

SOUTH AFRICA / JUDGMENT

Agri Eastern Cape and Others v Ndlambe Municipality and Others (5528A/2021) [2021] ZAECHGC 116 (9 December 2021)

[2021] ZAECHGC 116

COURT

Eastern Cape High Court, Grahamstown

BEFORE

Govindjee

CASE / FILE NUMBER

5528A/2021

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IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE DIVISION, GRAHAMSTOWN

CASE NUMBER: 5528A/2021

NOT REPORTABLE

In the matter between:

AGRI EASTERN CAPE 1st APPLICANT

THE ALEXANDRIA AGRICULTURAL ASSOCIATION 2nd APPLICANT

BRENT MICHAEL McNamara 3rd APPLICANT

IGNATIUS THEODORUS MULLER 4th APPLICANT

ELIZABETH KLOPPER 5th APPLICANT

KOOS VAN ROOYEN (PTY) LTD 6th APPLICANT

and

NDLAMBE MUNICIPALITY 1st RESPONDENT

THE MUNICIPALITY MANAGER OF THE

NDLAMBE MUNICIPALITY 2nd RESPONDENT

THE EXECUTIVE MAYOR OF THE

NDLAMBE MUNICIPALITY 3rd RESPONDENT

ROLLY DUMEZWENI 4th RESPONDENT

KHULULWA NCAMISO 5th RESPONDENT

REASONS

GOVINDJEE AJ:

REASONS

FOR ORDER

Background

1. During 2016, the applicants launched an application to compel the Ndlambe Municipality (the Municipality) and its responsible officials to comply with its statutory obligations and to enforce various Acts of Parliament, By-Laws and Regulations relating to the control of animals within its jurisdiction.
2. The parties reached an agreement prior to the hearing of that application. An order was granted on 10 March 2017 by agreement (the

first Plasket J Order). In terms of this Order, the Respondents were ordered, in part:

2.1 To comply with their legislative responsibilities, which included the obligations and duties set out in:

2.1.1 The Ndlambe Municipal Commonage By-Law (Notice 140);

2.1.2 The Ndlambe Municipal Prevention of Public Nuisance and Keeping of Animals By-Law (Notice 132);

2.1.3 The Animal Identification Act 6 of 2002;

2.1.4 The Conservation of Agricultural Resources Act 43 of 1983;

2.1.5 The Fencing Act 31 of 1963;

2.1.6 The National Environment Management Biodiversity Act 10 of 2004.

2.2 In respect of the above legislative prescripts, to within 60 days:

2.2.1 Put in place an animal tracing identity system;

2.2.2 Develop an internal record keeping system;

2.3 To implement the above system within six months.

2.4 To, within six months impound all unauthorised / unbranded animals, to isolate diseased animals, regulate the number of animals and the like.

3. The first Plasket J Order was not complied with, resulting in an application to have certain Respondents found guilty of contempt of court. This resulted in attempts at negotiation and a further settlement agreement which was made an Order of Court on 10 July 2018 (the Second Plasket J Order). The Respondents' failure to comply with this Order resulted in another contempt of court

application.

4. The Respondents then filed a report dealing with its financial constraints. An Order taken by agreement before Tokota J (the Tokota

J Order), dated 26 March 2020, required the Respondents to report back within 25 calendar days after the last day of the national

Covid-19 lockdown period, setting out all the steps it had taken.

5. This application was launched on 9 October 2020, again seeking to hold the Respondents in contempt of court. The Respondents filed a report on 22 February 2021 ('the 2021 Report'). The Applicants were dissatisfied with the contents of this report, and responded in detail, including a draft order. The parties subsequently attempted to reach agreement on the contents of that draft. The minute of a pre-hearing conference dated 27 October 2021 reflected agreement on most of the terms contained in the Applicants' draft order. The only remaining issues in dispute were the following:

5.1 The period of time to be afforded to the Respondents to implement an application procedure in respect of application for permits, in terms of the applicable by-laws, sought by persons who keep or are seeking to keep animals within the First Respondent's residential areas, public spaces and / or commonages;

5.2 The period of time to be afforded to the Respondents to implement an updated animal traceability system in accordance with the Animal Identification Act, 2002.

5.3 The period of time to be afforded to the Respondents to collect tariffs in terms of the tariff system applicable.

5.4 Costs.

6. The Applicants initially suggested that 30 days was an appropriate period of time in respect of the first two issues in dispute, and that 60 days was sufficient before tariffs should be collected. The Respondents assisted the Court by providing a Draft Order reflecting their stance. On their approach to the remaining issues in dispute, the Respondents should only file a further progress report within six months of the date of the Order. This progress report would detail all steps taken and to be taken to implement a procedure for permit application, an animal traceability system and tariff collection. In addition, in respect of the first two issues, timetables could be provided identifying the steps still to be taken. Finally, the Respondents submitted that the First Respondent should be ordered to pay the costs of the application on a party and party scale.

7. Following argument before me on 4 November 2021, it was ordered that:[1]

‘1. Within three (3) months of the date of this Order, the Respondents shall implement an application procedure in respect of applications for permits, in terms of the Ndlambe Municipality Prevention of Public Nuisance and Keeping of Animals By-laws, sought by persons who keep or are seeking to keep animals within the First Respondent’s residential areas, public spaces and / or commonages.

2. The respondents shall ensure that the aforesaid permit application procedure shall ensure that permits are only issued in circumstances where all relevant legislative provisions are adhered to and complied with, including, but not limited to:

2.1 the provisions of the Animal Identification Act 6 of 2002;

2.2 the provisions of the Animal Diseases Act 35 of 1984;

2.3 the provisions of the Conservation of Agricultural Resources Act 43 of 1983.

3. Within three (3) months of the date of this Order, the Respondents shall implement an animal traceability system, complying with all relevant legislative

provisions, including, but not limited to, the provisions of the Animal Identification Act 6 of 2002, which system will include, but not be limited to, the following:

3.1 a tamper evident method of marking authorised animals;

3.2 immediate verification of the ownership of animals;

3.3 records of the ownership of the animals;

3.4 records of the health status of the animals;

3.5 secure record keeping;

3.6 a tariff system applicable to the authorised keeping of animals;

3.7 a procedure to remove animals, that have died, been sold or disposed of, from the traceability system;

3.8 a procedure to re-allocate animal authorisation identification

4. Within six (6) months of the date of this Order, the Respondents shall report on the implementation of a management plan in respect of each commonage under the First Respondent’s control, which management plan shall include, but not be limited to, the following:

a. a commonage carrying capacity review program; and

b. over-grazing prevention plans;

- c. On 28 February 2022, the Respondents shall report on the implementation of a management plan in respect of each commonage under the First Respondent's control, which management plan shall include, but not be limited to, the following:
 - i. A maintenance program, in relation to inspecting, maintaining, repairing and / or replacing infrastructure on the said commonages, including, but not limited to, fencing, gates, livestock watering points, animal handling, dipping facilities, tagging facilities and cattle races.
- 5. Within six (6) months of the date of this Order, the Respondents shall implement a plan to ensure that annual inspections, to determine the health status of animals, with particular regard to the notifiable diseases referred to in the Animal Diseases Act 35 of 1984, are held in respect of animals kept on commonages, public spaces and residential areas within the jurisdiction of the First Respondent
- 6. The respondents shall keep a register of the inspections, referred to in paragraph 5 supra, and the outcomes thereof;
- 7. Within five (5) months of the date of this Order, the Respondents shall ensure that all animals, that aren't authorised in terms of paragraph 1 supra and that are kept within commonages, public spaces and residential areas within the jurisdiction of the First Respondent, are impounded

in phases to accommodate the holding capacity of the First Respondent's pound;

- 8. No animals that have been impounded in terms of paragraph 7 supra and that will be kept on the First Respondent's properties, may be released until such time as they have been authorised in terms of paragraph 1 supra.
- 9. Within three (3) months of the date of this Order, the Respondents shall collect tariffs in accordance with the system implemented in terms of paragraph 3.6 supra.
- 10. Within sixty (60) calendar days of the date of this Order, the Respondents shall implement a system in respect of the reimbursement of private individuals who have incurred costs as a result of animals that have been impounded in accordance with the First Respondent's

By-laws.

- 11. The Respondents are to file, with the Registrar of this Honourable Court, within seven (7) months of the granting of this Order, reports in the format of sworn statements reporting on the progress made in complying with the terms of paragraphs 1-10 supra.
- 12. All or any of the Applicants are hereby given leave, if they so wish, to respond to the reports to be filed by the Respondents within thirty days of the filing of such reports by the Respondents.

13. The Respondents are hereby given leave, if they so wish, to respond to the reports to be filed by the Applicants within 30 days of the filing of such reports by the Applicant.
14. This matter may be enrolled for further hearing, on a date to be arranged with the Registrar, for consideration, by this Honourable Court, of the reports filed by the Respondents and the replies thereto by the Applicants, if any, and for the granting of a further Order in respect of this matter.
15. The First, Second and Third Respondents, the one paying the others to be absolved, are to pay the costs of this application on an attorney client scale.

The reasons for the time periods stipulated and costs order follow.

The arguments

8. The Respondents' submitted, correctly in my view, that the remaining issues in dispute were closely intertwined, so that they

must be considered together when assessing reasonable time periods for compliance.[2] They pointed to two overlapping, existing procedures, regulated by two different by-laws, as being sub-optimal. The requisite information to be provided prior to obtaining municipal approval was not evident. There was no specified application form or stipulated application procedure incorporating timelines.

9. As such, the Respondents argued that the present by-laws required an overhaul in order to ensure certainty, effectiveness and efficiency.

It might even be necessary to adopt a new by-law to regulate the issue. Relying on various sections of the Local Government: Municipal

Systems Act, it was argued that failure to incorporate the application procedure into a by-law would have no external force and

effect. The Respondents' proposed timeframe was built around the period required for the steps necessary prior to adoption of a by-law, such as a municipal council decision and publication. Counsel submitted that a policy in relation to the fees payable would be required (only) once the new by-law took effect. It was also argued that aspects of the proposed by-law should be linked together with the budgetary process in respect of the 2022/2023 budget, which could be adopted any time before 30 June 2022. On top of this, even once a by-law was passed, further time was required to inform persons who need to make application to register their animals. It was therefore suggested that implementing the disputed paragraphs of the Applicants' draft order within 30 / 60 days was impossible.

10. At the outset, it must be noted that these arguments are markedly different from the contents of the Respondents' Interim

Progress Report dated 17 March 2020[3] as well as the Report dated 22 February 2021. That Report, which incorporated the Interim Progress Report, served as the Respondents'

answering papers in this application and made no mention of by-law inadequacy. Instead, the focus was on budgetary challenges, Covid-19 difficulties, the severe water crisis, the establishment of a task team and development of a plan of action and steps taken or to be taken to tag, mark, authorise and impound animals. A pro forma application was attached and the First Respondent indicates its 'intention to finalise the application process by the end of 2021'. In addition, the Report notes:

'Once the tagging and application processes have been finalised, all untagged, unmarked and / or unauthorised animals found...will be impounded in accordance with the relevant laws relating thereto.'

An approved tariff list was also attached. The First Respondent indicated, however, that it had taken a decision to hold the payment

of the relevant tariffs, and the consequence enforcement thereof, in abeyance. The Report also dealt with the carrying capacity of commonages, fencing and alien vegetation. It concludes with the following assurance:

'The First Respondent is determined to meet its obligations and rectify the issues presently at hand. To this end, the First Respondent is providing such resources and manpower, as it is able within its operational constraints, to tackle the problem areas identified

herein and reach a resolution thereof. However, this is an ongoing, work-in-progress and circumstances dictate that the First Respondent

is unable to resolve the said issues immediately and must facilitate the solution in a measured manner. It is submitted that the First Respondent is taking all reasonable actions, within the matrix of its obligations and constraints, to address the issues identified in this matter and will continue to do so until the problem areas have been fully rectified.'

There is no suggestion whatsoever that the pace of the implementation of an application procedure, animal traceability system and collection of tariffs would be retarded by the manner in which the by-laws had been constructed, or that a new by-law would be silver bullet for proper compliance.

11. Given this discrepancy, it is unsurprising that the Applicants raised the following core arguments in response, and requested a punitive costs order:

- The long delay in raising the need for a new by-law, considering that the initial application was launched in 2016;
- The reasons for not implementing the existing by-laws were contrived, bearing in mind that previous undertakings based on those by-laws had been made Court Orders by agreement, and without any suggestion that a new by-law was required;

- The possibility that the Municipal Council might never adopt the proposed new by-law or make budgetary provision for its implementation;
- The Respondents' attitude was to procrastinate and they were fortunate not to be held in contempt;
- The Municipality's Council had previously made an effort to comply with the previous Orders, as evidenced by the minutes of meetings dated 29 August 2017[4] and 16 November 2020;
- The infrastructure for compliance was in place but was simply not being implemented and an open-ended process to achieve this was undesirable.

Local government objectives and the Local Government: Municipal Systems Act, 2000

12. Municipalities form an important component of our constitutional scheme of government and constitute the first line for the delivery of services.[5] The objects of local government are –
 - a) to provide democratic and accountable government for local communities;
 - b) to ensure the provision of services to communities in a sustainable manner;
 - c) to promote social and economic development;
 - d) to promote a safe and healthy environment; and
 - e) to encourage the involvement of communities and community organisations in the matters of local government.[6]
13. A municipality must strive, within its financial and administrative capacity, to achieve these objectives.[7] The basic needs of the community must be prioritised and the social and economic development of the community promoted. In order to do so, a municipality must structure and manage its administration and budgeting and planning process properly.[8]
14. It is generally accepted that the constitutional autonomy accorded to municipalities must be purposively used in order to provide services and promote development.[9] 'Development' has been expansively defined in the Local Government: Municipal Systems Act 32 of 2000 (the Act) to include

'the upliftment of a community aimed at improving the quality of life of its members'.[10] As Steytler and De Visser note, 'development is broader than improving the financial position of the community; the upliftment of a community must be done with reference to its "social, economic, environmental, spatial, infrastructural, institutional, organizational and human resources" aspects'.[11] The Act's preamble reflects the notion of a progressive approach to capacitating local government to serve as an efficient,

frontline development agency.

Analysis

15. The municipal regulation of various matters relating to animals cannot be gainsaid.[12] It is, for example, necessary to have a mechanism for dealing quickly and effectively with animals found trespassing on land or straying in public places or on public roads.[13] The council of any municipality has the right to exercise the municipality's executive and legislative authority, and to do so without improper interference.[14] Importantly, a municipality is able to exercise its legislative and executive authority in a variety of ways other than through passing by-laws, by:[15]
- a) Developing and adopting policies, plans, strategies and programmes, including setting targets for delivery;
 - b) Promoting and undertaking development;
 - c) Establishing and maintaining an administration;
 - d) Administering and regulating its internal affairs and the local government affairs of the local community;
 - e) Implementing applicable national and provincial legislation and its (existing) by-laws;
 - f) Providing municipal services to the local community, or appointing appropriate service providers;
 - g) Monitoring and, where appropriate, regulating municipal services where those services are provided by service providers other than the municipality;
 - h) Preparing, approving and implementing its budgets;
 - i) Imposing and recovering rates, taxes, levies, duties, service fees and surcharges on fees, including setting and implementing tariff, rates and tax and debt collection policies;[16]
 - j) Monitoring the impact and effectiveness of any services, policies, programmes or plans;
 - k) Establishing and implementing performance management systems;
 - l) Promoting a safe and healthy environment;
 - m) Passing by-laws and taking decisions on any of the above-mentioned matters;[17] and
 - n) Doing anything else within its legislative and executive competence.

16. The respondents' Interim Progress Report and 2021 Report reflect attempts to comply with the Tokota J Order and efforts to progress with implementation despite various constraints. This amounts to the exercise of executive authority, which is the purview of the municipal council. While agreement has now been reached on a range of matters, including certain timeframes for implementation, the remaining issues in dispute reflect a changed tack through a quest for an optimum solution through legislative amendment.
17. There appears to be no support for this change on the papers. That aside, given the long history of the matter, the various Court Orders and resulting litigation, an approach which will unnecessarily result in delayed compliance and implementation cannot be justified.
18. There is also no merit in the suggestion that the existing by-laws are contradictory to the point of being unworkable. The purpose of the Ndlambe Local Municipality Commonage By-Law is, as the name suggests, to provide for the control and administration of animals on a commonage established by the municipality. A person seeking approval to keep or depasture any animal in a camp or commonage must first obtain written approval from the municipality, by submission of a prescribed form.[18] The Prevention of Public Nuisances and Keeping of Animals By-Law regulates general matters involving the keeping of animals. It

prohibits, for example, the keeping of animals other than pets on any premises without the municipality's approval.[19] 'Premises' is defined, as is 'public place'.[20] The permission to keep animals, other than pets, in terms of this By-Law relates specifically to 'premises', and not to public places.[21] S 4(4) appears to confirm the point.[22] Similarly, s 5 of this by-law references an application form for applicants 'who apply to keep animals' and s 6 notes that the municipality will consider 'the location, geographical features or size of the premises in respect of which the application is submitted' as well as the 'documents and site plans submitted' before it grants or refuses consent. To suggest that this amounts to an overlap with the Commonage By-Law appears to be erroneous. Even if there is some overlap, there appears to be no good reason why application procedures cannot be developed (to the extent that they are inadequate) and implemented in respect of both By-Laws to regulate, firstly, control and administration of animals on a commonage (in terms of the Commonage By-Law) and the keeping of animals on any premises (to be read to exclude a commonage, in terms of the Keeping of Animals By-Law). Both By-Laws countenance this, and to stunt implementation until the actual, refined step-by-step application procedures and forms are prescribed, for example, as annexures to the By-Laws, appears to me to be unwarranted and unnecessarily formalistic. Such an approach would, in my view, merely serve to delay the Municipality's progress in attaining its objectives, which include provision of services to communities.

19. The respondents may well consider the existing legislative framework to be sub-optimal, and it is the prerogative of the municipal council to address that by passing new by-laws or amending existing by-laws.[23] But that does not imply that the choice to embark upon a legislative process, with all that this entails, may be used by the respondents

to delay matters when a range of other options are available. A municipality has the right to exercise any power concerning a matter

reasonably necessary for, or incidental to, the effective performance of its functions.[24]

20. It must also be accepted that an ordinance's silence on particular matters is not of itself necessarily fatal to the existence of basic rights.[25] An ordinance's incompleteness (or even its unconstitutionality) will not always result in its implementation being halted until it is amended in the manner considered desirable by the legislature. In *Zondi*, various sections of Pound Ordinance (KwaZulu-Natal), 1947,[26] resulted in an impounding scheme inconsistent with the Constitution. The Constitutional Court held that it would be inappropriate to seek to remedy the inconsistency in the Ordinance, which was a task for the legislature and involved certain policy decisions.[27] It was also relevant that a provincial Act was in the process of being drafted, which would result in the repeal of that Ordinance

within an expected 12-month period. Significantly, the Constitutional Court nonetheless proceeded to consider interim arrangements, also on the basis that there was a need to protect landowners against trespassing animals, pending the revised legislation.[28]

21. The respondents may feel that the timeframes stipulated in this Order will distract from their new masterplan to fix matters once and for all through legislative amendment. Municipalities must strive to achieve their objectives and will typically be able to choose their path to doing so. Courts will not easily interfere with the exercise of municipal legislative and executive authority. In this case, however, and bearing in mind the history of the matter and the importance of the provision of the services in question, a three-month timeframe is considered to be a reasonable period of time for the remaining matters in dispute to be actioned.[29] This may involve expedited arrangements, including development of amended application forms and processes and rapid information sharing using innovative approaches.[30] This process should already have commenced on an urgent basis. If employees of the Municipality are required to work outside of their normal hours to comply with this Order, this is more than justified given the importance of the issues and the long period of time that has already elapsed since the first Plasket J Order.
22. The respondents have, courtesy of the settlement discussions that have been entered into, avoided the application for contempt of court. The papers reflect the protracted history of the matter and the applicants' attempts to trigger meaningful action on the part of the respondents. Instead of committing to an expedited timeframe, an open-ended process has been contrived, amounting to a changed approach to matters that have been the subject of these proceedings for a number of years, and which have resulted in Court Orders by agreement. The First Plasket J Order, for example, required an animal tracing identity system to be put in place within 60 days from the date of that Order and implemented within 6 months. That Order was taken by agreement on 10 March 2017. Yet this issue remained in contention in respect of the period of time to be afforded to the respondents for compliance

and various assurances have proved to be empty. In these circumstances, I am of the view that an attorney client costs order is warranted, to be paid by the first, second and third respondents, the one paying the others to be absolved.

A GOVINDJEE

ACTING JUDGE OF THE HIGH COURT

DATE HEARD: 4/11/2021

ORDER: 5/11/2021

REASONS: 9/12/2021

APPEARANCES

FOR THE APPLICANT: ADV MULLINS SC

INSTRUCTED BY: NETTLETONS

ATTORNEYS

FOR THE RESPONDENT: ADV MOORHOUSE

INSTRUCTED BY: MESSRS

DULLABHS ATTORNEYS

[1] The Orders in respect of the only remaining issues in dispute have been underlined for the sake of convenience.

[2] See *Zondi v MEC for Traditional and Local Government Affairs and Others* 2004 (3) SA 589 (CC) at par 73 for a similar approach.

[3][3] This Interim Progress Report explained the level of compliance with the Second Plasket J Order, and focused on progress with tagging,

branding, tariffs, impounding of stray animals, health status of animals, isolation of diseased animals, commonage carrying capacity,

fencing, alien vegetation and provided additional information.

[4] The Municipal Manager's recommendation to Council makes mention of an Action Plan with time frames based on the first Plasket J Order, as well as a series of recommendations relating to impounding of cattle found on public open spaces, payment of fines and tariffs and urgency to complete tagging of animals.

[5] See *Darries and Others v City of Johannesburg* [2009] 3 All SA 277 (GSJ) at par 18.

[6] S 152(1) of the Constitution of the Republic of South Africa, 1996 (the Constitution).

[7] S 152(2) of the Constitution.

- [8] S 153 of the Constitution.
- [9] See N Steytler and J de Visser Local Government Law of South Africa (Issue 13) (2020) par 4.3.
- [10] S 1 of the Local Government: Municipal Systems Act, 2000.
- [11] Steytler and De Visser supra par 4.3.
- [12] See Zondi supra at par 80: unattended animals may cause damage to crops and property. They could also pose safety or health hazards to other animals and members of the public.
- [13] Zondi ibid par 80.
- [14] S 4(b) of the Act. Local government is recognised in South Africa's constitutional order as the third sphere of government, so that judicial interference is limited: see Capricorn District Municipality and Another v South African National Civic Organisation 2014
- (4) SA 335 (SCA) at par 19. Also see Kungwini Local Municipality v Silver Lakes Home Owners Association and Another
- [2008] ZASCA 83; 2008 (6) SA 187 (SCA) at par 14 and City of Johannesburg Metropolitan Municipality v Zibi [2021] 3 All SA 667 (SCA) at par 19.
- [15] S 11(3) of the Act.
- [16] S 74 of the Act confirms that a municipal council must adopt and implement a tariff policy. A municipality has the general power to levy and recover fees, charges or tariffs in respect of any municipal function or service through municipal council resolution,
- and seemingly without the need for a specific by-law: s 75A of the Act. See Capricorn District Municipality supra par 12 and City of Johannesburg Metropolitan Municipality supra at pars 17, 18. The municipal council also has the right to set, review or adjust the tariffs within its tariff policy: s 81(3) of the Act.
- [17] S 75 of the Act provides that a municipal council must adopt by-laws to give effect to the implementation and enforcement of its tariff policy.
- [18] S 5(1) and (2).
- [19] S 4(1).
- [20] S 1.
- [21] See s 19, for an illustration of the applicability of the ordinance to 'public places' in the case of dogs and cats.
- [22] 'In order to consider an application in terms of subsection (1), the municipality may obtain the input or comments of the owners or occupants of surrounding premises.'
- [23] S 156(2) of the Constitution.

[24] S 156(5) of the Constitution.

[25] See *Transvaal Agricultural Union v Minister of Land Affairs*

[1996] ZACC 22; 1997 (2) SA 621 (CC) at paras 25-26.

[26] No 32 of 1947.

[27] At para 128.

[28] At para 129.

[29] In respect of the time period to collect tariffs, also see fn 16, above.

[30] See the remarks of the Constitutional Court on the use of Provincial Gazettes and local newspapers to communicate with livestock owners, including illiterate persons, in *Zondi supra* at paras 50, 51.

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