REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

Reportable: No
Of interest to other judges: No
18 March 2021 Vally J

Case number: 11/28108

In the application of:

Primemedia (Pty) Ltd t/a Comutanet	**First Applicant**
Primemedia Outdoor (Pty) Ltd	**Second Applicant**
Rank TV (Pty) Ltd	**Third Applicant**
Comuta Net (Pty) Ltd	**Fourth Applicant**
Continental Outdoor Media (Pty) Ltd	**Fifth Applicant**
Corpcom Outdoor (Pty) Ltd	**Sixth Applicant**
Merafe Rail (Pty) Ltd	**Seventh Applicant**

and

Passenger Rail Agency of South Africa (Prasa)	**First Respondent**
Umjanji Media Consortium	**Second Respondent**
Umjanji Media (Pty) Ltd	**Third Respondent**
Siyathembana Trading 281 (Pty) Ltd	**Fourth Respondent**
Strawberry Worx Pop (Pty) Ltd	**Fifth Respondent**

JUDGMENT

Vally J

Introduction

[1] This matter commenced on 26 July 2011. It has its roots in a decision taken on 13 December 2010. It was only finalised in this court, a court of first instance, in March 2021. After the decision was taken Prasa sought to evict the first applicant,

Primedia (Pty) Ltd t/a Comutanet (Primedia) from its sites, where advertising space is sold. Primedia secured an interim interdict on 8 June 2011 preventing the eviction and thereby protecting its interests. The interim interdict is still in place. Nevertheless, it would be remiss of me not to record that I am disappointed that the matter had lasted ten years in a court of first instance. Fortunately, a delay of this length is not the norm in this division or indeed any division of the High Court. And fortunately too, the cause of the delay cannot be laid at the door of the court. There were numerous interlocutory applications, mainly brought by the first respondent, Prasa, and by the second respondent, Umjanji Media Consortium (Umjanji) which delayed the finalisation of the matter.

[2] In February 2010 Prasa issued a tender - tender number HO/CA/739/02/2010 (the tender)- in terms of which it invited interested parties to submit bids to provide media advertising and broadcasting services on various sites owned by Prasa. After receiving and considering the various bids, including those from some of the applicants, Prasa made a decision on 13 December 2010 (the decision)[1]. The decision went in favour of Umjanji. On 25 February 2011 this was communicated to the first applicant.

[3] The applicants consist of two sets – the first being the first to fourth applicants and the second being the fifth to seventh applicants. For ease of reference the first set will be referred to as Primedia and the second set as Continental. Prasa being the party with a primary interest in the matter – it is its decision that is being impugned

[1] As will be seen later the decision is characterised as administrative action in terms of the Promotion of Administrative Justice Act, (PAJA), the terms decision and action are used interchangeably in the judgment.

– initially opposed the application but subsequently decided to withdraw its opposition. Umjanji and the third respondent, Umjanji Media (Pty) Ltd, which are associated companies, also do not oppose the application. The fourth respondent Siyathembana Trading 281 (Pty) Ltd (Siyathembana), and the fifth respondent, Strawberry Worx Pop (Pty) Ltd (Strawberry) were not cited by the applicants. Siyathembana applied in April 2013 to join the proceedings as a respondent. It secured an order to that effect in March 2015. On 28 April 2016 Strawberry sought to join the proceedings as a respondent but it also applied for a permanent stay of the application. It was granted leave to join. Both Siyathembana and Strawberry opposed the relief sought, which is to have the decision reviewed and set aside. However, Siyathembana did not file heads of argument nor did it participate in the hearing.

The decision

[4] The decision consists of awarding a contract to Umjanji for a period of five (5) years commencing on 1 June 2011. The contract concerned outdoor advertising at the various sites owned by Prasa. Revenue generated by the contract was to be shared on a proportional basis between Prasa and Umjanji – which right and obligation was passed on to either Siyathembana of Strawberry depending on which of the two entities enjoyed occupation and usage of the site. The proportion depended on whether the contractor – Siyathembana or Strawberry - was required to expend any monies towards making the advertising possible at the site.

Pertinent facts

[5] On 4 December 2010, which was about a week before the tender was awarded to Umjanji, Umjanji ceded and assigned certain rights and obligations to Strawberry.

The cession and assignment agreement was conditional upon Prasa consenting thereto should Umjanji succeed in securing the contract. On 31 August 2011 Umjanji ceded and assigned portions of its rights to Siyathembana. In terms of these two agreements[2] certain rights and obligations acquired in terms of the contract by Umjanji were transferred to Siyathembana and Strawberry. Prasa was party, and consented, to the Siyathembana agreement.

[6] At the time the tender closed Umjanji was not in existence. This fact was initially concealed by Prasa and Umjanji, but was eventually established by the Public Protector who was impelled - by a complaint she received - to determine the veracity of certain allegations of illegal and improper conduct by employees of Prasa in managing the affairs of Prasa. The alleged illegal conduct included the awarding of the contract to Umjanji by senior employees of Prasa. She found that 'Umjanji Consortium was incorporated on 23 April 2010'. This 'was more than a month after the closing of the tender.' The party that attended the compulsory tender briefing was one Provantage Media (Provantage). It was part of Umjanji, but the other constituent parts of Umjanji, being KG Media and Future Growth Foundation, did not attend the briefing and 'seem not to have even existed' at the time of the briefing.

[7] Strawberry participated in the tender but Siyathembana did not. Strawberrry's participation was independent of Provantage, meaning that it was a competitor to one of the constituent parts of Umjanji. As a result of the cession agreements, both

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[2] For ease of reference the cession and assignment agreements will simply be referred to as the cession agreements or, if reference is to the singular, the cession.

Siyathembana and Strawberry secured occupation and usage of various sites of Prasa, allowing them to sell advertising space at these sites.

[8] Primedia alleged various irregularities in the awarding of the contract to Umjanji. Prasa filed an affidavit explaining its decision to withdraw its opposition, wherein it listed some of these grounds. They are: (i) Prasa acted *ultra vires* as it awarded the contract to a single party; (ii) Prasa acted *ultra vires* in that it awarded the contract to a party that did not tender and was therefore disqualified, (iii) Prasa acted *ultra vires* because it awarded exclusive rights to a single party; (iv) by awarding a single contract concerning all the sites Prasa contravened the Competition Act, 89 of 1998; and (v) the decision in itself contravened the Preferential Procurement Policy Framework Act 5 of 2000. In that affidavit it also emphasised the importance of the Public Protector's finding. It says that having taken note of both, it had come to the conclusion that there was no merit in its opposition. It withdrew its opposition on 29 March 2016. I hold that the decision to withdraw was correct and commendable.

The effect of the withdrawal of opposition.

[9] Prasa essentially concedes that Primedia is correct in its allegations. It also concedes that the Public Protector's finding is correct.

The applicable legal prescripts and principles

[10] Section 217 of the *Constitution of the Republic of South Africa Act, 108 of 1996* (the Constitution) is of direct relevance to this matter, for it lays down an unbending rule according to which contracts concluded by organs of state, such as Prasa, are to be concluded. It provides that when 'an organ of state contracts for goods and

services, it must (my underlining) do so in accordance with a system which is fair, equitable, transparent, competitive and cost effective.' The language used here indicates that compliance with its terms is peremptory. Prasa is accordingly obliged to appoint a contractor in terms of the tender it issued through a system that is designed and able to achieve five objectives which are: fairness, equity, transparency, competitiveness and cost effectiveness.'[3] The system Prasa utilises must achieve all five objectives. Any decision or action taken by Prasa which falls squarely within the prescripts of s 217 and which it fails to comply therewith would, if challenged by way of review proceedings, be declared to be invalid and would be set aside. The court in such a circumstance would be obliged to do so.[4]

[11] The decision constitutes 'administrative action' as envisaged by s 1 of the *Promotion of Administrative Justice Act, 3 of 2000* (PAJA) read with s 33 of the Constitution.[5] It is therefore susceptible to review on the grounds specified in s 6(2) of PAJA. Section 6(2) of PAJA provides a comprehensive list of grounds upon which an action of an organ of state may be reviewed. Some of them are: the action is a result of a failure to comply with a procedure prescribed by an empowering provision, the action was influenced by a material error of law, the action was taken for ulterior purpose or, the action is 'otherwise unconstitutional or unlawful'.

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[3] *Municipal Manager, Qaukeni Local Municipality and Another v FV General Trading CC* 2010 (1) SA 356 (SCA) at [11] and [13]; Metro Projects CC v Klerksdorp Local Municipality 2004 (1) SA 16 (SCA) at [11]

[4] *Department of Transport and others v Tasima (Pty) Ltd* 2017 (2) SA 622 (CC) at [77]

[5] *Logbro Properties CC v Bedderson NO and Others* 2003 (2) SA 460 (SCA) at [5] and the cases cited therein

[12] Prasa is required to comply with the *Public Finance Management Act 1 of 1999* (the PFMA), particularly s 2 thereof which enjoins Prasa to manage its 'revenue, expenditure, assets and liabilities' soundly.

Conclusions arrived at by application of the legal prescripts to the pertinent facts

[13] The awarding of the contract was unlawful as:

a. The tender was awarded to an entity that did not exist at the time the tender closed. Thus it could not have been awarded by application of a system that is 'fair, equitable, transparent, competitive and cost effective.' It breached s 217 of the Constitution;

b. The cession agreements, which allowed Prasa, Siyathembana and Strawberry to circumvent the careful scrutiny that arises from the application of s 217 of the Constitution, were also unlawful. They were designed to subvert the control process inherent in the application of s 217 of the Constitution and they succeeded in doing so.

c. Further by awarding the contract to a party that did not exist at the time the tender closed and which could not perform its obligations in terms of the contract, Prasa certainly did not manage its 'revenue, expenditure, assets and liabilities' soundly. It therefore contravened s 2 of the PFMA.

d. Notwithstanding the fact that Umjanji did not exist when the tender closed at the time the contract was awarded to Umjanji, it did not satisfy the requirements of the tender. Prasa and Umjanji were aware of this before

the contract was awarded. Hence Umjanji concluded the cession agreement with Siyathembana which Prasa consented to and a cession agreement with Strawberry, which Prasa tacitly consented to. As a result, Prasa could not fairly, equitably or with true purpose award it the contract. Thus, the awarding of the contract was a breach of s 217 of the Constitution. Furthermore, by awarding the contract to a party that could not perform the obligations set-out therein, Prasa could only be acting with ulterior purpose. Accordingly, the decision stands to be reviewed and set aside in terms of s 6(2) of PAJA;

e. Strawberry concluded the cession agreement with Umjanji even before Umjanji was awarded the contract. Neither Umjanji nor Strawberry explained this anomaly. Both were aware that at the time the tender closed, Umjani was not in existence. Both were aware that Umjanji was ineligible to tender and yet they anticipated that Umjanji would receive the tender. The only inference to be drawn from this is that they had advanced knowledge that Umjanji would secure the contract. This, too, demonstrates that the decision did not result from the application of a fair, open and transparent system and that there was improper conduct in taking the decision.

[14] As I have found that Prasa breached s 217 of the Constitution by awarding the contract to Umjanji, it becomes obligatory upon me to declare its action unlawful and to set the contract aside. In the same vein, the cession agreements too breached s 217 of the Constitution. They subverted the operation of s 217 of the Constitution and

are therefore, in my judgment, unlawful. A declaration to that effect has to be made and they too have to be set aside.

[15] The decision also stands to be reviewed and set aside in terms of s 6(2) of PAJA.

Mootness

[16] Although Prasa did not oppose the relief sought, it raised the issue of mootness. It did so in a quest to assist the court with pertinent submissions, and its efforts in this regard are appreciated. It submitted that the contract had a limited lifespan of five years - which had expired in May 2016 - making the relief sought moot. I do not agree. In my view, the termination of the contract by effluxion of time does not detract from the fact that I am impelled by virtue of the findings in [13] above to declare the decision to be unlawful. Further, the interim relief secured by Primedia allowed Primedia to continue to occupy the sites– as well as enjoy other ancillary benefits –pending finalisation of the matter. Finalisation will be achieved once this court pronounces on the validity of the decision and makes an appropriate order consistent with the pronouncement. Furthermore, Continental, Siyathembana and Strawberry, too, enjoy occupational rights and other benefits. The latter two do so as a result of the impugned decision and the cession agreements. A final pronouncement on the impugned decision and the cession agreements will only serve to clarify the legal position and put an end to any occupation and ancillary benefits these parties enjoy by operation of the unlawful decision.

[17] Strawberry asks that if the decision is found to be unlawful, it should not be prejudiced as it is an 'innocent party', in that it played no role in the decision. It says that it merely concluded a cession agreement with Umjanji. It says further that it has been in occupation of various sites as a result of innocently concluding the cession agreement, and therefore asks that the court, in the exercise of its power, fashion a just and equitable remedy allowing it to continue occupying these sites. The argument is without merit.

a. Firstly, by allowing it to benefit from the unlawful decision it would effectively be endorsing the unlawful decision;

b. Secondly, the cession agreement is itself unlawful, and allowing Strawberry to benefit therefrom would effectively be endorsing the unlawful cession agreement;

c. Thirdly, Strawberry is not an innocent party. It concluded the cession agreement with a party – Umjanji - that was ineligible to be awarded the contract, and more importantly it did so even before Umjanji was actually awarded the contract. This it could only have done by having advance knowledge of Prasa's decision. The moment it became aware that Umjanji was going to be – or even possibly going to be – awarded the contract it became incumbent upon it to raise the alarm. Instead it decided to seek a benefit therefrom by concluding the cession agreement. Further, it was – having participated in a briefing session - itself a competitor for the contract or part thereof. But, instead of awaiting the outcome of its bid, it elected to

conclude a cession agreement with a party that did not even participate in the briefing session. Such conduct is not the conduct of an innocent party.

[18] Hence, having found that the cession agreements are unlawful, it is, I hold, imperative that they be set aside. This is to avoid any further ambiguity or debate on the matter.

Striking-out application

[19] A few days prior to the hearing, Strawberry brought an application to strike-out certain averments in the replying affidavits of Primedia and of Continental. It seeks to strike-out paragraphs 129 to 138 of Primedia's replying affidavit and the annexures attached thereto, which are portions of the report of the Public Protector. It also seeks to strike-out paragraphs '25 to 82, 157, 178, 251.6, 253.4-253.5 and 254.3'. It alleges that the contents of these paragraphs in both replying affidavits and the contents of the Public Protector's report constitute new matter in reply, and constitute hearsay evidence. They are, they say, scandalous, vexatious and irrelevant.

[20] The contents of these paragraphs and the Public Protector's report deal with the contamination of the decision and the cession agreements with malfeasant conduct on the part of, inter alia, the erstwhile Chief Executive Officer of Prasa, Mr Lucky Montana (Mr Montana). Some of the contents rely upon evidence that has been presented at the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector, including State Owned Enterprises. The Commission is chaired by the Deputy Chief Justice and is commonly referred to as the Zondo Commission. The evidence reveals that the awarding of the contract to

Umjanji and the subsequent cession agreements - which Prasa consented to directly in the case of Siyathembana and tacitly in the case of Strawberry – were tainted by irregular conduct and undue influence exerted at Prasa by Strawberry and Mr Montana. The evidence is certainly damning of Strawberry. It shows that Strawberry was not an innocent party as it makes out in its answering affidavit. The evidence is clearly relevant and revealing. At the same time, it cannot be said that the evidence is scandalous and vexatious. It deals pertinently and directly with an issue that was before court.

[21] It is true that the evidence is contained in what is termed a 'replying affidavit', but it must be recalled that at the time Primedia and Continental brought the application Strawberry was not part of the application, and most of all the evidence was not available to them. Accordingly, they could not be expected to have raised it in their founding papers. The evidence could have been presented in their answering affidavits in Strawberry's intervention application, but it was agreed by the parties that pursuing an opposition to the intervention application was not the most prudent way approach the matter. Instead Strawberry should be allowed to file it's answering papers to the founding papers of Primedia and Continental with these two parties then responding in their replying papers. This is exactly what they did. Accordingly, the contention that they constitute material that is impermissibly contained in replying papers is without merit. Had it been in the answering papers in the intervention application, then Strawberry would have replied thereto. As it happened, Strawberry could only have replied by filing a fourth set of papers. Thus, all that was required was for Strawberry to file a fourth set of papers and a short application to have them admitted. It chose not to do so. The fourth set of papers would have contained its

response on affidavit to the allegations contained the paragraphs and annexures it complains of. Instead of putting down a version, their counsel applied at the hearing for the material to be struck-off, alternatively the matter to be referred to oral evidence. It was a most inappropriate call. It is necessary to make clear that courts do not simply refer matters to oral evidence on the say-so of a party. Parties must first put their versions down on paper. Hence Strawberry had to do so, albeit through a fourth set of papers. Once that was done, then all genuine disputes of fact could be identified. Thereafter the court would look at whether the disputes of fact are material to the determination of the issues in the matter. If they are material, it would attempt to resolve them by application of the principles set out in *Plascon-Evans*[6] and in *Wightman*[7]. Only if it could still not determine the issues because genuine disputes of fact exist on paper would a court refer the matter to oral evidence. And then, too, the referral must be specific and circumscribed.[8] In this case, we do not even have a version by Strawberry. Thus, Strawberry's call to have the matter referred to oral evidence, albeit moved from the bar, was a bold one, one that is unmoored from the practical reality of civil procedure.

[22] In the circumstances, Strawberry's application to strike-out the evidence contained in the replying papers of Primedia and Continental is dismissed and Strawberry's call made from the bar for the 'matter' to be referred to oral evidence is

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[6] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A)
[7] *Wightman t/a JW Construction v Headfour (Pty) Ltd and Another* 2008 (3) SA 371 (SCA) at [12] - [13]
[8] *Kalil v Decotex (Pty) Ltd and Another* 1988 (1) SA 943 (A) at 981D-E; *Standard Bank of SA Ltd v Neugarten and Others* 1988 (1) SA 652 (W)

also dismissed. As for the costs, I do not propose to make a separate order simply for this – the striking out application.

Appropriate relief

[23] Strawberry asks that if the court finds the decision to be unlawful it should leave the practical arrangements – the *status quo*, as it were - that follows thereon, albeit on the basis of the cession agreements, intact. This, it says, would be just and equitable. I disagree. Once I find that the decision as well as the cession agreements are unlawful - as I have done – then the only remedy is to set aside the decision and to declare the cession agreements to be of no force and effect. Anything less, would, in my view, be countenancing the unlawful conduct.

Costs

[24] Prasa should undoubtedly pay the costs of the applicants until the date it withdrew its opposition to the matter, which was on 29 March 2016. At the same time, Siyathembana and Strawberry should pay the costs of the applicants from the moment they sought to intervene. In both cases, given the voluminous amount of paper and the general importance of the matter, the costs should include those occasioned by the employment of two counsel.

Order

[25] The following order is made:

a. The decision taken by the first respondent on 13 December 2010 and conveyed to the first applicant on 25 February 2011 is declared to be unlawful and is reviewed and set aside.

b. The cession and assignment agreement concluded between the second and third respondents with the fourth respondent is declared to be unlawful and is of no force and effect.

c. The cession agreement concluded between the second and third respondents with the fifth respondent is declared to be unlawful and is of no force and effect.

d. The first respondent is to pay the costs incurred by the applicants up to and including April 2013, which costs are to include those occasioned by the employment of two counsel.

e. The first and fourth respondent are to jointly and severally pay the costs of the applicants, the one paying the other to be absolved, from April 2013 to 29 March 2016, which costs are to include those occasioned by the employment of two counsel.

f. The fourth respondent is to pay the costs of the applicants from 29 March 2016 up to 20 April 2016 which costs are to include those occasioned by the employment of two counsel.

g. The fourth and fifth respondents are to jointly and severally pay the costs, the one paying the other to be absolved, of the applicants as from 20 April 2016, which costs are to include those occasioned by the employment of two counsel.

Vally J
Gauteng High Court (Witwatersrand Local Division)

Date of hearing: 16 February 2021
Date of judgment: 19 March 2021
For the first to fourth applicants: PT Roodt with CC Bester (Heads compiled by JPV McNally SC, CC Bester and M Sethaba)
Instructed by: Blake Bester De Wet & Jordaan Inc

For the fifth to seventh applicants:	A Subel SC with A W Pullinger
Instructed by:	Fluxmans Inc Attorneys
For the first respondent:	A Bham (SC) with K Motla
Instructed by:	Lawton's Africa
For the fifth respondent:	AC Botha SC with DW Watson
Instructed by:	Saint Attorneys