

IN THE COURT OF APPEALS OF TENNESSEE

JOHNNY KING,) C/ A NO. 03A01-9511-CH-00386
Plaintiff - Appellant,) CAMPBELL COUNTY CHANCERY COURT
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v.) HONORABLE BILLY JOE WHITE,
) CHANCELLOR
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)
CITY OF CARYVILLE,)
)
Defendant - Appellee.) AFFIRMED AND REMANDED.

FILED
February 14, 1996
Cecil Crowson, Jr.
Appellate Court Clerk

PHILIP A. KAZEE of SEXTON, SEXTON, & KAZEE, P. C., Oneida, for Appellant.

CARROL D. KILGORE of BRANSTETTER, KILGORE, STRANCH & JENNINGS, Nashville, for Appellee.

OPINION

Susano, J.

This is a breach of contract action. The defendant City of Caryville (Caryville or City) refused to honor a contract admittedly executed by its Mayor. The contract granted the plaintiff Johnny King (King) the exclusive right to operate and manage a solid waste landfill for the City. The trial court granted Caryville's Tenn. R. Civ. P. 12.02(6) motion to dismiss¹, finding that

under the provisions of [Caryville's] statutory Charter and particularly of T. C. A. former § 6-2-201(1) and (19), the power [to authorize the contract] could only be exercised by following the formal requisites for the adoption of ordinances and not by mere resolution of the City Council, so that the Resolution adopted and the Contract entered into are *ultra vires* and therefore null and void under T. C. A. former § 6-2-103(b).²

King appeals, raising one issue. That issue, taken essentially verbatim from his brief, is as follows:

Did the trial court err in finding that the City of Caryville had no implied or inherent power, by resolution, to provide for the collection and disposal of the City's garbage or solid waste, and to enter into contracts with private persons for that purpose, in view of the power expressly conferred upon the City "to prevent or remove nuisances" by former T. C. A. §6-2-201(2)?

¹The City filed "matters outside the pleadings" in support of its motion. Because of this, our disposition of this case is controlled by the summary judgment rule, Tenn. R. Civ. P. 56. See Tenn. R. Civ. P. 12.02.

²T.C.A. § 6-2-103(b) formerly provided that "[e]very act, contract, and agreement *ultra vires* shall be null and void."

We affirm

I

The facts of this case are not in dispute. On November 27, 1989, Caryville's Board of Aldermen (Board) adopted a resolution, the relevant terms of which are as follows:

WHEREAS, the City of Caryville is currently incurring substantial expense in disposing of solid waste originating from within the City; and

* * *

WHEREAS, Johnny King of Oneida, Tennessee has presented a proposal whereby that [sic] this City may greatly reduce the cost of disposing of solid waste, and further protect the health and safety of our citizens; now

THEREFORE, I move that we accept the proposal as heretofore presented by Johnny King, authorize the Mayor to submit the City's application for registration of a solid waste disposal or processing operation, with the Tennessee Department of Public Health, Solid Waste Division, State of Tennessee, and to authorize the Mayor to execute such contracts and leases and such other documents as may be necessary to effectuate and/or carry out the proposal as presented by Johnny King.

This resolution was the only official action taken by the Board authorizing the Mayor to contract with King.

Two days after the resolution was adopted, the Mayor of Caryville, expressly acting on behalf of the City, executed a contract with King

for the specific purpose of establishing and operating a landfill in Scott County, Tennessee, upon the real property described in the lease dated November 29, 1989, for the use and benefit for the City.

As indicated, King and the Mayor also executed a lease agreement under which Caryville agreed to lease some 113 acres from King to be used as the City's solid waste landfill. According to King's complaint, the City breached the contract. This fact is not disputed as far as this appeal is concerned. King sued Caryville on the contract, and the Chancellor, as previously noted, found that Caryville's execution of the contract was *ultra vires* and that the contract was therefore null and void. He accordingly granted Caryville summary judgment, dismissing the complaint.

II

The issue in this case causes us to focus on Caryville's incorporation. Cf. *City of Lebanon v. Baird*, 756 S.W2d 236, 244 (Tenn.1988). Caryville selected the mayor-aldermanic form of government, thereby making the City subject to the statutory provisions of Chapter 1 of Title 6 of the Tennessee Code. Caryville's adoption of that form of government had the further effect of bringing it within the ambit of Chapter 2 of

Title 6, pursuant to T.C.A. § 6-2-101, as that statute was in effect³ at all times relevant to this controversy. That statute provided as follows:

All municipalities organized or amending their charters under chapter 1 of this title shall be controlled by and subject to the limitations and restrictions of this chapter.

The statutory powers granted to Caryville were set forth in T.C.A. § 6-2-201. It provided, in pertinent part, as follows:

Every corporation formed as above shall have full power and authority:

(1) To enact such bylaws and ordinances as may be necessary and proper to preserve the health, quiet, and good order of the town;

(2) To prevent or remove nuisances;

* * *

(19) To pass all bylaws and ordinances necessary and proper to enforce the powers granted, not inconsistent with the Constitution and laws of the United States or of the state of Tennessee.

Much of King's brief is devoted to his argument that Caryville had the implied or inherent power to provide for the collection and disposal of the City's garbage under T.C.A. § 6-2-

³In 1991, the General Assembly entirely replaced Title 6, Chapters 1 and 2 of the Tennessee Code Annotated with new provisions. See Chapter 154, Public Acts of 1991. All of the statutory provisions cited in this opinion are those existing before that change.

201(2), which empowered Caryville "[t]o prevent or remove nuisances." This argument misses the point. The issue is not *what* powers the City had; but rather *how* those powers had to be exercised. *City of Lebanon v. Baird*, 756 S.W2d 236, 241 (Tenn. 1988) ("Thus, the law recognizes a difference between the existence of a municipal power and the manner or mode of exercising municipal power legitimately.") Subsections (1) and (19) of T.C.A. § 6-2-201 mandated that the passage of an ordinance was necessary in order to "enforce the powers" of the City. It follows that the City's contract with King was not properly authorized by the November 27, 1989, resolution since that action was unattended by the requisite formalities of an ordinance⁴. The Chancellor found that "under . . . T.C.A. former § 6-2-201(1) and (19), the power could only be exercised by following the formal requisites for the adoption of ordinances . . ." We agree; but there was still another justification for the Chancellor's ruling, and that was previously found at T.C.A. § 6-2-308:

No appropriation of money, or order involving it, or levy of taxes, shall be made unless the ordinance authorizing the same be read once on three (3) separate days, and passed

⁴For example, the former provisions of T.C.A. § 6-2-102 required that

[e]ach ordinance, or the caption and a complete summary of each ordinance, shall be published after its final passage in a newspaper of general circulation in the municipality. No ordinance shall take effect until the ordinance or its caption and summary is published.

It is undisputed that the city's resolution of November 27, 1989, was not published as required by this code section. See also T.C.A. § 6-2-308 quoted in the body of this opinion. There was also no compliance with this latter statutory provision.

on its third reading by a majority of the entire board, by calling the ayes and noes. All other ordinances shall be read on two (2) separate days. All ayes and noes on all ordinances shall be recorded.

(Emphasis added). Under this section, it is clear that the King contract, involving as it did the "appropriation of money" for the lease, had to be authorized by ordinance. Because Caryville did not follow the proper procedure to authorize the Mayor to bind the City by contract, we agree with the Chancellor's judgment that the City's execution of the contract was *ultra vires*. *Keenan & Wide v. City of Trenton*, 130 Tenn. 71, 168 S.W 1053, 1055 (1914) ("[T]he legislative stipulation, here appearing, that the manner of exercise should be by way of ordinance made it incumbent, in order to validity [sic], that such more deliberate form of authorization should have been adopted."); *Terry v. Commissioners of Cookeville*, 198 S.W 2d 1010, 1012 (Tenn. 1947); *City of Lebanon* at 243. ("The procedure is itself essential to the validity of the act since it is this process that provides the protection to the citizens For the city to ignore the distinction drawn by a charter between a resolution and an ordinance results in the act being *ultra vires*.").

III

We must next determine the effect of our holding that Caryville's dealings with King were *ultra vires*. The general rule is that *ultra vires* conduct renders the resulting act null and void. T. C. A. § 6-2-103(b) ("Every act, contract, and agreement *ultra vires* shall be null and void."); *City of Lebanon*, 756 S.W2d at 241. The Supreme Court has noted exceptions to this general rule. In *City of Lebanon*, the court observed that

[i]f a city's action is *ultra vires*, not because the power has not been granted to it to act in the first instance, but because the city failed to exercise a power it has in the manner prescribed by controlling law, the question is what consequences flow from voiding the action. . . . When the city has attempted to enter a contract that is *ultra vires* because it was not entered into in the authorized manner, the issue is often presented as to whether the concepts of equitable estoppel or implied contract are applicable.

756 S.W2d at 243. However, in the present case, King did not present an "equitable estoppel or implied contract" issue to either the trial court or this court. Furthermore, there are no facts before us to suggest that either doctrine is applicable here. Cf. *City of Lebanon* at 243-46. These exceptions do not provide King a "safe harbor" from the general rule that an action *ultra vires* is null and void.

Our decision finding this contract to be null and void is further bolstered by the provisions of T.C.A. § 6-2-103(a):

All persons dealing with municipal corporations shall be put upon inquiry; and in all cases the burden of proof shall be upon them to show the law is pursued as to its powers.

King has failed to meet his burden. On the contrary, it is abundantly clear that "the law [was not] pursued as to [the City's] powers" as far as the subject contract is concerned. *See also City of Lebanon* at 244 ("Moreover, when entering a contract with a municipality, '[o]ne dealing with municipal officers, boards, or committees is bound at his peril to take notice of the limitation of their authority.'" (quoting from *Kries & Co. v. City of Knoxville*, 145 Tenn. 297, 305, 237 S.W. 55, 57 (1921))).

For all of the foregoing reasons, we affirm the Chancellor's holding that the contract between King and the City of Caryville was null and void. We therefore affirm the judgment of the trial court in its entirety and remand this case to that court for the collection of costs assessed there. Costs on appeal are taxed and assessed to the appellant.

Charles D. Susano, Jr., J.

CONCUR:

Herschel P. Franks, J.

Don T. Murray, J.