

[19] It is relevant that no contract at this stage has come into operation between the parties. It is only when the Board grants approval that a contract can be concluded, and the envisaged construction may commence. At this stage only preliminary arrangements were in place. It is common cause that any work done prior to the conclusion of the contract is at the sole risk of the applicants.

[20] At the stage of the talks between the parties considering the percentage rates, it is evident that the discussions reached a deadlock. The applicants insisted on financial compensation as stipulated in the 2016 policy document being at the percentage rates of 0,5% and 1% respectively. SANRAL on the other hand did not accept these percentages but were open to a proposal on a rate that was higher than the 2016 policy document. Therefore, I accept that the percentages to be approved by the Board is not a standardized percentage for every application. Instead, each application is considered independently on its own worth taking into account the different classes of facilities, size of facilities, and is the traffic on rural or urban areas. The new policy envisages an annual review that may result in levy percentage changes. What is before the court is a dispute on percentages without the Board having had an opportunity to consider the matter and make a decision in the context of the application. In the event the applicants are dissatisfied with the Board's decision, recourse to appeal lies with the Minister.

[21] The vital question is whether the functionary performing an administrative act in terms of an empowering legislation translates to the functionary automatically implementing legislation.[5] The Constitutional Court in ***Minister of Defence and Military Veterans v Motau and Others***[6] provided practical guidance in crafting a definition relating to an administrative action from the following seven elements, that there must be:

> *"(a) a decision of an administrative nature;*
>
> *(b) by an organ of state or a natural or juristic person;*
>
> *(c) exercising a public power or performing a public function;*
>
> *(d) in terms of any legislation or an empowering provision;*
>
> *(e) that adversely affects rights;*
>
> *(f) that has a direct, external legal effect; and*
>
> *(g) that does not fall under any of the listed exclusions."*[7]

[22] In respect of these 7 elements in the present matter the applicants relied on sections 1 (a) (ii) and 1(b) of PAJA. It provides as follows:

> *"'administrative action' means any decision taken, or any failure to take a decision, by-*
>
> *(a) an organ of state, when-*
>
> *(ii) exercising a public power or performing a public function in terms of any legislation; or*

[5] *Minister of Public Service and Administration v Nontobeko Ntsinde and Others* (A63/2019) [2020] ZAGPJHC 399 (23 December 2020) at para 26.
[6] [2010] ZACC 18.
[7] Ibid para 33.

(b) a natural or juristic person, other than an organ of state, when exercising a 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, but does not include-" (listed exclusions)

[23] In ***Cape Metropolitan Council v Metro Inspection Services Western Cape CC and Others***[8], the dictum of the court is furthermore relevant when it considered that although a power may arise from legislation but when contracting it is not performing a public duty or implementing legislation. It is exercising a contractual right that is founded on the consensus of the parties in a commercial contract. The court said the following:

"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. Section 33 of the

[8] 2001 (3) SA 1O13 SCA para 18.

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.'[9]

[24] In the present matter it follows therefore that as long as the doors to negotiation where open between the parties, SANRAL in executing its public duty or implementing legislation was purporting to exercise a contractual right founded on the consensus of the parties in respect of a commercial contract in all these circumstances. Once the negotiations on the percentage rates reached deadlock, the applicants become eligible to a remedy specified within the provisions of the SANRAL Act. However, the applicants did not pursue these remedies, instead they have lodged this application for review in terms of PAJA alternatively on the principle of legality.

[25] As part of the ongoing negotiation on 19 January 2022, the applicants provided a further updated feasibility report to SANRAL. In response SANRAL sent a letter on 28 February 2022 taking a stance that the increased fee levies are in line with the Horizon 2023 long term strategy. Further that SANRAL opposes the updated feasibility study and that the parties are unable to reach settlement in the negotiations.

[26] Applicants' complaints are further fueled by the flawed decision-making process of the 2021 policy document. They submitted that the decision of the Board to increase

[9] Ibid at para 18.

rates is unreasonable, irrational and arbitrary because the basis for the levy adjustment is flawed, does not take the RAS model into consideration and the effect of the levies will be devastating to the applicant and other stake holders in the fuel industry and the increased levies will make the filling station commercially unviable. However, it was not apparent what served before the SANRAL Board when the decision was taken.

[27] They argued that the decision was not published as required in accordance with the provisions of section 35 (5) of the SANRAL Act. There was no public participation in terms of section 39(2). The approval of the business and financial plan by the Minister of Transport as set out in section 25(1) read with section 34(2) of the SANRAL Act was not performed. That the decision to increase the percentages emanating from the 2021 policy document was circulated within SANRAL only after the applicants were notified of the increased percentage rates. They were informed of these rates on 25 January 2021 prior to the Board's approval. The Board allegedly approved the 2021 policy document at a board meeting on 28 January 2021 and the minutes were signed only on the 30 March 2021 and published in June 2021. SANRAL failed to address this procedural issue in its answering affidavit. For these reasons the applicants seek an ancillary relief that the 2021 policy document is unlawful and of no force and effect and SANRAL be ordered to set the percentage rates as it was set out in the 2016 policy document.

[28] I agree with the applicants' reliance on the decision in ***Bel Porto*** [10] where the court held that a "rational and coherent process tends to produce a reasonable outcome." However, there is nothing in the papers before this Court that shows that a rational and coherent process was followed to have the levy percentages in the current application considered by SANRAL's Board as well as to have the entire 2021 policy document challenged by an internal appeal to the Minister. The applicant failed to take this procedural step and instead submits that the letter sent by SANRAL on 28 February constitutes an exhaustion of internal remedies. Since the application was launched on 2 June 2022 the applicants consider this to be within the 180 days required in terms of PAJA and no condonation is required for the late filing of the review application.

[29] It is trite that only after the Board's consideration and decision, that such decision is subjected to an internal appeal before the Minister in terms of Section 57 of the SANRAL Act. Without the Board's consideration of an issue the matter cannot be placed on internal appeal before the Minister.

[30] Subrule (1) of section 57(1) provides as follows:

> *"Where the Agency has refused a person's application for an approval or permission contemplated in section 48 or 49 or has granted a limited or conditional approval or permission the person may appeal to the Minister against the refusal, limitation or condition in question and the Minister may dismiss the appeal or allow it in whole or in part, or take any other decision that the Agency could have taken with regard to the application."* (underlined emphasis).

[10] 2002 (3) SA 265 (CC) at para 165

[31] Further, subrule (3) of section 57 of the SANRAL Act provides that:

"an appeal in terms of subsection (1) must be lodged with the Minister in the manner and form and within the period as prescribed."

[32] Since no decision was taken on the levy percentages by SANRAL's Board in respect of the current application, no finding can be made on SANRAL'S decision being flawed. The policy considerations relating to the 2021 policy document that served before the Board in January 2021, the manner of its publication, public participation as envisaged in the Act and whether the decision is unreasonable, irrational and arbitrary was also not placed before the Minister and is therefore not fit for Court review. It is a requirement to exhaust all internal remedies in terms of the provisions of Section 57(1) of the SANRAL Act read with Section 7(2) of PAJA.

[33] The applicant has failed to exhaust internal remedies against SANRAL's decisions to refuse an application for an approval or permission to construct over a National Road or to grant a limited or conditional approval or permission. This will clearly include a dispute on the levy percentages to be charged. The applicant's failure to exhaust internal remedies means that it is precluded by the provisions of section 7(2) of PAJA from approaching this court.

[34] In the context of the present matter I accept that SANRAL is performing a public function but is negotiating on levy percentages and not applying an enforceable tariff rate. Although the power arises from legislation, the levy percentages are negotiable

as in commercial contracts. These negotiations have no direct, external legal effect on the public except between the applicants and SANRAL. I therefore cannot find that SANRAL in carrying out its mandate in negotiating levy percentages and not applying the outdated levy percentages as set out in the 2016 policy document is an irrational decision under the principle of legality.

[35] I cannot find a basis upon which SANRAL can be ordered to charge levies in terms of the 2016 policy document. From the affidavits and submissions made to this court I cannot find that the percentage rates were absolute. SANRAL invited the applicants to propose rates higher than 1% and 2,5% respectively. The applicants took a decision not to propose a rate and therefore the matter should proceed to exhausting all internal remedies in terms of the provisions of the SANRAL Act. I do not accept the applicants' submission that the letter sent by SANRAL's attorneys on 28 February 2022 translates into the exhaustion of internal remedies. This in my view states the position correctly. Since internal remedies have not been exhausted the matter is therefore prematurely placed before the court for review under PAJA and for the reasons expounded above fails to succeed on the principle of legality.

[36] As a result the following order is made:

36.1 The application for review is dismissed with costs.

R FRANCIS-SUBBIAH

JUDGE OF THE HIGH COURT, PRETORIA

APPEARANCES:

FOR THE APPLICANTS:	Adv. HGA SYNMAN SC Adv. JD MATHEE
INSTRUCTED BY:	LAUFS ATTORNEYS c/o PESTANA ATTORNEYS
FOR THE RESPONDENTS:	Adv. L KUTUMELA
INSTRUCTED BY:	THE STATE ATTORNEY, PRETORIA
DATE OF HEARING:	30 AUGUST 2023
DATE OF JUDGEMENT:	10 OCTOBER 2023

This judgment has been delivered by uploading it to the court online digital data base of the Gauteng Division, Pretoria and by e-mail to the attorneys of record of the parties. The deemed date and time for the delivery is 10 October 2023.