

SOUTH AFRICA / JUDGMENT

De Klerk and Others v City of Bombela Local Municipality c/o Municipal Manager and Others

(2928/2018) [2020] ZAMPMBHC 42 (16 July 2020)

[2020] ZAMPMBHC 42

COURT

Mbombela High Court, Mpumalanga

BEFORE

Jansen van Rensburg

CASE / FILE NUMBER

2928/2018

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Policy

REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

MPUMALANGA

DIVISION

Case:

2928/2018

1.

REPORTABLE: YES / NO

2.

OF INTEREST TO OTHER JUDGES: YES/NO

3.

REVISED : YES

16

July 2020

In the matter between

FRANCOIS DE KLERK

NO

1st APPLICANT

JOSSY DU TOIT
NO
2nd APPLICANT
GARY BRIAN KLINKRADT
NO
3rd APPLICANT
Nominated by KA
Administrators (Pty) Ltd
In their capacities as
the duly appointed Trustees
for the time being of the
Qualtec Developers Trust
FRANCOIS DE
KLERK
4th APPLICANT
AND
CITY OF BOMBELA LOCAL
MUNICIPALITY 1st
RESPONDENT
C/O THE MUNICIPAL
MANAGER
MUNICIPAL PLANNING
TRIBUNAL FOR THE 2nd RESPONDENT
CITY OF BOMBELA LOCAL
MUNICIPALITY
MUNICIPAL APPEAL
AUTHORITY FOR THE 3rd
RESPONDENT
CITY OF MBOMBELA LOCAL
MUNICIPALITY
BLAIZEPOINT TRADING 101
CC
4th RESPONDENT
CURRO HOLDINGS
LTD
5th RESPONDENT

JUDGMENT

JANSEN VAN RENSBURG AJ

INTRODUCTION

[1]. This is an application by the applicants for the following relief as per Notice of Motion –

“1. That the decision by the third respondent dated 13th June 2018, whereby it dismissed the applicants’ points in limine be declared invalid and of no force and effect;

2. The aforesaid decision by the third respondent dated 13th June 2018, whereby it dismissed the applicants points in limine are reviewed and set aside;
3. The decision by the third respondent dated 13th June 2018 is hereby substituted with the following –
 - (a). The points in limine raised by the applicant in the heads of argument dated 1 May 2018 is upheld’
 - (b). The appeal of the appellant is upheld and the decision of the Municipal Planning Tribunal for the City of Mbombela Local Municipality is amended to read as follows – ‘the application by Blazepoint Trading 101 CC for the re-zoning of the remaining extent of portion of Erf 3242 Nelspruit X14 is refused.
4. The applicants are insofar as required exempted from their requirements to fully exhaust their internal remedies to prosecute the appeal on the merits. Which exemption is granted in terms of section 7(2)(c) of the Promotion of Administrative Justice Act 3 of 2000.
5. The first, second and third respondents are ordered to pay the cost of this application and in the event of the fourth and / or fifth respondents opposing the application, that it be ordered to pay the cost jointly and severally with the first to third respondents.
6. Further and / or alternative relief.”

HISTORY OF THIS APPLICATION

LOCUS STANDI

[2]. The applicants are the purported Trustees of the Qualtec Development Trust reference number IT 001131/2005. [1] The letters of authority annexed to the application only refer to the 1st and 3rd applicants as authorise Trustees of Qualtec Development Trust referred to above.

[2.1.]. Miss Jossy du Toit (the 2nd applicant) is therefore not a Trustee in terms of the attached letters of authority and in terms of section 6(1) of the Trust Property Control Act 57 of 1988.

[2.2.]. Further to this allegation by the 1st applicant, mr de Klerk (in his official capacity as a Trustee) and simultaneously as the 4th applicant (in his personal capacity) deposed to the affidavit on behalf of the three Trustees of the Trust. [2]

[3]. The confirmation affidavits referred to by mr de Klerk [3] of Miss Jossy du Toit [4] and Gary Brian Klinkradt [5] is not commissioned and for that reason not before the court. The court has confirmed the position with counsel for the respondents who also did not have the commissioned affidavits by Miss Jossy du Toit and Gary Brian Kinkradt referred to above in its possession. The applicants did not react to these allegations and gave no evidence to the contrary in this regard.

[4]. Mr de Klerk mentioned that he has locus standi but never referred or elaborated in this regard in the rest of the founding affidavit. [6]

THE APPLICANTS NOTICE OF MOTION

[5]. Referring to the relief sought in the Notice of Motion, mr de Klerk refers to setting aside the 3rd respondents decision (the Municipal Appeal Authority for the City of Mbombela Local Municipality – hereafter the MAT) which was taken on 13th June 2018 and the reasons provided to the applicants’ on 11th July

2018. [7]

[6]. From the papers before me, it is obvious that the applicants application was not dealt with by the MAT but the applicants were informed that the points in limine was dismissed whereby the applicants were invited to attend an appeal hearing by the MAT scheduled for 2 days (31st July 2018 and 1st August

2018) at the Hazyview Protea Hotel at 10:00 am. [8]

[7]. Mr de Klerk alleges that the MAT provided the applicants with its reasons for declining its points in limine dated 11th July

2018. [9] There is no indication that the decision or reason was forthcoming from the MAT. Instead both letters came from the office of the 1st respondent which letters were dated 13th June 2018 and 9th July 2018.

[8]. From the papers it is clear that Qualtec Development Trust (represented by the applicants) as the 4th respondent owed properties next to each other; the one party planned to develop a residential area and the other party wanted to develop a Day-care centre, Nursery school and a Crèche.

[9]. In 2016, the 4th respondent started with its plans to develop and build the Day-care centre, Nursery school and a Crèche. The application for rezoning of the property owned by the 4th respondent is attached to the applicants’ application. [10] The 4th respondent had to comply with the requirements for rezoning as well as public participation of the proposed development. [11]

[10]. Mr de Klerk, in his personal capacity, lodged a complaint addressed to the 1st Respondent whereby Mr de Klerk alleged that he was representing the surrounding owners / residence of properties in M[...] Street, C[...] Street and Aurora Drive, Nelspruit Extension 14. [12] From reading the complaint there is no reference to Qualtec Development Trust. The first paragraph of the complaint

read as follows –

“OBJECTION TO THE LAND DEVELOPMENT APPLICATION – AS/16/02031 SUBMITTED ON PORTION 19 OF ERF 3242 NESLPRUIT EXT 14

I Francois de Klerk, on behalf of the residence of Nelspruit Ext 14 (See attached list) hereby formally object to the land development application AS 16/02931 submitted by GAP development Planners

.....

Taking the above into consideration, we hereby formally object to the proposed development.

SIGNED BY MR DE KLERK [13]

.....

Signature of the person or representative of the body or authorised representative in the case of a petition.

Dated: 30 November 2016.

See attached Petition pages 1 – 4”

[51.2.] The objection has been lodged as follows –

‘Francois de Klerk

Portion 80 of erf 3[...]

Nelspruit Ext 1[...]

· 082 458 4422

francois@agroup.co.za’ [14]

[11]. Somehow a list of names, addresses and signatures of some persons were attached which appears on some pages attached to the founding affidavit; nothing more. [15]

SEQUENCE OF EVENTS AND HEARINGS

[12]. The following events transpired between the applicants and the respondents –

[12.1.]. The 4th respondent’s application for the re-zoning of the property was handed in at the offices of the 1st respondents on 24th October

2016. [16]

[12.2.] A letter dated 14th June 2017 addressed to mr de Klerk indicated that a hearing would be arranged for 28th June 2017 whereby Mr de Klerk was invited to state his case in support of his objections and indicate whether he would require a site inspection. [17] Mr de Klerk responded in a letter dated 21 June 2017 and raised a few concerns and confirmed that a site meeting should be held. [18]

[12.3.].The first meeting between the parties was scheduled for 27th September 2017 which purportedly proceeded notwithstanding a request by the applicants for the postponement of the meeting.

[12.4.]. After the meeting of 27th September 2017 was held, the Planning Tribunal of the City of Mbombela sent a letter dated 9th November 2017 to Mr de Klerk indicating that the result of the meeting was that the objections raised by applicants for the re-zoning of the remaining portion of

Erf 19 of Erf 3242 X 14 Nelspruit from 'Special' for the purpose of Sports grounds to 'Special' for the purpose of a Nursery school, Crèche and Day care centre was not upheld.[19] The property would therefore be re-zoned in terms of section 50 of the by-laws on Spatial Planning and Land Use Management Act 16 of 2013 from 'Special' for Sports grounds to 'Special' for purpose of Nursery School, Crèche and Day care centre subjected to specific conditions. The reasons for the re-zoning was explained in the letter to Mr de Klerk. [20]

[12.5.]. The applicants served a notice of appeal dated 29th November 2017 on the Registrar Mbombela Appeal Authority. [21] Paragraph 2 of the notice reads as follows –

'We Nuplan Development Planners CC, act herein on behalf of FRANCOIS DE KLERK as an authorised Trustee of QUALTEC DEVELOPEMENT TRUST. We confirm that we have, by way of due appointment and authorisation been instructed to lodge a

NOTICE OF APPEAL

in terms of section 116 of the Mbombela By-laws on Spatial Planning and Land Use Management within the 21 days allowed.....

.....

We await confirmation of the date for the appeal hearing at your earliest convenience.....[22]

[12.6.] The grounds for the appeal [23] and the appellants chronology of events is attached. [24]

[12.6.1.]. Noteworthy from the schedule of events in the period since the beginning of 2017 and before the appeal was scheduled, a number of letters and information was exchanged between the applicants and the 1st to 3rd respondents. [25]

[12.6.2.]. The 4th respondent filed a notice to oppose the applicants appeal in terms of section 118 of the Mbombela By-law on Spatial Planning and Land Use Management Act 16 of 2013 dated 14th December

2017. [26]

[12.6.3.]. The applicant had ample time from 28th June 2017 to 22nd September 2017 to prepare the reports mentioned in the appeal memorandum to be served on 20th September

2017. From the schedule the appeal hearing was set down for 10th April

2018. [27]

[13]. Mr de Klerk alleged that on 15th June 2018 the MAT communicated its decision to refuse the applicants points in limine to the applicants. [28] This allegation by mr de Klerk is factually incorrect.

[13.1.]. The first letter dated 13th June 2018 only mentions that the applicants 'points in limine' was 'not refused but was indeed dismissed'. To refuse a decision means that the entity declined to listen to hear any arguments but to dismiss a 'point in limine' is to make a 'judgment' that the reasoning or the contents of the 'point in limine' is bad in law or not applicable. There is no reason why the merit of the application could not follow after the applicants 'points in limine' has been dismissed.

[13.2.]. The second letter dated 9th July 2018 referred to the information conveyed to Mr de Klerk via Nuplan Development Planners in which letter Mr de Klerk was informed that the re-zoning of the disputed property was not affected and that the subdivision was not registered at the Deeds office and its status remained unchanged being that of 'Special'. [29]

[14]. Meanwhile, on 11th June 2018, the 4th respondent sold the property to the 5th respondent. In this regard it is noteworthy to find the proof of the sale between the 4th and the 5th respondents included in the applicants papers. [30] For purposes of this application, the 4th respondent was no longer the lawful owner of the immovable property known as remaining Extent of Portion 8[...] of Erf 3[...] Nelspruit Mpumalanga [31] at the stage when legal action was instituted by the applicants against the respondents. The property was registered in the name of the 5th respondent on 8th October

2018. [32] The 4th respondent was no longer a party to the proceedings between the applicants and the respondents, thus excluding the 4th respondent.

[15]. The appeal hearing on the merit of the objection was set down for 18th October

2018. [33]

[16]. For all intents and purposes the arguments of how the 4th respondent went about in applying for the rezoning read with the allegations by Mr de Klerk has in my view no further impact on the application before this court except to merely refer to sections and interpretations of the sections mentioned in the affidavit. [34]

[16.1.]. Mr de Klerk alleges that the 4th respondent could not apply for the rezoning of the property as section 56(1) and section 61(1) of the Town Planning and Townships Ordinance prevented it.

[16.2.]. Mr de Klerk alleges that the Planning Tribunal was in breach of the provisions of section 61(1) of the Ordinance. [35] In this regard one must read the letter dated 9th July 2018 which clearly indicates that the rezoning was not affected. [36]

[17]. Mr de Klerk refers to the dismissal of the applicants 'points in limine' and the decision of the MAT, which constituted a breach of various sections of the Promotion of Administrative Justice Act 3 of 2000 [the PAJA]. [37] The effect of the letter dated 9th July 2018 is that it only refers to the dismissal of the applicants' 'points in limine' and not to the merit of the appeal which was never dealt with before the MAT.

THE APPLICANTS ARGUMENTS REGARDING A JUST AND EQUITABLE REMEDY

[18]. Mr de Klerk argued that the dismissal of the applicants' 'points in limine' constitute an Administrative action as contemplated in section 1 of PAJA. PAJA was promulgated to give effect to a lawful, reasonable and procedurally fair process where public officials exercise their powers to make decisions. Mr de Klerk argue that in dismissing the applicants' 'points in limine' the MAT has infringed the rights of the applicants in terms of section 33 of the Constitution. [38] Mr de Klerk also submit that a court shall, where the MAT did not comply with the standard required for a fair and lawful Administrative

action, a court has the discretion to declare such action invalid based on which would be just and equitable.

[19]. Mr de Klerk submits that for the review and setting aside the decision by the MAT with reference to the 'points in limine' qualify as an 'exceptional case' based on the Municipalities' By-laws, the Ordinance and the SPLUMA. Mr de Klerk submits that the application by the 4th respondent should have been declined as it was fatally defective.

[20]. Mr de Klerk in the founding affidavit refers to the following –

[20.1.]. To remit the matter back to the MAT would constitute a waste of time, resources and money for Qualtec Development Trust and the 4th respondent, but also for the Municipality and the MAT. [39]

[20.2.]. Section 7(2)(a) of the PAJA provides that a court shall not review an Administrative action unless an internal remedy provides for in any other law has first been exhausted. [40]

[20.3.]. Mr de Klerk submits that at the 1st hearing of the MAT on 10th May 2018, the applicants' 'points in limine' was 'dismissed'. Mr de Klerk submits that because the appeal was not heard on the merit, the case was 'exceptional' and that the applicants must be exempted from continuing to exhaust the internal appeal.[41] Mr de Klerk argued that should the 'points in limine' been upheld it would have been the end whereby the Planning Tribunals authorisation of the 4th respondents application would have been dismissed.

[20.4.]. Mr de Klerk admit and concede that the applicants appeal has not been finally ruled upon by the MAT but that the applicant should for this reason be exempted from having to go through a fruitless and wasteful exercise of debating the appeal on the merit, only thereafter to bring a review application. [42] The applicants argue that the MAT would spend a lot of time in finalising the appeal and the usage of resources and it would be a waste of time.

[20.5.]. Mr de Klerk mentioned that Qualtec Development Trust is the owner of portion 80 of Erf 3[...] Ext 1[...] Nelspruit.

[20.6.] Mr de Klerk received an letter which was addressed to Qualtec Development Trust dated 15th February 2017 in which mentioning was made to reconsider the objection raised by mr de Klerk. [43]

THE RESPONDENTS

[20]. The Municipal Manager of the Mbombela Local Municipality (the respondent) deposed to an affidavit on behalf of the 1st to 3rd respondent.

[44] The respondent is the Head of the 1st respondents' Administration and responsible for the implementation of the 1st respondents' Municipal by-laws, Spatial Planning and Land Use Management Act 16 of 2013 [the SPLUMA] and other Legislation in the Provincial Gazetted Extraordinary dated 10th July 2015 Notice 79 of 2015. [45]

[21]. 'The first respondents' first point in limine': The respondent raised the 'mootness' of the applicant's application

[21.1.]. The 1st to 3rd respondents submit that the present application became "moot" in that by the time that the applicant declared the dispute and instituted the present application, the dispute was no longer applicable. The reason being that the 5th respondent became the lawful owner of the property which was sold to the 5th respondent on 11th June 2018 and properly registered in the name of the 5th respondent on 10th October

2018. [46] The 4th respondent was no longer the owner of the property.

[21.2]. As the matter stands (as from the transfer of the property from the 4th to the 5th respondents), the applicants application has no effect on the matter between the applicants and the 1st to 3rd respondents. The respondent confirms that the 5th respondent applied for a rezoning of the property which was not opposed by or objected to by the applicants. For this reasons the application between the applicants and the 1st to 3rd respondents became "academic in nature" and which has become "moot".

[22.3]. The respondent submit that the MAT (the 3rd respondent in this application) is the entity in terms of section 143(1) of the By-laws to confirm, vary or revoke the MPT's decisions. The dismissal of points in limine does not mean that the merit of applications before the Tribunal or Planning committee is dismissed. Objections and assumptions without evidence does not allow an aggrieved person to merely make use of section 7(2)(a) of the PAJA to address disputes which has not been dealt with by the internal structures of the Municipality.

[22.4]. The respondent confirmed that the property referred to by the applicants are still fenced and remain as a sports ground for the present purpose. [47] The 5th respondent's application for rezoning [48] (which is not before this court to adjudicate about) would take effect to provide an Educational facility to advance the educational

needs for children who would attend the facility as from 2020. This 2nd application by the 5th respondent was never challenged by the applicants in the present application before me.

[22.5]. The respondents referred to the time frame of the legal action instituted by the applicants against the respondents. The applicants' application is dated 4th October 2019 whereas the property referred to in the application was sold and transferred from the 4th respondent to the 5th respondents on 10th October 2018. The applicants' issued their application a few months after

the change of ownership of the property from the 4th to the 5th respondents took place. For this reason there is no 'dispute' between the applicants and the 1st to 4th respondents. There is no indication of any reason for the delay in the issuing of this application on 4th October 2019.

[23]. 1st to 3rd Respondents second point in limine: Jurisdiction

[23.1.]. The respondents argue that this court does not have the jurisdiction to hear the applicants application as the internal remedies provided by the By-laws and the applicable Legislation of the Municipality makes provision that the internal remedies must first be exhausted where after an applicant may approach a court for a review and setting aside any decision of a public official in terms of the PAJA.

[23.2.]. The respondents submitted that the applicants did not argue its merit before the MAT but instead elected to try to follow an unlawful short-cut to this court which is not the correct procedure in dealing with issues still to be adjudicated by the Municipalities Internal structures put in place to deal with a case where after any aggrieved party may approach a court for relief.

[23.3.]. The respondents submitted that the applicant must have been aware of the change of ownership of the property between the 4th and 5th respondent as the printout of the sale and transfer of the property in dispute was attached to the founding affidavit of Mr de Klerk. The MAT is the entity who is the designated Municipal body to have heard the merit of the applicants' complains prior to any other legal action being instituted. The deponent of the answering affidavit does not have insight into the dispute resolution process of the MAT and the applicants in relation to the merits of their application, which has since become 'moot'. A dismissal of 'points in limine' does not mean that the main application has also been dismissed. For this reason the court does not have jurisdiction to interfere in the uncompleted proceedings of the Municipality and its structures. The applicants did not advance any exceptional

reasons for this court to intervene in the administration of the Municipality and its internal legal structures which are dealing with complaints.

[23.4.]. For this reason, the 4th respondents purported application is wrongfully before the court. The arguments forwarded by the applicant should therefore be dismissed.

[24]. The 1st to 3rd respondents' third 'point in limine': Locus Standi of the applicants

[24.1.] Locus standi refers to the right of a person or entity to enter into litigation. This right is subjected to requirements which are applicable on the specific case or application with its own unique circumstances.

[24.2.]. From evaluating the purported schedule attached to the founding affidavit deposed to by Mr de Klerk, reference is made to a table containing names, addresses and signatures. There is no indication of what the purpose of this document is. Absent is the authority of each signatory or any indication of any vested or established rights being infringed.

[24.3.]. From the application these ‘affected persons or entities’ are not joined in the present application; there is the allegation by Mr de Klerk acting on behalf of a group of alleged residents with reference to section 38 of the Constitution of the Republic of South Africa Act 108 of 1996. The purported petition does not indicate the reason for the petition nor does it contain any Special Power of Authority by each signatory to Mr de Klerk to act in the interest of those signatories, that each would accept the outcome of this court’s judgment and order or whatever or even acknowledge that each signatory would be liable for any cost or cost order against the signatories, jointly and / or severally. It seems as if this was just a table or schedule with names, signatures and addresses.

[24.4.]. The following Legislation and By-laws makes provision for the following actions to be taken in this regard -

[24.4.1.]. Section 45(2) of the SPLUMA provides for the procedure whereby any affected person or entity could intervene in the functioning of the MPT and the MAT.

[24.4.2.]. Section 54(3) of the SPLUMA provides for a person or entity to establish his or her or its status as an interested person or entity.

[24.4.3.]. Section 120 of the By-laws deals with parties to an appeal authority as an appellant who lost an appeal read with section 51(1) of the SPLUKA or after a petition under section 45(2) of the SPLUMA to be granted intervenor status.

[24.4.4.]. Section 51(5) of the SPLUMA refer to an interested person who must for the purposes of sub-section 4(c) be a person who is having a pecuniary or proprietary interest and who is adversely affected and able to demonstrate that he or she would be so affected by the decision of the MPT or an MAT.

[24.4.5.]. The respondents submitted that the 1st applicant could not under the circumstances act on behalf of the purported ‘affected owners’ of the neighbourhood merely based on a table or schedule with names, signatures and addresses in the light that there was no description of the complaint or a special power of attorney to Mr de Klerk to act on behalf of the purported owners of property in the neighbourhood.

[25]. 1st to 3rd Respondents fourth ‘point in limine’: Internal remedies

[25.1.]. The respondents submit that dismissing the applicant ‘points in limine’ during the internal procedures of the Municipality, does not qualify and authorise the applicants to advance to this court in terms of section 7(2)(a) of the PAJA. The applicants appeal is still ‘alive’ and must be dealt with by the 3rd respondent in terms of the SPLUMA and its Regulations.

[25.2.]. The applicant has not disclose or demonstrated the existence of ‘exceptional circumstances’ to enable the applicants to deviate from the procedures to be followed by the applicant and the 1st to 3rd respondents at municipal level. The reasons advanced by the applicant do not fall within the category or to be classified as ‘exceptional circumstances’.

[25.3.]. The applicants did not allege or refer to section 113 of the By-laws in the founding affidavit by mr de Klerk which might have been regarded as grounds for an exemption to exhaust the internal remedies available to the applicants. Nor did the applicants allege that the 3rd respondent was inconsistent with either the By-laws, SPLUMA or its regulations.

EVALUATION OF THE EVIDENCE

THE APPLICANT

The Trustees

[26]. Evidence by the applicants which needs to be referred to are the following –

[26.1.]. The 1st and 4th applicants, Mr de Klerk, indicates that he was acting in his official capacity as a Trustee (1st applicant) of the Qualtec Development Trust and secondly in his own personal capacity as the 4th applicant.

[26.2.]. From the onset there is no resolution provided by the Trust whereby the Trustees authorised Mr de Klerk to institute legal proceedings against the 1st to 5th respondents.

[26.3.]. The Letters of Authority to act as a Trustee of the 1st and 3rd applicants are the only documents attached to the application. [49] The 2nd applicant does not possess a Letter of Authority from the Master of the High Court to be appointed as a Trustee of Qualtec Development Trust.

Authorisation of mr de Klerk to act on behalf of the trust

[27.]. Mr de Klerk does not allege in the founding affidavit that –

[27.1.] Mr de Klerk had been authorised by his co-Trustees to bring the present application on behalf of the Trust. There is no copy of any relevant resolution, which reflects that Mr de Klerk and all the other Trustees had decided that Mr de Klerk was authorised, in his capacity as a Trustee, to institute motion proceedings against the respondents for the relief sought in the Notice of Motion.

[27.2.]. Annexed to the founding affidavit are two supporting affidavits by the remaining two Trustees being the 2nd and 3rd applicants which are not commissioned.

[50] This in itself is alarming and does not further the case of the applicants in any way. The 2nd and 3rd applicant merely refer to the founding affidavit by Mr de Klerk referring to references to the 2nd and 3rd respondents without specifically stating that Mr de Klerk was authorised in his capacity as Trustee to institute legal proceedings against the respondents on behalf of the Trust as he may in the exercise of his own and exclusive discretion deem fit.

[27.3.]. From the citation of the 2nd and 3rd applicants as Trustees and the Letters of Authority issued by the Master the 2nd applicant was and is not a Trustee of the Trust at the time when the 1st, 3rd and 4th applicant instituted legal action against the respondents . For this reason read with the non-commissioned affidavits by the 2nd and 3rd applicants the application is fatally flawed.

[27.4.]. The applicants did not attach the Trust Deed to the application. Mr de Klerk did not allege with proof that he was the authorised or delegated person by the Trustees in the Trust Deed to institute legal action against the respondents. All that Mr de Klerk states in the founding affidavit is that he is a major business man residing at 21A Laser Street Die Steiltes Nelspruit and he is a Trustee of Qualtec Development Trust [51] and that he is the 4th applicant acting in his personal capacity.

[27.5.]. In my view it is clear that Mr de Klerk was not authorised by the purported Trustees, excluding the 2nd applicant who is not on the documents filed by mr de Klerk a Trustee of the Trust in terms of section 6(1) of the Trust Property Control Act 57 of 1988. In the absence of the Trust Deed, no allegations by Mr de Klerk regarding Qualtec Development Trust are properly before a court to make an informed decision. The applicants (mainly Mr de Klerk) were responsible to provide the necessary documents to prove its allegations. Mr de Klerk, in failing to provide the Trust Deed and the proper authorisation by the other Trustee(s), created the applicants predicament in this application.

[27.6.]. Decisions taken in terms of the Trust Deed forms the backbone of Trusts which include decisions made for and the delegation of powers by majority vote or those taken unanimously by all serving Trustees. It must be kept in mind that, although common, a provision that a decision can be reached by majority vote (as opposed to decisions taken jointly and unanimously) to an extent constitutes an abrogation of the joint action requirement that generally applies to Trusts [52].

[27.8.]. There is no allegation by Mr de Klerk of any clause of the Trust Deed in which he has specifically been delegated the powers of the other Trustees to institute or defend legal proceedings on behalf or against the applicants or the respondents. There is no allegation by Mr de Klerk that he was specifically delegated in terms of any clause of the Trust Deed that Trustees could authorise one another to sign, for official purposes, any document required for the administration of the Trust and for the execution of any transaction in connection with the affairs of the Trust or to defend or institute legal action against or on behalf of the Trust. In my view it is clear that in the absence of a Trust Deed and read with the non-commissioned affidavits by the 2nd and 3rd applicants, the power to institute or defend legal proceedings on behalf of the Trust and other Trustees was not delegated to Mr de Klerk acting in his official capacity as a Trustee of the Qualtec Development Trust.

[27.9.]. In my view the specifically delegation of “fundamental decisions” and of “fundamental discretionary power” would have to be expressly provided for in a Trust Deed and, if not, it will not readily be implied [53]. In the absence of the Trust Deed and the resolution in the present

matter and as far as the relief sought in the notice of motion is concerned. It is clear that the body of Trustees did not delegated to Mr de Klerk any power to institute legal proceedings against the respondents and to sign all documents and take all necessary steps to bring such proceedings to finality. This is also evident from the purported representation of Mr de Klerk on behalf of the residents of the specific area of the property in dispute.

[27.10.]. The impact of the 2nd and 3rd applicants non-commissioned affidavits is of no consequence or advantage of the 1st to 3rd applicants' case. It is the objective contents of resolution (which is missing in this application) which would have been decisive and any resolution "must be interpreted objectively in order to determine (its) precise ambit and legal effect". Under normal circumstances the "ordinary principles of the law of agency"[54] would prevail, which would allow a Trustee to authorise another Trustee to act on his or her behalf. This specific requirements is absent in the present application.

[27.11.]. Even if it is to be assumed that a Trustee could in his/her name institute legal proceedings on behalf of all the other Trustees, it would still be a requirement that such a Trustee be authorised to act on behalf of the other Trustees. [55] Even though Mr de Klerk have in the present matter not explicitly averred that he instituted these proceedings on behalf of the other Trustees, it is in my view abundantly clear that this is precisely what happened.

[27.12.]. There appears moreover to be no requirement of formality regarding how the remaining Trustees should signify their association with the action so long as adequate proof is produced that the litigating Trustee has been properly authorised to act on behalf of all the other Trustees. [56] One Trustee would only be able to authorise another "to institute proceedings on his or her behalf" if the former is in terms of section 6(1) of the Trust Property Control Act [57] entitled to act as a Trustee.

Mr de Klerk acting on behalf of the signatories of the purported petition

[28.]. Mr de Klerk alleges that he was acting on behalf of the residents/property owners in the area and purportedly attach a "list of residents as a petition" to the founding affidavit. [58]

[28.1.]. The list is undated and further the purported "aggrieved residents" does not specifically authorised Mr de Klerk by means of a 'Special Power of Attorney' or whatever to institute legal action against the respondents.

[28.2.]. The signatories do not confirm the contents of the founding affidavit or any of the annexures' thereto by Mr de Klerk which should have been an important aspect to be included in the purported petition.

[28.3.]. There is no indication in the purported petition of any of the following –

[28.3.1.]. Any indication of any authorisation of Mr de Klerk to act on behalf of the signatories to the purported petition.

[28.3.2.]. Any indication of the litigation to follow, the responsible legal representative(s), the cost of litigation, who would be responsible to pay the cost of litigation, whether Mr de Klerk is funding the cost of litigation, time frames and possible outcomes of any litigation.

[28.3.3.]. Responsibilities of any signatory to the purported petition in future actions and litigation, risks or any conflicts in interests between the signatories of the purported petition.

[28.3.4.]. Whether the signatories were offered the option of 'opt-in' or 'opt-out' in the process and the litigation between the applicants' and the respondents' and if so, what was expected from each signatory?

[28.3.5.]. Whether any signatories were indemnified from whatever result or failure of the petition would have on the signatories?

[28.3.6.]. In the light of the above I am of the view that the purported petition annexed to the founding affidavit does not include the essential elements to inform a potential signatory of the contents and the results of a petition. There is NO indication by any of the signatories that Mr de Klerk was authorised to act on each signatories behalf. The purported table is undated. Another important aspect is that none of the signatories confirm the founding affidavit with a confirmation affidavit. In this regard the reference to representation of signatories in the founding affidavit is not corroborated.

The applicant's application

[29.]. The affidavit of Mr de Klerk was commissioned on 11th October 2018 and the application was issued on the same date. [59]

[29.1.]. According to the affidavit by Mr de Klerk, the property in dispute was sold by the 4th respondent to the 5th respondent on 11th June

2018. [60] The transfer of the property from the 4th to the 5th respondent was affected on 8th October

2018. [61] In other words by the time that this application was brought by the applicants against the 1st to 5th respondents, the 4th respondent was no longer the lawful owner of the property. Whatever was included in the 4th respondents' purported application for the rezoning of the property, became "moot and of no value to the applicants".

[29.2.]. In my view, the applicants, especially Mr de Klerk, was instituting legal action against the 4th respondent long after the 4th respondent disappeared from the scene. This actions resulted in litigation which was clearly unnecessary and there is no indication

that the signatories of the purported petition was duly informed that the legal issues with the 1st to 3rd respondent concerning the 4th respondent has ended.

[29.3.]. Other as allegations by Mr de Klerk about the purported registration of the re-zoning of the property in dispute, and notwithstanding the confirmation by the 1st respondent that the status of the property was unchanged, the litigation continued over a matter that has ended or became 'moot' on 8th October 2018.

[29.4.]. The respondents submitted that because the matter became 'moot' there is no consequences or results from a matter that became 'moot' such as this application. Read herewith that there was no evidence by Mr de Klerk that the status of the property in dispute, has indeed changed as alleged. A court will not give advisory opinions on an abstract proposition of the law where a case no longer exists and has become 'moot'. There can hardly be a clearer instance of issues that are wholly academic of issues exciting no interest but an historical one, than those on which a ruling is wanted which does not exist at the time of the judgment to be handed down. Due to the actions by the applicants their application became "moot" especially where the ownership of the property changed prior to the applicants application being issued. The question to be answered is when does a matter become "moot"? The Constitutional Court described the concept of "mootness" in the matter of National Coalition for Gay and Lesbian Equality & Others v Minister of Home Affairs [62] in which the Court held the following –

"A case is moot and therefore not justifiable if it no longer presents an existing or live controversy which should exist if the court is to avoid giving advisory opinions on abstract propositions of law. Such was the case in JT Publishing (Pty) Ltd and Another v Minister of Safety and Security and others [1996] ZACC 23; 1997 (3) SA 514 (CC); 1996 (12) BCLR

(1599) where Didcott J said the following at para [17] –

"There can hardly be a clearer instance of issues that are wholly academic, of issues exciting no interest but an historical one, than those on which our ruling is wanted have now become"

The jurisdiction of this court to intervene in the procedures and tribunals of the 1st respondent

[30]. Mr de Klerk submits that this court must intervene and review and set aside the purported decision by the MAT.

[30.1.]. The applicants 'points in limine' was dismissed by the MPT. Thereafter the applicants were invited to an appeal hearing set down for 31 July 2018 and 1 August 2018.

[30.2.]. From here the present application found its way on the court roll. The only argument by Mr de Klerk is that this is an exceptional case; nothing further. Not attending the invitation to attend the appeal hearing, Mr de Klerk approaches this court and in doing so disregards the procedures and internal remedies of the 1st respondent being the 3rd respondent, after being unsuccessful with the appearance before the 2nd respondent.

[30.3.]. Any request for a court to intervene in matters such as this one stands to be dismissed for the simple reason that a court cannot intervene whilst there is internal remedies that should be exhausted prior to approach a court under circumstances as in this application. Mr de Klerk had the opportunity to have the merits dealt with by the Appeal Tribunal of the Municipality, but due

to the influx of time, the matter became ‘moot’, especially with the transfer of ownership from the 4th to the 5th respondents, prior to the launch of this application. The allegations and relief sought against the 1st to 4th respondents under the circumstances described in the founding affidavit stands to fail.

[30.4.]. It is clear that the applicants did not follow the procedures prescribed by the SPLUMA, the Regulations and the By-laws. It is clear that the MAT did not hear the merit of the applicants appeal but elected for some unknown reason to take a short-cut to issue the application.

[30.5.]. There is no reference to section 113 of the By-laws which deals with ‘bias and disclosure of interest’ or any allegation in terms of motivated proposes or submissions regarding of fraudulent actions by the Municipality, wilful derailing of the appeals process by the MAT, loss of documents and information by the MPT and MAT, that the community in this specific area is going to suffer health risks, noise pollution, increase in traffic volume and accidents, any shortage of essential services, that the community is going to suffer irreparable harm or that there is an increase in crime in the area. None of the above was dealt with in the founding affidavit.

[30.6.]. The only reason that Mr de Klerk referred to is that to follow the procedure of the MAT is a ‘waste of time and money’. This is not a valid reason to approach a court for a ‘short-cut’ to try to have a court review and set aside a ruling by the MAT to dismiss the ‘points in limine’ whereas the merit of the applicants application was not even dealt with by the MAT. This is to put the ‘horse before the cart’ and to require a court to act in this manner, should set a dangerous precedent for similar situations. The law is very clear – exhaust all internal remedies and procedures before issuing an application such as in this case. Then a litigant can approach a court with clean hands and request the relief sought by the applicants; otherwise it is a futile exercise, a waste of the courts time and money.

[30.7.]. Mr de Klerk did not elaborate or motivate the purported ‘exceptional circumstances’ why this court should entertain this application, which has become ‘moot’ prior to the application being issued. I can find no “exceptional circumstances” in terms of section 8(1)(c)(ii) of the PAJA to entertain the applicant’s application.

SUMMARY OF APPLICATION

[31]. The application by mr de Klerk on behalf of the applicants for the review and setting aside the decisions made by the 1st to 3rd respondents have no merit as Mr de Klerk was not authorised by the trustees, in the light of the 2nd applicants position, read with the 3rd applicants non-commissioned affidavits to institute any legal action against any of the respondents.

[32.]. Any references to the 4th respondent in the application by the applicants are of no use to the applicants.

[33.]. The applicants have wrongfully placed the 4th respondent as the culprit before the court to argue its case. In my view the 4th respondent has no bearing on the applicants' applications, its actions read with the lawful ownership of the 5th respondents' property which was confirmed by the applicants, prior to the issuing of this application by the applicants.

Other as to acknowledge that the 5th respondent is the lawful owner of the property in dispute, not a single aspect regarding the lawful owner of the property was dealt with by the applicants.

[34]. Mr de Klerk claims that the points in limine was "refused"; its incorrect, it was "dismissed". The applicants were afforded an opportunity to state their case before the Municipal Appeal Tribunal. [63]

[35]. Mr de Klerk claims that the Appeal Tribunal forwarded the reasons for the "refusal" of the "points in limine" is incorrect. The Appeals Tribunal recorded the following in the letter addressed to the applicants dated 9 July 2018 [64] which reads as follows -

"The decision to dismiss the "Point in Limine" pertaining the application process (particular the advertising notices) followed by the applicant was based on the following -

1. The property is currently zoned "Special". The applicant complied with all the application process required in terms of the Mbombela By-laws on Special Planning and Land Use Management.
2. The argument that there was no consideration given to the change of land use from 48 erven zoned "Residential 2" and approved subdividing and amendment scheme (AS/14/01840) is dismissed based on the fact that the intended subdivision was not registered at the Deeds Office, resulting on the property retaining its original zoning of "Special" .

[36]. From reading the papers the Provincial Gazette no 2587 dated 16th October 2015 refer to the Local Authority Notice 118 of 2015 [65] -

'[1]. Portion 1 to 48 of the remainder of Portion 1[...] of Erf 3[...] Nelspruit Extension 14 to 'Residential 2' subject to Annexure conditions'

[37]. Following the above the 4th respondent advertised the proposed re-zoning in the Lowvelder, which for all present purposes became 'moot'. [66] The 1st respondent indicated that the re-zoning did not take effect. From the papers it is clear that mr de Klerk did not attach any proof of this allegation that the property was indeed re-zone in this regard to his founding affidavit or in any reply.

CONCLUSION

[38]. For the above reasoning the applicant's application stands to fail and be dismissed with cost.

COST

[39]. Cost should be awarded to the successful party. The respondents argued for a punitive cost order on attorney-own-client scale. I am of the view that the applicants' was the creator of its own misery so to speak. I am of the view that the applicants' actions in this regard must be taken into consideration in awarding cost. Not only have they embarked on an application which included the wrong party (allegations against the 4th respondent) but they also tried to engage the residents of the neighbourhood in their fatal action against the 1st to 3rd respondents. Fatal deficiencies such as the absence of resolutions and commissioned confirmation affidavits formed part of this application, not to mention the request to the court to entertain this application under specific sections of the PAJA whereas the internal remedies of the appeal Tribunal was still an option.

[40]. The answering affidavit by the respondents were signed and commissioned on 23rd April 2019 and served on the same day. For some reason there is no replying affidavit on the court file. For this reason the allegations

by the respondent stand uncontested as there is no rebuttal of any allegations or any other evidence by the 1st to 3rd respondents under oath for that matter.

[41]. Coming back to the answering affidavit of the respondents, it is clear that the applicants' had an opportunity to take note of the contents of that affidavit, especially with reference to the change of ownership of the property which was confirmed by Mr de Klerk in his founding affidavit. This should have alerted Mr de Klerk not to 'jump the gun' so to speak but to investigate the matter in more detail. There were many ways to have stopped this unnecessary litigation but instead the applicants, especially Mr de Klerk persisted in furthering their "moot application" knowing what the correct position is.

[42]. This application was set down for 30th June 2020, some one year and two months later. In my view there was ample time to re-evaluate the applicant's position and to acted differently instead of persisting that the application be heard.

[43]. Under these circumstances I am of the view that cost should be granted on a punitive scale.

ORDER

[44]. The application is dismissed with cost.

[45]. The applicants are ordered to pay the cost of the 1st to 3rd respondents on an attorney-own-client scale, to be paid jointly and / or severally, the one paying the other absolver including the wasted cost of the postponement of 30th June 2020.

[46]. The cost of the respondents shall include cost of two counsel so employed.

H.C.JANSEN VAN RENSBURG

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

MBOMBELA DIVISION

Date of hearing: 30th June 2020

7th July 2020

Judgment: 16th July 2020

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Ref: MABUZA/05/M157/18/PP

4th AND 5TH RESPONDENT

No appearance

- [1] See paragraph 2.1 of the founding affidavit page 8.
- [2] See page 7 para 1.2. and page 31 para 50.
- [3] See page 35 para 52
- [4] See page 213.
- [5] See page 216.
- [6] See page 7 para 1.3.
- [7] See annexure QD 4 and QD5 from the founding affidavit.
- [8] See page 11 para 6 read with page 42 annexure QD4 dated 13th June 2018.

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- [9] See page 11 para 7 read with page 44 annexure QD5.
 - [10] See page 46 annexure QD7 read with section 43 of the Mbombela By-law on Spatial Planning and Land Use Management 2015 [SPLUMA].
 - [11] See affidavit by Gerhardus Wilhelm Botha dated 5 December 2016 annexure QD9.
 - [12] See page 113 annexure QD 10.
 - [13] See page 117 and page 34 para 51.14 and 51.15.
 - [14] See page 31 to 32 para 51.3. Also see paragraph 1 of the objection by mr de Klerk where mr de Klerk in his personal capacity and as a purported representative of the residents in the area objected to the 4th respondent's application.
 - [15] See page 118 to 121
 - [16] See page 252
 - [17] See page 309.
 - [18] See page 388.
 - [19] See page 122 annexure QD 11 and page 407.
 - [20] See page 410 under the paragraph dealing with the reasons for the approval.
 - [21] See page 145 annexure QD 13.
 - [22] It must be mentioned that the initial objection was served in the name of mr de Klerk - see footnote 14 above read with page 146.
 - [23] See page 147 annexure QD 14.
 - [24] See page 173 of the bundle.
 - [25] See page 178 to 182.
 - [26] See page 435.
 - [27] See page 182 para 53.
 - [28] See page 15 para 23 and 24 read with page 199 annexure QD16 and page 200 annexure QD 17.
 - [29] See page 200 annexure QD 17 dated 9 July 2018.
 - [30] See page 11 para 4.8. and 4.9. and page 41 annexure QD 3.
 - [31] Paragraph 4.4 and 4.5 of the founding affidavit page 10 of the bundle.
 - [32] Page 41 and 42 as annexure QD 3 of the bundle.
 - [33] See page 16 para 25.

- [34] See para 26 from page 16 to page 21 para 26.12.
- [35] See page 22 para 26.14.
- [36] See page 21 para 26.12 to page 22 para 26.14 read with page 200 annexure QD 17
- [37] See page 22 para 27.
- [38] See page 27 para 39.
- [39] See page 28 para 44.
- [40] See page 29 para 46.
- [41] See page 29 para 48.
- [42] See page 29 para 48 and page 30 para 49.6.
- [43] See page 33 para 51.7 to 51.9 and annexure QD 20 pages 205.
- [44] See pages 227 to 251 of the bundle.
- [45] See para 1 to 4 on page 228 and 229 of the bundle.
- [46] See annexure QD3 on pages 41 and 42 of the bundle.
- [47] See para 58 at page 244 of the bundle.
- [48] See page 252.
- [49] See page 37 and annexure QD 1 in the bundle.
- [50] See page 212 to 217 - annexure QD 24 and QD 25.
- [51] See page 7 para 1.1 and 1.2.
- [52] See *Land and Agricultural Bank of South Africa v Parker and Others* 2005 (2) SA 77 (SCA) (Also reported at [2004] 4 All SA 261 (SCA)) para [17]; See also *Thorpe and Others v Trittenwein and Another* 2007 (2) SA 172 (SCA) para [14].
- [53] *Ibid*, para's [24] to [26].
- [54] *Nieuwoudt NO and Another v Vrystaat Mielies (Edms) Bpk supra* (para [22] footnote 10), para's [6] and [23]
- [55] *Van der Westhuizen v Van Sandwyk* 1996 (2) SA 490 (W)
- [56] Page 266 of the 4th edition of Honoré's *South African Law of Trusts* Essentially the same remarks appear in the 5th edition of the book, at pp 322 – 323; *Cupido v Kings Lodge Hotel* 1999 (4) SA 257 (E) (Also reported at [1999] 3 All SA 578 (EC)) at 263 G, *Glen Elgin Trust v Titus and another* [2001] (2) All SA 86 (LCC) (2001 JDR 0002 (LCC)) para [14], *Buffelsdrift Game Reserve Owners' Association v Holkom and Others* [2014] JOL 32107 (GP) (2014 JDR

1427 (GP)), Deutschmann NO & Others v Commissioner for the South African Revenue Service; Shelton v Commissioner for the South African Revenue Service 2000 (2) SA 106 (ECD) at 119 F - G

[57] 57 of 1988

[58] See page 34 para 51.14 and 51.15 and pages 118 to 121 of the bundle.

[59] See page 1 and 36 of the bundle.

[60] See para 4.8. on page 11 of the bundle.

[61] See page 41 annexure QD 3 of the bundle.

[62] 2000

(2) SA 1 (CC).

[63] See page 15 para 23 and page 43 annexure QD 4 para (i)

[64] See page 200 annexure QD 17.

[65] Page 201 annexure QD 18.

[66] Page 103.

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