

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CCT NO: 172/16

In the matter between:

SOUTH AFRICAN RIDING FOR THE DISABLED

ASSOCIATION ("SARDA")

Applicant

and

THE REGIONAL LAND CLAIMS COMMISSIONER

First Respondent

SEDICK SADIEN

Second Respondent

EBRHAIM SADIEN

Third Respondent

FILING SHEET

FILED HEREWITH (ORIGINAL PLUS 25 COPIES):

- 1) Applicant's submissions pursuant to the Directive of the Chief of Justice dated 19 September 2016; and
- 2) List of Authorities.

DATED at **CAPE TOWN** this **30TH** day of **SEPTEMBER 2016**.

BOWMAN GILFILLAN INC.

Per:



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**APPLICANT’S SUBMISSIONS PURSUANT TO THE DIRECTIVE OF THE CHIEF
JUSTICE DATED 19 SEPTEMBER 2016**

1. In determining whether SARDA has a direct and substantial interest in the amended order of the Land Claims Court dated 8 February 2013, transferring the ownership of the land it occupies from the State to the Second Respondent, the following facts set out in the Applicant’s founding affidavit, not seriously challenged by the Respondents, are relevant:

- 1.1 SARDA's occupation of the land began on 8 December 1981 pursuant to a 20 year lease with the School Board of the Cape, (paragraph 11, founding affidavit, p4).
- 1.2 The property had been expropriated by the Provincial Government of the Western Cape for educational purposes in 1966, (paragraph 12, founding affidavit, p4).
- 1.3 Ownership of the property was transferred by the Provincial Government of the Western Cape to the National Government in 1990, (paragraph 13, founding affidavit, p4).
- 1.4 Despite the property being owned by the National Government since 1990, the Provincial Government of the Western Cape continued to enter into annual leases with SARDA after the expiry of the initial lease on 30 June 2001, (paragraphs 14 and 15, founding affidavit, p5).
- 1.5 The last written lease between the Provincial Government of the Western Cape and SARDA was entered into on 1 February 2007 and expired on 30 June 2007, (annexure "CPF4A" to the founding affidavit, p49 (1 – 21)).
- 1.6 The lease was signed by an official of the Provincial Government of the Western Cape, Mr James Deas Slabbert who signed the lease in

his capacity as "landlord", (annexure "CFP4A" to the founding affidavit, p49(1 – 21)).

- 1.7 On 28 June 2007 the Provincial Government of the Western Cape advised SARDA in writing as follows: *"This office hereby regrets to inform you that this department is not in a position to renew your lease agreement for the premises you are currently occupying, until such time that a decision has been taken on the future of the aforementioned property. Your current lease will however continue on a month to month basis until further notice"*, (annexure "CFP5" to the founding affidavit, p50).
- 1.8 On 14 February 2009, SARDA was advised in writing that the property would be handed over to the Department of Public Works (National) from April 2009. SARDA was requested to liaise directly with a certain Ms S Valentine who was said to manage the letting of national property, (annexure "CFP6" to the founding affidavit, p51).
- 1.9 On 16 February 2010 Ms Valentine advised Ms Anna Duncan of SARDA that the Department of Public Works was working on having SARDA's lease finalised and that until such time, the National Government was not able to accept rental, (annexure "CFP7" to the founding affidavit, p52).

- 1.10 As a result of Ms Valentine's communication, SARDA proceeded to pay its monthly rental of R2 379.96 directly into its attorney's trust account on notice to the Department of Public Works, (paragraph 24, founding affidavit, p7).
- 1.11 On 27 July 2012, SARDA received an email from Ms Ivy Murundwa of the Department of Public Works which stated as follows: *"I would like to arrange a site meeting for next week Tuesday the 31st of July 2012 regarding the above lease agreement. Please confirm your availability"*, (annexure "CPF10" to the founding affidavit, p58).
- 1.12 Although officials from the Department of Public Works visited the SARDA site in the first week of August 2012 (not on 31 July 2012 as arranged in the email), no written lease was offered to SARDA until it became aware of the amended order of the Land Claims Court from a report published in the Cape Times on 7 March 2013 (paragraphs 26 and 71 of the founding affidavit, pages 7 and 21 respectively).
- 1.13 The replacement cost of the improvements made by SARDA was estimated by a professional valuer at R3 450 000, (replying affidavit, p252).
- 1.14 SARDA provides a valuable public service to disabled, previously disadvantaged school children from across the Cape Peninsula (paragraph 68, founding affidavit, p25). The use to which the land

has been put by SARDA is therefore consistent with the original basis for expropriation, namely, education.

CONCLUSIONS TO BE DRAWN FROM THE FACTS

2. A tacit monthly lease between SARDA and the National Government was in place at the time of the amended order of the Land Claims Court. This is so because the National Government did nothing to disturb the arrangement described in the Provincial Government's letter referred to in paragraph 1.7 above.
3. SARDA had a legitimate expectation of the monthly lease continuing until a written lease was concluded.

LEGAL PRINCIPLES

4. The power to enter into contracts of lease in respect of State land vests in the President in terms of section 2(1) of the Disposal of State Land Act 48 of 1961.
5. Section 6 of the Act allows the President to assign his power to the Minister of Public Works, who in turn may, pursuant to section 7, assign his power to an Administrator of a province.
6. By virtue of their conduct, it is assumed that at the relevant times, both the Provincial Government of the Western Cape and the Minister of Public Works have administered erf 142 Constantia, the subject of the amended

order of the Land Claims Court, pursuant to the power originally vested in the President.

7. In Bullock N.O and others v Provincial Government, North West Province, and another 2004 (5) SA 262 (SCA), a case which was decided on the transitional provisions of the Constitution prior to the promulgation of the Promotion of Administrative Justice Act 3 of 2000, it was held that the decision of a Provincial Government to grant a servitude over land occupied and improved by the Applicant, to his neighbour, constituted administrative action liable to be set aside by a Court at the suit of a person who had the standing to claim such relief, (paragraph 14).
8. On facts similar to the present, the Court held that a lawful occupier who had effected improvements and had entered into negotiations with the relevant organ of State to lease the property in question, had standing both to challenge the administrative action granting the servitude adverse to his potential rights and to be heard prior to such decision being taken, (paragraph 24).
9. In deciding that the Applicant had the right to be heard, the Court held that the Applicant had a legitimate expectation of entering into a lease in respect of the land in question, (paragraph 22).
10. Bullock was followed in Grey's Marine Hout Bay (Pty) Ltd and others v Minister of Public Works and others 2005 (6) SA 313 (SCA), where the

granting of a lease by the State in respect of harbour property was held to be administrative action. The analysis in Grey's Marine was referred to without criticism by this Court in Allpay Consolidated Investment Holdings (Pty) Ltd and others v Chief Executive Office South African Social Security Agency and others 2014 (4) SA 179 (CC) at footnote 39.

11. The difference between public and private disposition of property was set out by Schreiner JA in his dissenting judgment in Mustapha and others v Receiver of Revenue Lichtenberg 1958 (3) SA 343 (A) as follows: "*In exercising the power to refuse to grant or to renew, the permit, the Minister acts as a State official and not as a private owner, who need listen to no representations and is entitled to act as arbitrarily as he pleases, so long as he breaks no contract. For no reason or the worst of reasons the private owner can exclude whom he will from his property and eject anyone to whom he has given merely precarious permission to be there. But the Minister has no such free hand. He receives his powers directly or indirectly from the statute alone and can only act within its limitations, express or implied*", (at 347D – G).
12. Schreiner JA's dissenting judgment was endorsed, and the majority judgment overruled, by the SCA in Logbro Properties CC v Bedderson N.O and others 2003 (2) SA 460 (SCA), at paragraph 13. The majority in Mustapha had held that because the permit granting tenure was in the nature of a contract, the organ of State, in cancelling the permit, was not

fettered by public law principles.

13. Despite the contracts in question not being regulated by statute, as in Mustapha, the exercise of contractual rights by an organ of State, in the course of administering State Property, was regarded as the exercise of a public power and therefore as administrative action in Bullock and Grey's Marine. See also Logbro at paragraphs 13 and 14.
14. In President of the Republic of South Africa and others v South African Rugby Football Union and others 2000 (1) SA 1 (CC) at paragraph 143, the Court said as follows: "Difficult boundaries may have to be drawn in deciding what and what should not be characterised as administrative action for the purposes of s33. These will need to be drawn carefully in the light of the provisions of the Constitution and the overall constitutional purpose of an efficient and equitable and ethical public administration. This can best be done by on a case by case basis".
15. JR de Ville in Judicial Review of Administrative Action in South Africa, at 234 states as follows: "*In recent years the Courts have gradually been extending the application of the requirements of procedural fairness within the sphere of contractual relationships*".
16. Pretorius in an article , "*The defence of the Realm: Contract and Natural Justice*", 2002 SALJ 347, has suggested that to determine whether State contracts fall within the realm of administrative action, a distinction should be

drawn between agreements of a purely commercial nature and administrative agreements. The criteria which play a role in determining whether agreements are administrative are the relative bargaining power of the parties and the purpose of the contract, (at 386 – 388).

17. In this case, SARDA as a non-profit organisation paying a peppercorn rental of R2379 per month, is in an inferior position *vis a' vis* the State.
18. Also, the purpose of the lease in this case is for the public benefit, namely, the provision of free horse riding therapy to previously disadvantaged school children.
19. The nature and purpose of the lease indicate that it is an administrative agreement in the sense described by Pretorius above. In terminating SARDA's lease or entering into a new one, the Minister of Public Works would be exercising a public power in the course of administering the property of the State with immediate and direct consequences for SARDA and so qualify as administrative action both in terms of PAJA and section 33 of the Constitution.
20. The nature of SARDA'S lease is to be contrasted with the contract in Cape Metropolitan Council v Metro Inspection Services (Western Cape) CC 2001 (3) SA 1013 (SCA) which was explained and distinguished in Logbro at paragraphs 9 and 10.

21. In Ramburan v Minister of Housing (House of Delegates) and others 1995 (1) SA 353 (D) it was held that a trader who had been promised a right of first refusal by an organ of State had the right to be heard before a decision was taken to terminate his lease.
22. Contrary authority is Naran v Head of the Department of Local Government, Housing and Agriculture (House of Delegates) and another 1993 (1) SA 405 (T) where it was held that the cancellation of a lease by an organ of State was a purely contractual exercise and not administrative action.
23. De Ville comments on Naran as follows: "*It is difficult to comment critically on the judgment as the personal circumstances of Naran are not known (in order to determine the relevant bargaining positions of the contracting parties). In principle, however, procedural fairness would require that a hearing be given to a person under these circumstances. Of primary importance in determining what the contents of procedural fairness should be in this context are the relative bargaining positions of the contracting parties and the purpose or nature of the contract*", (op cit at 238).
24. Naran was not followed in Tony Rahme Marketing Agencies SA (Pty) Ltd v Greater Johannesburg Transitional Metropolitan Council 1997 (4) SA 213 (W) and is inconsistent with the principles set out in Logbro, Bullock and Grey's Marine.

CONCLUSION

25. The effect of the amended order of the Land Claims Court is to deprive SARDA of its right to administrative action which is lawful, reasonable and procedurally fair in terms of section 33 of the Constitution.
26. It would be incongruous to suggest that SARDA would have standing to be heard prior to the State terminating its lease but not when the Land Claims Court makes an order with the same effect.
27. In the light of the foregoing it respectfully submitted that SARDA has a direct and substantial interest in the amended order of the Land Claims Court dated 8 February 2013.

DATED at CAPE TOWN ON THIS 30TH day of SEPTEMBER 2016

M WAGENER

Attorney admitted to practise
in the High Court as Counsel
in terms of Section 4(2)
of Act 62 of 1995.

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LIST OF AUTHORITIES

CASES

- Allpay Consolidated Investment Holdings (Pty) Ltd and others v Chief Executive Office South African Social Security Agency and others
2014 (4) SA 179 (CC); (cited in paragraph 10 of the submissions)

- Bullock N.O and others v Provincial Government, North West Province, and another 2004 (5) SA 262 (SCA); (cited in the paragraphs 7, 10, 13 and 24 of the submissions)
- Cape Metropolitan Council v Metro Inspection Services (Western Cape) CC 2001 (3) SA 1013 (SCA); (cited in paragraph 20 of the submissions)
- Grey's Marine Hout Bay (Pty) Ltd and others v Minister of Public Works and others 2005 (6) SA 313 (SCA); (cited in paragraphs 10, 13 and 24 of the submissions)
- Logbro Properties CC v Bedderson N.O and others 2003 (2) SA 460 (SCA); (cited in paragraphs 12, 13, 20 and 24 of the submissions)
- Mustapha and others v Receiver of Revenue Lichtenberg 1958 (3) SA 343 (A); (cited in paragraphs 11, 12 and 13 of the submissions)
- Naran v Head of the Department of Local Government, Housing and Agriculture (House of Delegates) and another 1993 (1) SA 405 (T); (cited in paragraphs 22, 23 and 24 of the submissions)
- President of the Republic of South Africa and others v South African Rugby Football Union and others 2000 (1) SA 1 (CC); (cited in paragraph 14 of the submissions)

- Ramburan v Minister of Housing (House of Delegates) and others 1995 (1) SA 353 (D); (cited in paragraph 21 of the submissions)
- Tony Rahme Marketing Agencies SA (Pty) Ltd v Greater Johannesburg Transitional Metropolitan Council 1997 (4) SA 213 (W); (cited in paragraph 24 of the submissions)

TEXTBOOK

- JR de Ville, *Judicial Review of Administrative Action in South Africa*; (cited in paragraphs 15 and 23 of the submissions)

ACADEMIC ARTICLE

- Pretorius - *The Defence of the Realm: Contract and Natural Justice*, 2002 SALJ 347; (cited in paragraph 16 of the submissions)