

Licence to trade:

Who decides?

Facts

Six informal beach traders made an urgent review application to the Cape High Court in December 2002 against the City of Cape Town (the Municipality), after their applications for trading permits for the 2002/03 season were unsuccessful. They sought permits to rent deck chairs and beach umbrellas during the peak holiday period on the beaches of Clifton and Camps Bay, where they had been permit holders for several previous seasons. The Municipality's Allocations Committee for beaches and trading considered the applications of the six traders but did not approve them. The traders lodged an appeal with the City Manager in terms of section 62 of the Municipal Systems Act but the City Manager upheld the decision of the Allocations Committee.

Informal trading policy

The Director of Community Facilities in the Municipality was responsible for drafting a policy on informal trading, of which informal beach trading formed part. It was prepared for the Municipality in 2000 and was embodied in a document used for the allocation of permits during the 2000/01 season. No final document was adopted for the 2002/03 season, but the Allocations Committee adopted an interim administrative framework for the allocation of informal trading permits on beaches for this period. This interim

framework also took into account the Municipality's procurement policy, especially the principle of proposed preferential treatment of people from historically disadvantaged communities. The interim framework clearly stipulated five guiding principles, trading periods as well as criteria that would apply when the Municipality considered applications.

In total 225 applications were received for the 2002/03 season. Where there were two or more applications for a specific site, the procurement terms in the interim framework were used as the deciding factor. In the end 110 applications were successful.

Issues and rulings

In considering the appeal of the six traders, the City Manager admitted that the Municipality did not have a formal policy in place on the allocation of beach trading permits, but pointed out that the interim framework was followed to the letter and the process was fair and conducted in a reasonable manner.

The first question before the court in *Carol Ellis and Others v The Allocations Committee-Beach & Trading and Others* (case no. 8556/02) was whether the decisions taken by the Committee and the City Manager had to be set aside on review due to the fact that the procurement elements within the interim framework unfairly discriminated against the six traders, as they are not from historically disadvantaged communities.

Finally, the traders argued that a beach trading policy had to be promulgated timeously to ensure public participation before implementation by the Municipality.

After assessing the race of the 110 successful applicants, the Court could not find proof that the application of the criteria in the interim framework resulted into unfair discrimination against the six traders.

On the status of the interim framework, the Court ruled that the document was lawfully adopted by the Municipality and that there was no reason why such framework had to be 'properly promulgated,' considering that it was not a by-law.

key points

- An interim policy may form the underlying document for administrative action, given that a municipality lawfully adopted the document.
- Decisions taken by a municipality must relate rationally to the purpose for which the decision making powers were given.

The Court would have reviewed the decision if it were not rationally related to the purpose for which the power was given. Thus, the interim framework as a policy on beach trading need not have been promulgated before it was implemented or applied by the Municipality.

Most importantly, the Court concluded that it could not interfere with the decision of a decision-maker simply because it might disagree with such decision, or with the underlying policy that gave rise to it. If it did so, it would violate the constitutional principle of separation of powers.

It is trite law that courts are reluctant to substitute their decisions for those of the original decision maker, because the Court is in no better position than the original decision maker was when the decision was first taken.

The application of the six beach traders was thus dismissed.

Comment

The court reaffirmed the principle that when a member of public considers taking a municipality's decision on review he or she needs to prove that the municipality did not follow the right procedure in making the decision.

Courts are reluctant to overrule decisions taken by municipalities purely on the grounds that the judicial authority disagrees with the decision itself or with the underlying policy.

Charmaine Maré
Local Government Project
Community Law Centre, UWC