

## August 2017

An update on the law on unlawful administrative action according to Merafong

Bidders and employers of projects in the public sector should be aware of the recent Constitutional Court judgment of *Merafong City Local Municipality v AngloGold Ashanti Limited 2017 (2) SA 211 (CC)* in circumstances where the validity of the administrative action taken (in awarding tenders or bids) is challenged.

The decision emphasised the principle that unlawful decisions by organs of state have a legal effect until they are declared invalid and set aside by a court. A party wishing to challenge the award of a tender, which constitutes administrative action, or any other administrative action, must take active steps to have the decision set aside, failing which it will remain valid despite its unlawfulness.

In Merafong, the issue centred on a decision taken by the Minister of Water Affairs and Forestry (the Minister) on 18 July 2005, in terms of which she overturned a decision by the applicant, Merafong City Local Municipality (Merafong).

Merafong sought to overturn the decision of the Supreme Court of Appeal, dismissing an appeal to it from a decision of the Gauteng Division of the High Court, Pretoria, which gave effect to the Minister's decision.

Merafong contended that the Minister's decision was invalid because it intruded on an exclusive constitutional competence that section 156(1) of the Constitution confers on Merafong.

The majority of the Constitutional Court held as follows regarding the setting aside of administrative action:

- The court emphasised that when making a finding on the validity of administrative action, the Constitution as the supreme law, was the starting point. The Constitution provides that, when deciding a constitutional matter within its power, a court "must declare that any law or conduct that is inconsistent with [it] is invalid to the extent of its inconsistency".
- The court highlighted the paradox that sometimes arises, referred to as the Oudekraal

paradox (*Oudekraal Estates (Pty) Ltd [2004] 3 All SA 1 (SCA)*), of which parties should be aware when challenging administrative action. Simply put, there are instances where an unlawful act has the effect of producing legally effective consequences and this may affect the finding that is made regarding the unlawful administrative action.

- The court referred to an earlier decision, where it was noted that there was a “clear distinction” between “the constitutional invalidity of administrative action”, on the one hand, and, on the other, “the just and equitable remedy that may follow from it”. It was for this reason that the court declared invalid a tender whose award was riddled with suggestive irregularities, while nevertheless suspending the declaration of invalidity pending determination of a just and equitable remedy. Upsetting the award might have had disastrous consequences for millions of vulnerable grant recipients. Hence it was just and equitable to keep the unlawful award temporarily in place by the exercise of the broad remedial powers the Constitution has vested in this court.
- The conundrum created by the Oudekraal paradox was found to be constitutionally sustainable and necessary, because unless challenged by the right challenger in the right proceedings, an unlawful act is not void or non-existent, but exists as a fact and may provide the basis for lawful acts pursuant to it.
- These consequences were found to follow from the wording of section 172(1) of the Constitution, which requires a court to declare any law or conduct inconsistent with the Constitution invalid to the extent of its inconsistency, but requires the court to do so only “when deciding” a constitutional matter within its jurisdiction. The provision does not dictate to courts when or how they must decide. It contemplates that a court may decline to decide a matter because the right complainant is not before it, or because the challenge is not warranted in the particular proceedings before it.

Finally, the court also considered the effect of the well-known judgments of *Oudekraal and Kirland (MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd t/a Eye and Lazer Institute 2014 (3) SA 481 (CC)* and emphasised that the decisions did not fossilise possibly unlawful and constitutionally invalid administrative action as indefinitely effective. It was expressly recognised that the Oudekraal principle put a provisional brake on determining invalidity. The brake was imposed for rule of law reasons and for good administration and it did not bring the process to an irreversible halt. What it required was that the allegedly unlawful action be challenged by the right actor in the right proceedings.

Parties should take care to ensure that any challenges to unlawful administrative acts are correctly brought, in the appropriate forum and according to the correct proceedings.

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