

SOUTH AFRICA / JUDGMENT

Artio Investments (Pty) Ltd (In Liquidation) and Others v Local Municipality of Madibeng and Others (39895/2017) [2018] ZAGPPHC 591 (28 May 2018)

[2018] ZAGPPHC 591

COURT

North Gauteng High Court, Pretoria

BEFORE

AC Sasson

CASE / FILE NUMBER

39895/2017

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

CASE

NO: 3989512017

In

the matter between:

ARTIO

INVESTMENTS (PTY) LTD (IN LIQUIDATION)

FIRST APPLICANT

ESAIAS

JOHANNES JANSE VAN RENSBURG N.O. SECOND

APPLICANT

LOUISA

SIBIYA N.O.

THIRD APPLICANT

ELIZABETH

MARGARET EDWARDS N.O.

FOURTH APPLICANT

MKHACANI

NOEL CHAUKE N.O.

FIFTH APPLICANT

and

THE

LOCAL MUNICIPALITY OF MAOIBENG
FIRST RESPONDENT
THE
MUNICIPAL MANAGER OF THE MUNICIPALITY
OF
MADIBENG
SECOND RESPONDENT
THE
MEC OF LOCAL GOVERNMENT AND HUMAN
SETILEMENT
FOR NORTH WEST PROVINCE
THIRD RESPONDENT
SNOWY

OWL PROPERTIES 300
(PTY) LTD REGISTRATION
NUMBER:

2003/017970/07
FOURTH RESPONDENT
KLAAS
JOSEF ROMAAN L'ECLUSE
FIFTH RESPONDENT
JEFFREY
BARNARD DE KLERK
SIXTH RESPONDENT
LODEWYK
PRETORIUS
SEVENTH RESPONDENT
THE
REGISTRAR OF DEEDS, PRETORIA
EIGHTH RESPONDENT

JUDGMENT

AC SASSON, J

The parties

- [1] The first applicant (ARTIO Investments (Pty) Ltd) is a company in liquidation. I will refer to the first applicant as "the company". The second to fifth applicants are the co-liquidators of the company. I will refer to them collectively as "the liquidators". Where appropriate I will refer to the first to fifth applicants collectively as "the applicants".
- [2] The first respondent is the Local Municipality of Madibeng ("Madibeng" or "the municipality"). The second respondent is the Municipal Manager of Madibeng and the third respondent is the MEC of Local Government and Settlement for North West Province. Counsel on behalf of these respondents made common cause with the submissions advanced on behalf of the fourth to seventh respondents.

- [3] The fourth respondent is Snowy Owl Properties 300 (Pty) Ltd - a private company with limited liability. The fifth and sixth respondents are businessmen. The seventh respondent is an attorney and the eighth respondent is the Registrar of Deeds. No relief is sought against the second, third and eighth respondents. During argument the applicant also abandoned any costs order against the seventh respondent.

Brief background to the dispute

- [4] The company obtained a property - referred to in the papers as "Erf 5710" - soon after its incorporation and developed a shopping mall. It thereafter traded as a shopping mall and in fact is still trading as such. Erf 5710 Brits. Extension 91 Township Registration Division JQ, North West Province is in the heart of the industrial area of Brits (Madibeng).
- [5] Certain restrictive conditions were - and still are - registered against the title deed of Erf 5710 which restrictive conditions were carried over to title deed T48583/2005 on 21 April 2005. At the time this portion was known as Portion Number 42 (remaining extent) Farm Krokodildrift 446, JQ North West province. On the Title Deed of Farm Krokodildrift, the following restrictive conditions appear as paragraph E(i) - (iii):

" Behalwe met die skriftelike toestemming van die Administrateur as beherende Gesag soos omskryf in die Wet op Adverteer Langs Toebou en Paaie 1940 (Wet 21 van 1940)-

- (i) Mag die grond s/egs vir woon-en landboudeleindes gebruik word. Op die grond, of op enige behoorlike goedgekeurde onderverdelings

daarvan, mag daar nie meer geboue wees as een woonhuis tesame met die buitegeboue wat gewoonreg vir gebruik in verband daarmee nodig is en sulke geboue wat gewoonreg vir gebruik in verband daarmee nodig is en su/ke geboue en bouwerke as wat vir landboudeleindes nodig mag wees nie.

- (ii) Mag geen winkel of besigheid of nywerheid van watter aard ookal op die grond geopen of gedryf word nie;

- (iii) Mag geen gebou of bouwerk van watter aard ookal binne afstand van 95 meter vanaf die middel/yn van enige publieke pad opgerig word

nie."

- [6] These conditions were typical of farmland and were not contentious at the time it was entered into the original title deed. On 14 July 2006, Extension 91 was established as a Township on the Farm Krokodildrift .The township consisted of four erven. All these erven were created in terms of the township establishment and the aforementioned restrictive conditions in the existing title deeds were carried over from the previous title deed conditions and servitudes. According to the applicants, the subsequent transfer of the restrictive conditions was a patent mistake and should have been removed after the township establishment. Despite these restrictive conditions, Madibeng on 29 May 2008, issued an Occupancy Certificate in respect of Portion 42 Town Krokodildrift, 446, JQ, Ext 91.

- [7] On 9 December 2008, the Registrar of Deeds issued a Certificate of Registered Title Number T109984 in the name of the company by virtue of the Deed of Transfer T48583/2005. The restrictive title deed conditions were carried over to the Certificate of Registered Title Number T109984/08. According to the liquidators this was another mistake. They further express the view that these restrictive title deed conditions are "bizarre" as the property has been operating as a shopping mall since 2008 and was rezoned as such on 21 January 2009. In this regard it was submitted that by law, the township establishment takes precedent.
- [8] It is noteworthy to point out that Madibeng has not enforced these restrictive conditions for approximately 10 years and has, as already pointed out in fact issued an occupancy certificate for the immovable property on 29 May 2008. Since then, not a single objection was raised against the fact that the restriction was not complied with until an application was filed with Madibeng for the removal of these restrictive conditions.

Liquidation of the company

- [9] The company was finally liquidated by an order of the Gauteng Division, Pretoria on 8 September 2014. The liquidators were thereafter appointed and their powers extended on 14 October 2014 in order for them to litigate in the name of the company (now in liquidation) and to carry on or discontinue any part of the business of the company in as far as it is necessary for its beneficial winding-up.
- [10] The liquidators continued with the trading of the shopping mall and it is, according to the papers, still trading as such. Two meetings of creditors were held. ABSA Bank is the only approved creditor. The fourth respondent (Snowy Owl Properties 300 (Pty) Ltd) did not submit a claim for approval at either of the meetings.
- [11] In order for the liquidators to liquidate the assets of the applicant, they have to dispose of Erf 5710. The liquidators inform the court that currently there is a buyer for the shopping mall (that is situated on Erf 5710) and for the property itself, but that the agreement is subject to the removal of the restrictive conditions that are currently contained in the title deed.

Application for the removal of restrictions over Erf 5710

- [12] To this end, and on 25 November 2015, an application for the removal of the aforementioned restrictive conditions was launched by the liquidators. The application was originally launched in terms of the Removal of Restrictions Act[1] (hereinafter referred to as "the RRA") although, by that time, the RRA had already been repealed by the Spatial Planning and Land Use Management Act[2] (hereinafter referred to as "SPLUMA"). SPLUMA commenced on 1 July 2015.[3] The application for the removal of the restrictions that was filed with Madibeng was therefore brought in terms of the provisions of an act that had already been repealed. The application was published in the Provincial Gazette on 19 January 2016 and in Citizen and Beeld newspapers on 20 and 27 January 2016. The application was served on Madibeng as well as on the North West Provincial Administrator

- [13] From the papers before court, it appears that Madibeng did not give attention to the matter. From the transcript of an Insolvency Enquiry conducted by the liquidators and held on 2 December 2016, it appears that the stance adopted by Madibeng at the time was that this application (notwithstanding the fact that it was brought after the repeal of the RRA) must still be dealt with on a provincial level by the Department of Local Government and Human Settlement (as required in terms of the RRA) and not by the municipality itself (as required in terms of SPLUMA.) This stance was also adopted by the respondents in this matter during argument. (I will return to the Insolvency Enquiry in more detail herein below.)
- [14] On 15 February 2016, the fourth respondent lodged an objection to the application for the removal of the aforesaid restrictions. (I will deal return to the merits of this objection in more detail herein below.)
- [15] Despite the fact that an objection was lodged against the application to remove the restrictions, it is common cause between the applicants and the respondents that –(a) no logical purpose exists to retain the conditions in light of the specific character of the neighborhood; (b) Madibeng has not enforced the restrictive conditions for approximately a decade; (c) Madibeng issued an Occupancy Certificate on 29 May 2008; and (d) there was no objection raised against the fact that the restriction has not been complied with, save for the objection that forms part of this application (lodged by the fourth respondent).

SPLUMA

- [16] In terms of the provisions of SPLUMA, a restrictive condition may be removed, amended or suspended by a Municipal Planning Tribunal in accordance with section 47 of SPLUMA.
- [17] At the time when the application for the removal of restrictions was filed with Madibeng, no bylaws had yet been published by the municipality. It is also common cause that Madibeng also did not have a Municipal Planning Tribunal at the time when the application was launched.
- [18] Since Madibeng had received the application, it did not act on it in any way, despite a lapse of 12 months.

The nature of this application

- [19] This is an application for judicial review in terms of the provisions of the Promotion of Administrative Justice Act'[4] ("PAJA") for the failure[5] of Madibeng Municipality to take a decision to adjudicate an application by the applicants for the removal of restrictions that appears in Certificate of Consolidated Title T17694/2016, in respect of Erf 5710, Brits Township, Extension 91, Registration Division JQ, North-West Province. The period within which Madibeng is required to take such decision is prescribed by the Regulations published under SPLUMA.[6]

The respondents' submissions

- [20] I have already referred to the fact that counsel for the first to the third respondents made common cause with the submissions made on behalf of the fourth to the seventh respondents. On behalf of the respondents it was submitted that the administration of the provisions of the RRA had been assigned to the Premier of the North West Provinces by section 235(8) of the Interim Constitution[7] in terms of Regulation 160 of 31 October 1994. It was accordingly submitted firstly, that the wrong decision-making authority is before court and secondly, that as at 25 November 2015, the applicable legislation was the RRA and not SPLUMA.
- [21] In respect of the decision making authority,[8] it is trite law that it is fundamental to our constitutional order that every sphere of government is restricted by the principle that they may exercise no power and perform no function beyond that conferred upon them by law. [9]With this principle in mind, it was submitted on behalf of the respondents that the empowering legislation that regulated the adjudication for the removal of restrictive conditions at the time the applicants instituted their application was not SPLUMA but the RRA. Therefore, so it was submitted, the first respondent is not the administrative authority tasked with or empowered by statute to perform the relevant administrative action. According to the respondents, the decision- making power remained vested in the Administrator North West Provinces Administration - Department Local Government & Human Settlement and not Madibeng. Hence, according to the respondents, the wrong decision making authority is before the court.

Dispute between the parties

- [22] The fundamental dispute between the parties therefore is the following: According to the applicants, SPLUMA established as from 1 July 2015 a new administrative application procedure for the removal of a restrictive condition by placing the authority to consider such a removal in the hands of the Municipal Planning Tribunal or a designated municipal official as the case may be. According to the respondents, the administrative authority remained in the hands of the Administrator i.e. the Head of the Department of Local Government and Human Settlement Province. North West

Applicable legislation:

- [23] By proclamation[10] the President determined 1 July 2015, as being the date upon which SPLUMA came into operation.
- [24] It is clear from section 59 of SPLUMA that the laws mentioned in Schedule 3 (to SPLUMA) are repealed to the extent indicated in the third column in that Schedule. In this regard, Schedule 3 clearly states that "the whole" act (with reference to the RRA) is repealed by SPLUMA.

[25] By repealing the RRA as a whole, SPLUMA brings about a complete restructuring of the municipal planning processes to enhance the manner in which municipalities have been performing spatial planning, land development and land use duties. In terms of section 24(1) of SPLUMA, each municipality must develop and implement a single land use scheme for its entire area within a period of five years from the implementation of SPLUMA. Section 24(2) of SPLUMA contains guidelines on what must be included in such a land use scheme.

[26] It is specifically recognized by the legislature that certain applications, appeals or other matters may still be pending under

other legislation (such as the Development Facilitation Act[11]) at the time of the commencement of SPLUMA. In order to provide for the finalization of these (pending) matters. section 60 of SPLUMA provides for traditional arrangements.

[27] In terms of section 60(2)(a) all applications, appeals or other matters pending before a Tribunal, established in terms of section 15 of the Development Facilitation Act ("FDA") at the commencement of SPLUMA, that have not yet been decided or otherwise disposed of, must be continued and disposed of in terms of SPLUMA. In light of the fact that the applicants instituted their application on 25 November 2015 which is approximately 3 months after SPLUMA came into operation - the application at issue therefore falls outside of the operation of section 60 of SPLUMA (the transitional

provisions).

[28] It is, however, in the context of the dispute before this court important to point out that section 60 is specific in respect of the fact that even pending matters will be dealt with in terms of SPLUMA and not in terms of legislation that have been repealed by section 59 of SPLUMA. An application that was therefore brought under the RRA and which has not yet been finalized, will therefore be disposed of in terms of SPLUMA and not in terms of the RRA. For all practical purposes therefore. the RRA and its operation has seized as of 1 July 2015 in respect of all applications, appeals and other matters that are pending before a tribunal established in terms of section 15 of the DFA. This fact alone disposes, in my view, of the argument on behalf of the respondents that the adjudicative power to decide the application submitted by the applicants, remain with the Administrator as Head of the Department of Local Government and Human Settlement North West Province: If pending application must be disposed of in terms of section 60 of SPULMA, even more so, will applications submitted after the commencement of SPULMA be adjudicated in terms of SPULMA.

[29] Despite the clear provisions of section 59 and 60. the respondents remained insistent that the RRA continued to operate despite the fact that section 59 repealed the RRA as a whole. Their argument in this regard is as follows: Because the administration of the RRA in the North West Province was assigned to the Administrator and because it constitutes provincial legislation as envisaged by section 239 of the Constitution, SPLUMA could not, and did not, repeal provincial legislation. According to this argument, SPLUMA repealed the laws

mentioned in Schedule 3 which included the repeal of the RRA but only insofar as it applies on a national level. It was argued in this regard to be so due to the fact that to date, the RRA has not been repealed by the North West Province Legislator and it is therefore presumed only to be repealed on provincial level after the lapse of the five-year implementation period provided for in SPLUMA i.e. once all Municipalities have their land use schemes and by-laws in place.

In summary therefore, the argument is that the RRA, irrespective of the provisions of SPLUMA, remains in full force and effect in the North West Province pending the repeal thereof on a provincial level and insofar as municipalities have not implemented land use schemes and accompanying by-laws.

[30] There is no merit in this submission: Firstly, as already pointed out, in terms of section 59 of SPLUMA. the laws mentioned in Schedule 3 of SPLUMA are repealed to the extent indicated in the third column of Schedule 3. Schedule 3 makes it clear that "the whole" of the RRA is repealed by SPLUMA. Secondly, if proper regard is had to the provisions of section 235(8) of the Interim Constitution, it is clear that the President did in fact have the authority to repeal the entire RRA.

The provisions of section 235(8) of the Interim Constitution

[31] It is so that some, but not all of the administration of the provisions of the RRA, was assigned to the Premier of the North West Province by section 235(8) of the Interim Constitution in terms of Regulation 160: "Assignment of the Removal of Restrictions Act, 1967... to the Provinces under section 235 (8) of the Constitution of the Republic of South Africa, 1993" [12] From a reading of Regulation 160 it appears that the whole of the RRA "except section 5", was assigned to the Provinces. The question which therefore arises is whether the President can repeal an act in toto in these circumstances? On behalf of the respondents it was, as already pointed out, that the President had no such authority.

[32] In order to resolve the dispute, it is necessary to have regard to the provisions of section 235(8) of the Interim Constitution which reads as follows:

"235 Transitional arrangements: Executive authorities:

(8)(a) The President may, and shall if so requested by the Premier of a province, and provided the province has the administrative capacity to exercise and perform the powers and functions in question, by proclamation in the Gazette assign, within the framework of section 126, the administration of a law referred to in subsection (6) (b) to a competent authority within the jurisdiction of the government of a province, either generally or to the extent specified in the proclamation.

(b) When the President so assigns the administration of a law, or at any time thereafter, and to the extent that he or she considers it necessary

for the efficient carrying out of the assignment he or she may-

- (i) amend or adapt such law in order to regulate its application or interpretation;
- (ii) where the assignment does not relate to the whole of such law, repeal and re-enact whether with or without an amendment or adaptation contemplated in subparagraph (i), those of its provisions to which the assignment relates or to the extent that the assignment relates to them; and
- (iii) regulate any other matter necessary, in his or her opinion, as a result of the assignment, including matters relating to the transfer

or secondment of persons (subject to sections 236 and 237) and relating to the transfer of assets, liabilities, rights and obligations, including funds, to or from the national or a provincial government or any department of state, administration, force or other institution.

- (c) In regard to any policing power the President may only make that assignment effective upon the rationalisation of the police service

as contemplated in section 237: Provided that such assignment to a province may be made where such rationalisation has been completed in such a province.

- (d) Any reference in a law to the authority administering such law, shall upon the assignment of such law in terms of paragraph (a) be

deemed to be some reference mutatis mutandis to the appropriate authority of the province concerned».

[33] In terms of section 235(8)(b) of the Interim Constitution, the President may repeal or re-enact an act so assigned where the assignment does not relate to the whole of such an act. In this regard the Constitutional Court in *Executive Council of the Western Cape Legislature & Others v The President of the Republic of South Africa*[13] said the following in respect of the powers conferred upon the President:

"[9] Section 235(8) of the Constitution empowered the President to assign the administration of certain categories of laws to "competent authorities" within the jurisdiction of the various provinces who, by definition, were authorities designated by the Premiers. Sometime after the Constitution came into force the President purporting to act in terms of section 235(8), assigned the executive authority for the administration of the Transition Act to provincial administrators to be designated by the Premiers of each of the provinces. Section 235(8) also empowered the President when he assigned the administration of a law, or at any time thereafter, to amend or adapt such law in order to regulate its application or interpretation. This was permissible "to the extent that [the President] considers it necessary for the efficient carrying out of the assignment." When the President purported to assign the administration of the Transition Act to administrators in the provinces, he also purported to amend the law in terms of his powers under section 235(8). No objection was made by the applicants at that time to the assignment or to the amendments to the Transition Act. In fact, the third applicant claims to be the administrator in the Western Cape by virtue of such an assignment."

[34] I have already referred to Regulation 160 and specifically item 1 to the Regulations from which it is evident that the whole of the RRA except for section 5 was assigned to the Premier. The applicants are therefore correct in their submission that, due to the fact that section 5 of the RRA was not assigned to a provincial authority in terms of these regulations, the provisions of section 235(8)(b) of the Interim Constitution were applicable to the assignment: The President was therefore entitled to repeal the provisions of the RRA even though some of the provisions had been assigned to the Premier of the North West Province.

[35] The provisions of section 235 of the Interim Constitution were repealed by the current Constitution of the Republic of South Africa[14] and came into operation on 4 February 1997.

[36] Item 14(5) of Schedule 6 of the (current) Constitution provides as follows:

"Assignment of legislation to provinces

Any assignment of legislation under section 235(8) of the previous Constitution, including any amendment, adaptation or repeal and re- enactment of any legislation and any other action taken under that section, is regarded as having been done under this item."

Regulation 160 of 31 October 1994 is therefore deemed in terms of the provisions of Item 14(5) of Schedule 6 of the (current) Constitution to have been assigned in terms of Item 14 of the said Schedule.

[37] In terms of Item 14(2) of Schedule 6 of the (current) Constitution, the President has the following powers:

- To the extent that it is necessary for an assignment of legislation under subitem (1) to be effectively carried out, the President, by proclamation, may-
 - (a) amend or adapt the legislation to regulate its interpretation or application;
 - (b) where the assignment does not apply to the whole of any piece of legislation, repeal and re-enact, with or without any amendments or adaptations referred to in paragraph (a), those provisions to which the assignment applies or to the extent that the assignment applies to them; or..."

[38] The effect of Item 14(2)(b) therefore is that the President may repeal and re-enact any piece of legislation where the assignment does not apply to the whole of the legislation that was assigned.

[39] In conclusion: The whole of the administration of the RRA was not assigned to the Premier of the North West Province - there was only a partial assignment. The President therefore had the authority to repeal the provisions of the RRA so assigned. The President proceeded to do so when he assented to SPLUMA.[15]

[40] I was unable to find any decisions pertinent to the issue before the court. Counsel on behalf of the applicants was, however, able to refer me to the decision in *Ex Parte Whitfield and Similar Matters*. [16] Although the issue before the Court in that matter is different, the court did, however, confirm that SPLUMA has now established a new regime in terms of which applications for the removal of restrictive conditions must be dealt with. The court held as follows in general regarding the application of SPLUMA:

"[28] The Spatial Planning Act establishes a new administrative procedure for the removal of a restrictive condition. It does so by placing the authority in the hands of the Municipal Planning Tribunal or designated municipal official, as the case may be. It further seeks to establish criteria for the exercise of such authority which are consonant with the criteria to be applied in relation to spatial planning and land use management decisions generally."

[41] In light of the foregoing, it is declared that SPULMA is applicable to the application lodged by the applicant with the first respondent on 25 November 2015 for the removal of the restrictive conditions in respect of Erf

5710. It is further declared that, in terms of SPULMA, the local municipality of Madibeng is the authoritative power vested with the authority in terms of SPULMA to consider and determine the application lodged by the applicants on 25 November 2016.

[42] On behalf of the respondents it was submitted that the first respondent does not have the capacity to deal with the applicants' application in the absence of a land management scheme and subsequent by-laws. Such by-laws were, however implemented in March 2017. Mr Preiss for the applicants took issue with the respondents' submission and referred the court to Regulations 16 which clearly provides that, in the absence of a Municipal Planning Tribunal the municipality has the option of appointing an "authorised official" to consider applications such as the present one.

[43] I am in agreement with this submission Regulation 16 makes it patently clear that the Regulations applies even if no applicable provincial legislation or municipal by-laws regulating time frames have been promulgated In terms of the Regulations, a Municipal Planning Tribunal or an authorised official must complete the process in respect of a land use application within a period which may not be longer than 12 months.

[44] The Municipality therefore has and had the capacity to deal with the application submitted by the applicants but has failed to do so.

Failure to take a decision

[45] An Insolvency Enquiry was held in terms of sections 417 and 418 of the Insolvency Act. [17] Mr. Manaka (the Municipal Manager of Madibeng) was served with a subpoena to appear before the hearing. He failed to appear on three occasions. Mr. Rikhotso (the Chief Financial Officer of Madibeng) was also served with a subpoena to appear before the hearing. He failed to appear on two occasions. Mr. Mmbengwa (the legal advisor of Madibeng) appeared and testified. Mmbengwa testified that he had no knowledge of any town planning aspects.

Ms. Raphala (Town Planning) testified that applications to remove restrictive conditions are the responsibility of the Provincial Department of Local Government and Human Settlements. She testified that these applications are the responsibility of her department within the Madibeng Municipality but that this responsibility was limited to sending correspondence through to the Provincial Department of Local Government and Human Settlements. She confirmed that Madibeng did not respond to applicants as they, according to her, did not have an obligation to do so. She initially testified that Madibeng had no file for the application by the applicants and that she did not know about the application and the objection. She later changed her evidence and conceded that Madibeng did indeed have record of having received the application on 26 November 2015, but did not in any way act on it.

[46] It is clear from the papers that, having received the application on 26 November 2016, the Municipality failed to take any steps to adjudicate the application in terms of Regulation 16 of SPLUMA read with section 47 and 60 of SPLUMA. In this regard Regulation 16 reads as follows:

" 16 Timeframes for land development and land use applications

(1) This Regulation applies if no applicable provincial legislation or municipal by-laws have been promulgated that provide timeframes for land development and land use applications or a mechanism for regulating circumstances of apparent undue delay by the Municipal

Planning Tribunal or authorised official.

(2) For the purpose of this Regulation, a land development and land use application will be subjected to an administrative phase, a consideration phase and a decision phase.

(3) The administrative phase commences only after a complete land development and land use application is submitted to a municipality and the components of this phase contemplated in subregulation (6) for which the municipality is responsible, may not be longer than 12 months.

(4) The consideration phase may not be longer than 3 months.

(5) The decision must be made within 30 days from the last meeting of the Municipal Planning Tribunal or the authorised official.

(6) The administrative phase is the phase during which all public participation notices must be published and responded to, parties must be informed, public participation processes finalised, intergovernmental participation processes finalised and the application referred to the Municipal Planning Tribunal or authorised official for consideration and decision-making.

- (7) The consideration phase is the phase during which the Municipal Planning Tribunal or authorised official must consider the application, whether it be a written or oral proceeding, and undertake investigations, if required.
- (8) If no decision is made within the period referred to in subregulation (3), (4) or (5), it is considered undue delay for purposes of the Act and the applicant or interested person may report the non- performance of the Municipal Planning Tribunal or authorised official to the municipal manager, who must report it to the municipal council and mayor.
- (9) If at any time during the administrative phase the applicant fails to act or provide the necessary information within the timeframe

required by the municipality, the application is deemed to be refused by the Municipal Planning Tribunal or authorised official.

- (10) If an organ of state which is requested to provide comment on an application does not provide comment in the timeframe permitted by the municipality or any further extension of the period granted by the municipality for that comment, it is deemed that the organ of state has no objection to the application and the granting of the right applied for in the application and the Municipal Planning Tribunal or authorised official may report that non-performance to the executive authority of that organ of state, the Minister and

relevant MEC."

- [47] Clause 16(3) of the regulations provides that the entire process may not be longer than 12 months.

- [48] At the time of the filing of this application, 17 months have already expired since the application was submitted to Madibeng. As such the provisions of section 6(3)(b) of PAJA is applicable. Madibeng clearly had a duty to take a decision in respect of this application in terms of SPLUMA and the applicable regulations but has failed to do so.

The objection by the fourth, fifth and seventh respondents

- [49] The fourth respondent lodged an objection against the application on 15 February 2016. The basis of the objection appears from a letter of even date: (i) the company has been placed under liquidation and therefore has no locus standi in respect of the application. (ii) Secondly, the restrictive conditions render the mall illegal: "It is (sic) has not previously been considered necessary for the owners of the (illegal) mall to remove these conditions but an eminent sale of the property now necessitates it. If this was not so the illegal practice would have continued unhindered."

- [50] On 2 March 2016, the Town Planning Hub CC on instructions of the applicants replied to this objection filed on behalf of the fourth respondent. In this letter it is recorded firstly, that the application submitted was done on instructions of the liquidators with the required power of attorney. Secondly, it is recorded that the application was submitted by parties that had

no involvement with the initial township establishment application and in an attempt to rectify errors done by previous applicants. Despite this letter the objection was not withdrawn.

- [51] I have already referred to the Insolvency Enquiry that was conducted by the liquidators. From the transcript of 23 April 2016, it appears that the fifth respondent (Mr L'Ecluse- a director of the fourth respondent) conceded during the proceedings that the objection was launched by the fourth respondent as a tactical move to force the liquidators of the company to enter into discussions and negotiations with representatives of the fourth respondent to settle outstanding fees due to the fourth respondent and not for the reasons as set out in the objection:

"Mnr KJR L'Ecluse: As ons in sulke diepte in andere... (onduidelik) bykom en dit is skietgoed ja. Mnr Roos: Skietgoed? Goed, so daar is skietgoed wat ons u nie met ons wil dee/ (sic) voor Mnr Pretorius nie by is nie, verstaan ek u reg?

Mnr KJR L'Ecluse: My standpunt is ek wil graag dat Artio of the likwidadeurs met ons praat oor die koste om daar tot 'n vergelyk te kom.

Mnr Roos: Goed. So u gebruik die beswaar om Artio af te pers?

....

Kommissaris: Kan ek vir u so vra, Meneer L'Ee/use, as die likwidadeure vandag vir u 'n tjek skryf vir die voile uitstaande koste, sat u die beswaar terug trek? Mnr KJR L 'Ecluseuse: Ja."

- [52] From the correspondence attached to the papers and this exchange during the Insolvency Enquiry, it is clear that the lodging of the complaint by the fourth respondent constitutes an abuse of process: If the company was indebted to the fourth respondent another process ought to have been followed. Certainly, the correct procedure was not to devise lodging a frivolous objection against an application for the removal of the restrictive conditions in an apparent attempt to extort money from the company. This much was conveyed to the attorneys of the fourth respondent by the attorneys of the applicants:

"2. After the Insolvency Enquiry held on even date the following was brought to the Commissioners attention:

2.1 The objection as described above was only launched as an extortion mechanism to force the Liquidators of Artio Investments to meet with the representatives of Snowy Owl Properties to enable them to discuss payment of an amount due to Snowy Owl Properties and not for the reasons as set out in the objection.

...

The meritless objection clearly constitutes an abuse of process and can lead to an enormous damages claim against yourselves." [53] The fourth respondent should therefore have lodged a claim against the company in terms of the Insolvency Act instead of trying to force the company to effect payment of an amount due to the fourth respondent. In any event, this approach may ultimately have amounted to preferring one creditor above others.

[54] Lastly, the objection clearly lacks the necessary merits in that the fourth respondent is effectively lodging an objection to the fact that the company intends to rectify an error by removing the restrictive conditions.

[55] In light of the foregoing, the objection launched by the fourth respondent has no merit.

Substitution of the decision of the administrator

[56] It was submitted that the court should substitute its decision for that of the administrator. Some of the reasons advanced in support of this submission are that the court is in as good a position as Madibeng to adjudicate the application for the removal of the restrictions; that the decision of Madibeng is a foregone conclusion in that it is clear that the restrictive condition was erroneously included in Certificate of Registered Title Number T109984/08 and the subsequent title deeds and certificates.

[57] Although I accept that a court can substitute its decision for that of the administrator in exceptional cases, I am, however, not of the view that this is one of those cases: I have, in arriving at this decision, taken into account that the municipality must follow a process, which inter alia includes public participation. This has not been done. The matter is therefore remitted to Madibeng for consideration in terms of the provisions of SPLUMA. In order to allow for objections to be filed, Madibeng is directed to determine the timeframes in terms of the Regulations of the SPLUMA and/or applicable municipal by-laws, within which all interested parties may object to the removal of the restrictive title deed condition "E" of the Deed of Title of Erf 5710, Brits, Extension 91, Township, Registration Division J.Q., North-West Province. To this end, the applicants are directed to publish this court order in two publications of newspapers circulating in the Madibeng district and to serve this court order on each respondent and each owner of a property adjacent to the property.

Costs

[58] Cost should follow the result. The applicants do not persist with seeking a punitive costs order nor for an order against the sixth and seventh respondents. They do, however, persist with a costs order against the first, fourth and fifth respondents. Accordingly I have made a costs order against these respondents only.

Order[18]

In the event the following order is made:

1. The provisions of the Spatial Planning and Land Use Management Act, Act 16 of 2013, is applicable to the application lodged by the applicants with the first respondent on 25 November 2015, for the removal of the restrictive title deed conditions in respect of the property identified as Erf 5710, Brits, Extension 91 Township, Registration Division J.Q., North West Province.
2. It is declared that the first respondent is the authoritative power vested with the authority in terms of the Spatial Planning and Land Use Management Act, Act 16 of 2013 to consider and determine the application lodged by the applicants on 25 November 2015.
3. It is declared that the first respondent has failed to take a decision in respect of the application lodged by the applicants on 25 November 2015, within the prescribed time period of 12 months as set out in Regulation 16(3) of the Regulations in terms of the Spatial Planning and Land Use Management Act, Act 16 of 2013 and published in Government Gazette Extraordinary, no 239 of 23 March 2015.
4. The matter is remitted back to the first respondent for consideration in terms of the provisions of the Spatial Planning and Land Use Management Act, Act 16 of 2013.
5. The first respondent is directed to determine the timeframes in terms of the Regulations in terms of the Spatial Planning and Land Use Management Act, Act 16 of 2013 and/or applicable municipal by-laws within which all interested parties may object to the removal of the restrictive title deed condition "E" of the Deed of title of Erf 5710, Brits, Extension 91, Township, Registration Division J.Q., North West Province.
6. The applicants are directed to:
 - 6.1 Publish this court order in two publications of newspapers circulating in the Madibeng district;
 - 6.2 Serve this court order on each respondent and each owner of a property adjacent to the property.
7. The costs of this application must be paid by the first, fourth and fifth respondents jointly and severally, the one paying the other to be absolved.

JUDGE AC SASSON

JUDGE OF THE HIGH COURT

Appearances:

For the applicants: Adv DA Preis SC

Adv JHJ Saunders

Instructed by: Jaco Roos Attorneys

For the first respondent: Adv M Nowitz

Instructed by: Twala Attorneys

For the Fourth to Adv EA Lourens

Seventh respondents: Adv JC Prinsloo

Instructed by: Lood Pretorius

- Erasmus Attorneys

[1] Act 84 of 1967.

[2] Act 16 of 2013.

[3] As per Government Notice 26 published in Government Gazette 38828 published on 27 May 2015.

[4] Act 3 of 2000.

[5] Section 6(2)(g) of PAJA.

[6] Government Gazette Extraordinary No. 38594, published on 23 March 2015.

[7] The Constitution of the Republic of South Africa, Act 200 of 1993.

[8].In terms of section 1(i) of PAJA of Promotion of Administration of Justice Act 3 of 2000.

[9] See Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others 1999

(1) SA 374 (CC

[10] Supra footnote 3.

[11] Act 67 of 1995.

[12] Government Gazette No 16049 published on 31 October 1994.

[13] 1995 (4) SA 877 (CC).

[14] The Constitution of the Republic of South Africa. 1996 .

[15] Government Gazette No. 36730 published on 5 August 2013.

[16] 2017 (5) SA 161 (ECP).

[17] Act 24 of 1936.

[18] The order was handed down on 18 May 2018 the reasons to follow

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