



REPORTABLE

**IN THE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOODHOPE PROVINCIAL DIVISION)**

CASE NO: 10244/2004

In the matter between

DEPARTMENT OF PUBLIC WORKS

Applicant

and

M S MOOS CONSTRUCTION CC

Respondent

Coram: YEKISO J

Heard: 1 March 2005

Delivered: 24 June 2005

Summary: State Department: whether conferred with juristic personality – *locus standi* to initiate legal proceedings – found Department devoid of juristic personality and thus no *locus standi in iudicio* to institute legal proceedings – Public Service Act does not confer juristic personality.

JUDGMENT DELIVERED: 24 JUNE 2005

Yekiso J

[1] The Department of Public Works, as the applicant, has instituted proceedings out of this Court by way of Notice of Motion, in which

proceedings the applicant seeks an order for the eviction of the respondent from the site known as Klein Schuur Residence, Rondebosch. The site from which the applicant seeks to have the respondent evicted is described in the papers as the property of the Republic of South Africa. Its management and control vests in the applicant department¹. The applicant's cause of action is based on *rei vindicatio*. The applicant seeks the eviction of the respondent from the site in point on the basis that the respondent has no right therein. The applicant avers in its founding papers that the respondent's right to remain on site ceased on cancellation of a written agreement concluded between the Government of the Republic of South Africa, represented by the Director-General: Public Works and the respondent² in terms whereof the respondent undertook to do certain repair, restoration and upgrading works on the ministerial residence situate on site.

[2] The respondent opposes the relief sought on the basis that the applicant is not a legal *persona* with capacity to institute legal proceedings and, as such, does not have the necessary *locus standi in iudicio* to institute these proceedings; that the applicant is not the owner of the site from which it seeks to have the respondent evicted and thus the applicant's reliance on the remedy of *rei vindicatio* is misplaced; that

¹ Paragraph 4 of the founding affidavit deposed to by Gerard Damstra: Chief Director: Professional Services, Department of Public Works.

² The written agreement is annexed as annexure "A" to the affidavit of Carin Smuts.

the official of the applicant department who deposed the founding affidavit does not have authority to do so and that, in any event, the written agreement the applicant contends was cancelled, was not validly cancelled. The respondent does not, in its opposition, assert any right or entitlement to remain on site either by way of a *lien* or a tender of performance.

[3] The contract referred to in paragraph [1] above was concluded in Cape Town on 23 January 2004 pursuant to a tender process which took place during October 2003. As has already been pointed out, the contract was for the repair, restoration and upgrading of a ministerial residence Klein Schuur Resident, situate at Rondebosch. The contract price was in an amount of R 2,985,673-00. The period agreed upon for the completion of the work was a period of ten (10) months reckoned from date of delivery of the site. The site was delivered to the respondent on 11 December 2003 and the restoration and upgrading work had to be completed by not later than 24 September 2004. As has become customary in contracts of this nature, the contract makes provision for remedies in the event of default on the part of the contractor and for an extension of time in the event of an intervening variation. Once the site was handed over, the respondent commenced with the work on basis of the agreed schedule and construction programme.

[4] During the course of restoration and upgrading works, various site meetings were held in order to monitor the progress of the building works. It was in the course of such site meetings that a steady deterioration in progress was noticed. The respondent was called upon to remedy the unsatisfactory progress from time to time. At the 13th site meeting held on 28 June 2004 it was recorded that “the architect and client are extremely concerned regarding the progress on site and, although a programme was agreed upon, the contractor is not adhering to the work programme. The architect referred to a letter dated 25 June 2004 addressed to the contractor and requested a written response.”

[5] By way of a letter dated 10 July 2004 the Director-General of the Department of Public Works addressed a letter to the respondent in which letter the respondent was, amongst others, called upon to indicate “to the Architect on site, and in writing, how the respondent proposed to catch up with the unacceptable progress on site”. When no response was received by 5 August 2004, the Director-General addressed a further letter to the respondent, advising that the department had decided to cancel the contract in terms of clause 24(3)(b) of the conditions of contract. Once the contract was cancelled, and specifically on 29 November 2004, the applicant instituted these proceedings by way of Notice of Motion, seeking an order of eviction of

the respondent from site. In doing so the applicant relies on the remedy of *rei vindicatio*. The respondent is opposing the relief sought on the basis as set out in paragraph [2] above. Before dealing with those issues, I briefly need to restate the principles relating to the application and enforcement of the remedy of *rei vindicatio*.

REI VINDICATIO

[6] The principle that an owner cannot be deprived of his or her property against his or her will means that the owner is entitled to recover it from any person who retains possession of it without his or her consent³. The remedy of *rei vindicatio* is available to an owner for the recovery of his or her property, movable or immovable, from whomsoever is in possession or has detention thereof irrespective whether the possession or detention of the thing is *bona fide* or *mala fide*. The age old maxim *ubi rem meam invenio ibi vindico* applies. If an immovable property is being recovered, the claim usually takes the form of an application for an order of ejectment⁴.

An owner who initiates *rei vindicatio* to recover his or her property is required to allege and prove (a) that he or she is the owner of the thing; (b) that the thing was in possession of the defendant at the time the

³ Siberberg & Schoeman: The Law of Property 4th Edition p225.

⁴ C G Van der Merwe: The Law of Things: The Law of South Africa Volume 27 1st re-issue p323 par 381.

action was commenced and (c) that the thing which is vindicated is still in existence and clearly identifiable⁵.

[7] For the applicant to succeed in its action the aforementioned elements of *rei vindicatio* have to be satisfied. As has already been pointed out, the respondent challenges the applicant's *locus standi* on the basis that the applicant, in the first instance, is not a legal *persona* capable of instituting these legal proceedings and that, if the applicant is devoid of juristic personality, the applicant lacks the required *locus standi* to institute the vindicatory action as it seeks to do in these proceedings. The first issue I am required to determine in these proceedings, therefore, is whether the applicant is possessed of juristic personality, and if so, whether the applicant has capacity to institute these proceedings.

THE STATE OR GOVERNMENT AS A JURISTIC PERSON

[8] It probably would be putting the cart before the horse in determining the juristic personality of the Department of Public Works without, in the first instance, determining the juristic personality of the State or the Government of which the Department of Public Works forms an integral part in the scheme of governance. Despite a debate

⁵ Chetty v Naidoo 1974(3) SA 13(A) @ 20 B-C.

amongst constitutional and administrative lawyers⁶ at the beginning of the 20th century about the concept and juristic personality of the “State” and the “Government” as separate entities, there is at least abundant acknowledgment amongst academic writers and commentators that since the inception of the Union in terms of the South Africa Act, 1909, the then Union of South Africa was constituted as a State having juristic personality⁷. In terms of sections 98(3)(a); 117; 122; 123 and 125 of the South Africa Act, 1909, the then Union Government was constituted as a juristic person capable of suing and being sued in its own name. Watermeyer CJ put the position thus in *Die Spoorbond and Another v South African Railways, 1946 AD 999* at p1005:

“The Governor-General-in-Council (whom I shall call the Crown and who is also sometimes referred to as the Government of the Union) is regarded in law as a legal *persona*, with a perennial existence, and as such, a legal *persona* distinct from the individual human beings or group of persons who from time to time hold office as Governor-General and as members of the Executive Council, just as the King or the Crown in England is regarded as a corporation sole with a perpetual existence, and, as such, distinct from His Majesty the King.”

⁶ The article by L G Baxter entitled “The State and other basic law terms in public law” in the South African Law Journal Vol 99 1982 at p212 is instructive in this regard.

⁷ See also Verloren van Themaat: *Staatsreg* (1956) at p406; Hahlo and Kahn: *The Laws of the Union of South Africa* at p.170; Vieyra J also refers to these authorities in *die Regering van die Republiek van SA v Santam* 1964(1) SA 546(WLD) at 547.

[9] The trend in the recognition of the State and the Government as juristic *personae* continued to be entrenched in the Republic of South Africa Constitution Act, 32 of 1961⁸; in subsequent Constitutions such as the Republic of South Africa Constitution Act, 1983⁹; what is commonly referred to as the interim Constitution¹⁰ and ultimately the Constitution of the Republic of South Africa, 1996¹¹. The Crown Liability Act¹², which was later repealed by the State Liability Act¹³ was intended to regulate actions instituted against the State or the Government. The argument that Government is an organ of state and thus could not have *locus standi in iudicio* to institute proceedings was rejected in such decisions as *Die Regering van die Republiek van Suid-Afrika v Santam*¹⁴, supra. There is, however, no statutory provision on how the State or the Government may initiate legal proceedings. As we all know, in the Republic the government is constituted as national, provincial and local sphere of government which are distinctive, interdependent and interrelated¹⁵. The juristic personality of the government is thus implicit in Chapter 3 of the Constitution under heading Co-operative Government. Section 40(1) of the Constitution, in my view, settles the juristic personality of the government beyond doubt so that whatever

⁸ The Republic of South Africa came into being after the repeal of the South Africa Act, 1909.

⁹ This ushered the since disbanded tri-cameral parliamentary system whose existence ceased at midnight on 26 April 1994.

¹⁰ The Republic of South Africa Constitution Act, 200 of 1983.

¹¹ Act 108 of 1996.

¹² Act 1 of 1910.

¹³ Act 20 of 1957.

¹⁴ See footnote 6 above.

¹⁵ Section 40(1) of the Constitution of the Republic of South Africa, 1996.

debate there could be about the juristic personality of the State or the Government is now a matter of mere academic exercise. The question which then follows is whether this juristic personality of the State or Government extends to state departments? I shall now proceed to determine this issue.

THE STATE DEPARTMENT: A JURISTIC PERSON ?

[10] In terms of all the legislative enactments referred to in the preceding paragraph it will be noted that the State has many facets, these being executive, legislative and judicial organs of Government. The administration, of which the state departments form an integral part, and excluding the cabinet, is the executive branch of the government which implements policy and is responsible for the performance of the affairs of state. It's human resources would include officials in the state departments be it national, provincial or local spheres of government. The administration would also include public bodies and enterprises which perform public functions¹⁶ which, in most instances, would have juristic personality conferred on them by the Statutes which constitute them.

[11] Based on legal literature on constitutional and administrative law, it is evident that the State has many facets or organs, these being the

¹⁶ Yvonne Burns: Administrative Law under the 1996 Constitution: Butterworths 1998 p1.

executive, the legislature and judicial (the so-called *trias politica*) organs of Government. At the national sphere the main components of the state administration are the various state departments. The Legislature, through its legislative programme, enacts legislation, the National Executive which comprises the Cabinet formulates policy on basis of such legislation and the administration through various state departments, implements policy and render public service. These departments can be seen as a pyramid with the minister at the apex, descending through the director-general, heads of departments to senior and junior officials who form the base of the pyramid. This hierarchical chain of command is characteristic of a typical state department such as the Department of Public Works¹⁷. The Constitution does, however, distinguish between the executive branch of organ of the government and the administration by providing for the institution of public service.

[12] Section 197(1) of the Constitution provides for a Public Service within the public administration which must function and be structured in terms of national legislation¹⁸ and which must loyally execute the lawful policies of the government of the day. The composition and the structure of the public service is, in turn, provided for in section 7(2) of the Public Service Act. For the purpose of administration, the public

¹⁷ Yvonne Burns *op cit* p50.

¹⁸ The national legislation contemplated in section 197(1) is the Public Service Act No 103 of 1994.

service has been divided into a number of national departments, each headed by a designated head which, in the case of the Department of Public Works, is the Director-General: Public Works.

[13] Section 7(3)(b) of the Public Service Act provides:

“(b) Subject to the provisions of paragraph (c) and (d) a head of the department shall be responsible for the efficient management and administration of his or her department including the effective utilization and training of staff, the maintenance of discipline, the promotion of sound labour relations and the proper use and care of state property and he or she shall perform the function that may be prescribed.”

[14] Section 42A of the Public Service Act, in turn, provides that the minister¹⁹ may delegate to the Director-General or any officer or employee of the Department concerned any power conferred upon the Minister by or under the Act or any other law on such conditions as the Minister may determine. The Act goes on to determine limitation of actions in respect of proceedings instituted against the State and the procedure to be followed when instituting such actions. There is no provision in the Act nor am I aware of any other statutory provision on how the State is to initiate legal proceedings²⁰.

¹⁹ The Minister referred to is the Minister of Public Service and Administration.

²⁰ See an as yet unreported judgment of the Supreme Court of Appeal handed down on 23 March 2005 (per Conradie JA) in the matter of Distcor Export Partners & Another v The Director-General of the Department of Trade & Industry under case no: 521/2003.

[15] For the purposes of administration the Public Service has been divided into national departments²¹. The departments constituted in terms of the Public Service Act are listed under Column 1 to the first Schedule whilst the designations of the heads of the departments are set out and listed under Column 2 to the first Schedule. The Department of Public Works is one such departments and the head of the department is designated as the Director-General: Public Works. The responsibilities of the head of each department are set out in section 7(3) of the Public Service Act and these include efficient management and administration of his or her department and proper use and care of State property. Once appointed, the head of the department, in effect, becomes the chief executive officer of the department concerned and is responsible to the Ministerial head which is the Minister of the department concerned.

[16] The Public Service Act, in terms of which the Department of Public Works is constituted, consists of eight chapters each dealing with specific topics in the scheme of state administration. Section 39 and 40, under heading, Miscellaneous, deal with limitation of actions and limitation of liability respectively in respect of each department in the absence of any indication to the contrary in any other law. None of the

²¹ National departments referred to are set out in Schedule 1 of the Public Service Laws Amendment Act, No 86 of 1998 and which, in turn, was inserted as Schedule 1 to the Public Service Act, 103 of 1994.

other sections which constitute the Public Service Act confers juristic personality on any of the state departments listed in the first Schedule to the Act, including the Department of Public Works. The vision of the Department of Public Works, in terms of its Mission Statement, is to provide and manage accommodation, housing and infrastructure needs of national departments. Nowhere is it stated in the Public Service Act that the Department of Public Works is a legal *persona* capable of instituting legal proceedings in its own name. Its functions and activities are limited to the provision of service in the process of implementation of Government policy. The fact that the department is an organ of state in terms of section 239 of the Constitution does not cure the deficiency²² of juristic personality. State departments are mere vehicles for implementation where in the Public Service Act, which constitutes such departments, is juristic personality conferred on them.

[17] I am thus unable to find, on basis of available evidence and authority, that the applicant, being the Department of Public Works, is possessed of juristic personality with the capacity to institute legal proceedings. Moreso, it has not been established on basis of evidence before me that the applicant is the owner of the property from which it

²² In terms of section 239 of the Constitution the concept “organ of state” is defined as:

- “(a) any department of state or administration in the national, provincial or local sphere of government;
- (b) any other functionary or institution –
 - (i) exercising a power or performing a function 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, but does not include a court or a judicial officer.

seeks to have the respondent evicted. The fact that the Department of Public Works is devoid of juristic personality, necessarily leads to the conclusion that it does not have *locus standi* to institute these proceedings. In the light of the conclusion I have reached as regards the juristic personality of a State department, and the *locus standi* to institute these proceedings, it therefore follows that the Department of Public Works cannot avail itself of the remedy of *rei vindication*.

[18] It therefore follows that the relief sought by the Department of Public Works, devoid of juristic personality as it is, and not being the owner of the site from which it seeks to have the respondent evicted, cannot succeed.

[19] In the result the order I make is that the application is dismissed with costs.

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N J Yekiso, J