

SOUTH AFRICA / JUDGMENT

Du Toit and Another v Mangaung Metropolitan Municipality and Others (6019/2022) [2023]

ZAFSHC 339 (22 August 2023)

[2023] ZAFSHC 339

COURT

Free State High Court, Bloemfontein

BEFORE

JP Daffue

CASE / FILE NUMBER

6019/2022

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Policy

IN THE HIGH COURT

OF SOUTH AFRICA

FREE STATE

DIVISION, BLOEMFONTEIN

Case no 6019/2022

REPORTABLE: NO

OF

INTEREST TO OTHER JUDGES: NO

CIRCULATE TO

MAGISTRATES:

NO

In

the matter between: WILLEM
JACOBUS DU TOIT
1st
Applicant
TANYA
MARIE DU TOIT
2nd
Applicant
and
MANGAUNG
METROPOLITAN MUNICIPALITY
1st
Respondent
(Municipal
Planning Tribunal)
RAYMOND
RAUBENHEIMER N.O.
2nd
Respondent
(In
his capacity as trustee of the Raubenheimer Trust, TMP[...])
REGINIA
CATHERINA RAUBENHEIMER
3rd
Respondent
(In
her capacity as trustee of the Raubenheimer Trust, TMP[...])
BETA
TRUST ADMIN (PTY) LTD N.O.
4th
Respondent
(In
its capacity as trustee of the Raubenheimer Trust, TMP[...])

CORUM: JP DAFFUE J
HEARD

ON: 20 July 2023
DELIVERED
ON: 22 AUGUST
2023
This judgment was handed
down electronically by circulation to the parties'
representatives by email, and release to SAFLII.
The date and
time for hand-down is deemed to be 16h00 on 22 August 2023.
ORDER
1.
The rule nisi
dated 1 December 2022 and extended several times is confirmed.
2.
The first respondent shall provide, as

agreed, copies of annexures “I” to “S” of the second, third and fourth respondents’ application referred to in paragraph 3.3 of the rule nisi to the applicants’ attorneys on/or before 6 September 2023.

3.

The applicants shall, as agreed, file their response to the second, third and fourth respondents’ application with the Municipal Planning Tribunal on/or before 20 September 2023.

4.

The first respondent shall, as agreed, endeavour to ensure that its Municipal Planning Tribunal enrol the second, third and fourth respondents’ application for hearing before the end of November 2023.

5.

The first respondent shall pay the costs of this opposed application.

JUDGMENT

INTRODUCTION

- [1] The trustees of the Raubenheimer Trust TMP[...] (herein later referred to as the Trust) submitted a land use application in terms of the Free State Townships Ordinance, 9 of 1969 (the 1969 Ordinance) to the Free State Department of Corporate Governance, Traditional Affairs and Human Settlement (COGTA) on 1 November 2010. That is 13 years ago. It sought the subdivision of one of its properties, consolidation of properties and township development in respect of the consolidated property. These properties are situated in the Rayton township situated to the north of the city centre of Bloemfontein. The Trust is still awaiting finalisation of its application. Although irrelevant to this application, it is deemed appropriate to say that it is nothing, but an injustice, that residents seeking to develop their properties should be presented with the enormous difficulties experienced in casu.
- [2] The applicants in this application obtained a rule nisi on 1 December 2022 as set out fully hereunder. In 2018 and after the Trust’s application referred to in the previous paragraph was submitted, the second applicant bought a property adjacent to the properties to be developed by the Trust. The applicants want to participate in the proceedings before the Municipal Planning Tribunal (MPT) that has to adjudicate the land use application of the Trust in accordance with the present legislation. The central issue to be decided by the court is whether the applicants are interested persons entitling them to participate in the hearing before the MPT. The outcome will determine whether the rule nisi should be confirmed or discharged.

THE PARTIES

- [3] The applicants are Mr Willem Jacobus du Toit and Mrs Tanya Marie du Toit, a married couple permanently resident at 1[...] Lilyvale road, Rayton, Bloemfontein. The second applicant is the registered owner of this property (the second applicant's property). Adv HJ Cilliers appeared for the applicants on instructions of Matsepes Inc.
- [4] The Mangaung Metropolitan Municipality (the Municipality) is cited as the first respondent. The heading of the application papers as well as paragraph 3.2 of the founding affidavit indicate that the application is aimed at the Municipality's MPT. Adv AH Burger SC appeared for the Municipality on the instructions of Maduba Attorneys Inc, Bloemfontein

THE RELIEF SOUGHT

- [5] On 1 December 2022 a rule nisi was issued on application of the applicants in the following terms:

'1. Condonation is granted to the Applicants for the non-compliance with the Rules of Court pertaining to service, time limits, form and procedure and that this application be heard as an urgent application as contemplated in rule 6(12);

2. Condonation is granted to the Applicants for the non-compliance with the provisions of Section 35 of the General Law Amendment Act 62 of 1955;

3. A Rule Nisi is issued calling upon the First Respondent to show cause, if any, to this Honourable Court on 26 JANUARY 2023 at 09:30, why the following orders should not be granted and made final:

3.1 That the First Respondent be interdicted and prevented from proceeding with the Municipal Planning Tribunal hearing set down for 2 December 2022 at 08:00 relating to an application for the subdivision, consolidation and township establishment of Plots No. 9 and 12 Lilyvale Small Holdings, Rayton, Bloemfontein, Free State Province, until finalization of this application and compliance with the order issued in terms of this application;

3.2 That the First Respondent be ordered to only again enrol the Municipal Planning Tribunal hearing relating to an application for the subdivision, consolidation and township establishment of Plots No 9 and 12, Lilyvale Small Holdings, Rayton, Bloemfontein, Free State Province, upon reasonable notice to the Applicants after the First Respondent has received the legal advice it has undertaken to obtain to the issues raised by the Applicants as it had undertaken to do in their e-mail to Matsepes Attorneys dated the 27th of January 2022 and furnished such legal advice to the Applicants' attorneys, and upon reasonable notice to all interested and affected parties;

3.3 That the First Respondent be ordered to provide the Applicants with a copy of the application papers and all other relevant documentation relating thereto submitted by the Second, Third and Fourth Respondents for the subdivision, consolidation and township establishment of Plots No 9 and 12, Lilyvale Small Holdings, Rayton, Bloemfontein, Free State Province within a period of fourteen (14) days after the date of service of this order upon the First Respondent, and upon payment by the Applicants of the reasonable photocopying costs.

4. The order contained in paragraph 3.1 to operate as an interim interdict with immediate effect;
5. The First Respondent is to pay the costs of the application on the scale of attorney and client;
6. The Second, Third and Fourth Respondents are to pay the costs of the application, only in the event of opposing this application.'

[6] On 23 December 2022 the Municipality partially complied with paragraph 3.3 of the rule nisi by supplying copies of the application papers and relevant documentation submitted by the Trust for the land use application in

respect of its plots 9 and 12 Lillyvale Small Holdings, Rayton. However, it failed to submit annexures "I" to "S"

of the application. Notwithstanding this partial compliance with the court order, the Municipality filed a notice to oppose on 12 January 2023 and proceeded to belatedly file its extensive answering affidavit on 16 March 2023. Therein it raised three issues, to wit

- (a) absence of urgency; (b) non-joinder of the MPT; and (c) lack of locus standi insofar as the applicants had failed to apply to be regarded as interested parties in terms of s 45 of the Spatial Planning and Land Use Management Act 16 of 2013 (SPLUMA).

THE STATUTORY REGIME

[7] Before dealing with the relevant factual background, it is appropriate to consider the statutory regime that applied from time to time. I have referred to the 1969 Ordinance which had been applicable for many decades in respect of land use matters. When the Trust's application was served in 2010 the Development Facilitation Act 67 of 1995 (the DFA) applied. The DFA was partially declared invalid insofar as it conferred on Provisional Development Tribunals authority to regulate land use in municipal areas.[1] Before that application could be disposed of, SPLUMA came into operation on 1 July 2015, repealing the DFA.

[8] It may be argued that while SPLUMA repealed previous national planning legislation, it left in place old order legislation such as the 1969 Ordinance and more recent provincial planning legislation. This is apparent, bearing in mind s 2(2) of SPLUMA which states that 'no legislation not repealed by this Act may prescribe an alternative or parallel mechanism, measure, institution or system on spatial

planning, land use, land use management and land development in a manner inconsistent with the provisions of this Act.’ However, provincial legislation has effectively been superseded by SPLUMA.

[9] In terms of s 36 of SPLUMA a MPT ‘must consist of:

- (a) officials in the full-time service of the municipality; and
- (b) persons appointed by the Municipal Council who are not municipal officials and who have knowledge and experience of spatial planning, land use management and land development or the law related thereto.’

The municipal council must designate a member of the MPT as chairperson. Upon the first appointment of members of a MPT and when the municipal council is satisfied that it is in a position to commence with its operations, the municipal manager must publish a notice to that effect in the Provincial Gazette. The MPT may only commence its operations as contemplated in SPLUMA after the publication of the aforesaid notice.[2]

[10] SPLUMA is clear and unambiguous. Except as provided in that Act, all land development applications must be submitted to a municipality as the authority of first instance.[3] In terms of s 40 (9) of SPLUMA a MPT must decide a land use application without undue delay and within a prescribed period. In

considering and deciding an application the MPT must be guided by the development principles set out in SPLUMA and also take into account public interest as well as inter alia ‘the respective rights and obligations of all those affected.’[4] I have underlined the quote from s 42 as this aspect will be considered again in due course.

[11] The Municipality relied on s 45 of SPLUMA in submitting that the applicants do not have locus standi to participate in the Trust’s land use application before the MPT. Section 45(2) stipulates that ‘an interested person may petition to intervene in an existing application before a Municipal Planning Tribunal ... and if granted intervener status, the interested person may be allowed to participate in such proceeding ...’. The person claiming to be an interested person has to prove his or her status as such.

[12] Section 51 of SPLUMA deals with internal appeals. Section 51(1) provides that a ‘person whose rights are affected by a decision taken by a municipal planning tribunal may appeal against that decision.’ The provisions hereof have been recognised by the Constitutional Court in *Tronox KZN Sands (Pty) Ltd v KwaZulu-Natal Planning and Development Appeal Tribunal and Others*[5].

[13] Section 33(1) of the Constitution stipulates that ‘everyone has the right to administrative action that is lawful, reasonable and procedurally fair.’ The Promotion Administrative Justice Act 3 of 2000 (PAJA) defines administrative action. There can be no doubt that PAJA may be applied to decisions taken in respect of land use applications. In not allowing the owner of an adjacent property to object to a land use application of their neighbour, the administrator

will clearly act contrary to the principles of just administrative action. In *JDJ Properties CC and Another v Umngeni Local Municipality*[6] the Supreme Court of Appeal considered a review of a municipality's approval of a developer's building plan. The court held that a near-by land owner and a lessee of property in the immediate vicinity of the development had the necessary standing and right to enforce compliance with the particular municipality's scheme. I agree with Mageza AJ in *Zimmerman v Ndlambe Municipality and Others*[7] that nothing in SPLUMA revokes the rights to standing defined in the *JDJ Properties* decision *supra*.

THE RELEVANT

BACKGROUND

- [14] It is appropriate to briefly deal with the history of the matter. The Trust's land use application was submitted as long ago as 1 November 2010. In terms of the 1969 Ordinance all land use applications had to be filed with the now defunct Townships Board. In terms of this legislation local authorities such as the Municipality in *casu* were merely called upon to make inputs in respect of land use applications applicable to them. They did not have any powers to decide any land use issues.
- [15] Following upon the Trust's land use application, a dispute arose in respect of environmental assessment. The Provincial Government of the Free State Province instituted an appeal process and the matter was eventually dealt with in this court. Environmental authorisation for township establishment on the Trust's properties was eventually granted on 8 May 2018 as reflected in the court order of 14 September 2020 under case number 1167/2020.
- [16] After the purchase of the second applicant's property in 2018, the applicants became aware of the land use application of the Trust. As a result, their attorney, Mr Cloete of Matsepes and others met with a Mr Mofokeng of the Office of the Premier of the Free State Province during May 2018. Since then everybody concerned must have been aware of the applicants' interest in the land use application. At that stage Mr Cloete submitted to the meeting that the 2015 By-laws issued upon the enactment of SPLUMA was not complied with. In my view there could be no doubt since then that the applicants were regarded as interested parties pertaining to the intended development.
- [17] From May 2018 to 2021, ie for a period of three-years and four months, no further communication was received from the Municipality. During December 2021 the applicants obtained information that the Trust's application was to be considered by the Municipality. After some correspondence and communication, the applicants became aware that a MPT hearing would take place on 28 January 2022. They did not receive formal notice of this hearing. Clearly, the purpose of the hearing was to consider all relevant facts in order to decide on the proposed development. By then the Municipality did not consider that the applicants had any interest in the matter. It is apparent from the papers that the application before the MPT was not instituted in accordance with SPLUMA and the By-laws, but

commenced by way of an application filed earlier with the Townships Board as mentioned above.

[18] A day before the intended hearing of the MPT, Ms Maasdorp of the Municipality informed the applicants' attorneys per email that the hearing would be postponed until further notice. Already in February 2022 Mr Cloete on behalf of the applicants informed the Municipality that his clients had never been placed in possession of the land use application of the Trust. He also requested feedback on a monthly basis from Ms Maasdorp who did not respond appropriately, but merely confirmed that the matter had been referred to the Municipality's legal department. Ms Maasdorp's supporting affidavit is annexed to the Municipality's answering affidavit. She describes herself as 'an adult female, employed in the Department of Planning of First Respondent and at the Secretariat of the MPT ...'. It is mentioned at this stage that Ms Nkateko Mabunda also deposed to a supporting affidavit. She describes herself as 'an adult female, Acting HOD, Planning of First Applicant (sic it should be first respondent) and the Acting MPT Chairperson of the Mangaung Metropolitan Municipality ...'.

[19] Eventually, Mr Cloete received a notice indicating that the MPT hearing had been set down for 2 December

2022. Mr Cloete sought confirmation that the hearing would not proceed, but to no avail. In his letter of 21 November 2022 addressed to the Acting MPT Chairperson of the Mangaung Metro Municipality, Ms Mabunda, he made several legal submissions which are not relevant to the adjudication of this application. He also requested information as to whether the MPT had been properly constituted in terms of the By-laws. He furthermore requested confirmation on/or before 24 November 2022 that the hearing would not continue. No response was received which caused him to write another letter on 24 November 2022, requesting urgent confirmation that the hearing would not proceed, but to no avail.

EVALUATION OF THE EVIDENCE AND THE PARTIES' SUBMISSIONS

[20] There is no indication on record that the Trust's application was submitted to the Municipality as the authority of first instance. It is clear from the papers that the Trust did not apply afresh to the MPT in terms of the By-laws. Consequently, no advertisements were placed in the Provincial Gazette and a newspaper. Also, the second applicant as adjacent landowner was never officially informed of the application. The contrary is true. The application was initially filed with the Townships Board and was

merely forwarded to the MPT for further consideration. However, nothing turns around this and it does not have to be resolved in

adjudicating this application. It is apparent that the objectors did so in 2011 already and based on the application procedure that applied then. There is no indication why this matter dragged-out over so many years, except for what occurred from January 2022 till now as indicated above.

[21] It is the Municipality's case that the applicants have not applied to intervene in the application of the Trust as interested parties as provided for in s 45 of SPLUMA. In my view, this section is not applicable in casu. The applicants, and the second applicant in particular who is the registered owner of adjacent property to the properties to be developed, are clearly affected persons as provided for in s 42 of SPLUMA as well as in accordance with our common law. I refer to the judgments in Zimmerman and JDJ Properties which I mentioned supra. The applicants have been accepted as such and the Municipality has even partially complied with the court order by providing an

incomplete copy of the Trust's application. In my view, s 45 of SPLUMA provides that persons, other than those directly affected such as neighbouring owners, may present evidence that they have an interest in a land use application and should be allowed to

participate in the proceedings. The section can never be regarded as peremptory and must be seen in context. It is possible that residents in a neighbourhood where a shopping mall is to be erected, may consider objecting to the land use application although they stay a few street blocks away from the particular site. In such an event such residents may well have to apply in terms of s 45 to be declared persons with an interest if they show, for example, that increased traffic volumes will negatively affect the values of their properties.

[22] During oral argument I indicated to counsel that I would prefer to adopt a pragmatic approach. I indicated that the matter had been dragging on for too long and that it was time that the Trust's land use application now be adjudicated by the MPT. Mr Cilliers agreed with the suggested order put to counsel. Mr Burger was advised to obtain proper instructions and leave was granted to his attorney to confirm in writing whether the Municipality was satisfied with the suggested order in the event of the rule nisi be confirmed. An email was received the same day from Mr Zuma of Maduba Attorneys. The relevant paragraph reads as follows:

'After consultation and taking instruction as per the Judges suggestion, it my client's instruction that they are in agreement with the Judges suggestion that they(MMM) be granted 14 days (2 weeks) or whatever time the Court deems reasonable to deliver the outstanding documents as per the Applicants' contentions and grant the Applicants 2 weeks or whatever time the Court finds reasonable, to file their respective application/applications. Further that the Court directs or suggests that the MPT to deal or consider the matter before end of November 2023.'

Insofar as the MPT is not a party to these proceedings, the order to be granted is not directed at the MPT, but the Municipality. Consequently, the orders contained herein are in line with the email received from the Municipality's attorneys on 20 July 2023.

CONCLUSION

[23] I am satisfied that the rule nisi should be confirmed. The applicants had no option but to proceed on an urgent basis in order to prevent the MPT hearing of 2 December

2022. The facts as indicated speak for themselves. Although the MPT was not joined as a party, the Municipality that relied on

non-joinder failed to provide the applicants' attorney with details pertaining to the establishment of the MPT. No details have been provided in the answering affidavit of the Municipality to show that the MPT is in existence in accordance with the provisions of s 37 of SPLUMA and the By-laws. In any event, as indicated above, the secretariat and acting chairperson of the MPT were fully aware of the application and even deposed to supporting affidavits. No relief was sought against the MPT and I also do not intend to grant an order against it. The applicants are interested persons for the reasons advanced herein and I am satisfied that there was no reason for them to officially apply in terms of s 45 of SPLUMA to be declared as such.

[24] The applicants are entitled to their costs on the application on an opposed basis, including those costs that stood over for later adjudication, to wit the costs of 23 March 2023. The postponement was occasioned by the late filing of the Municipality's answering affidavit. The applicants sought costs on an attorney and client scale. I have considered this, but I am satisfied that in exercising my discretion, there is no reason to award punitive costs.

[25] The following order is issued:

JP DAFFUE J

Counsel for the Applicants: Adv HJ Cilliers Instructed by: Matsepes Inc BLOEMFONTEIN Counsel for the First Respondent: Adv AH Burger SC Instructed by: Maduba Attorneys BLOEMFONTEIN

[1] See City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and Others (335/08) [2009] ZASCA 106; 2010 (2) SA 554 (SCA); 2010 (1) BCLR 157 (SCA); [2010] 1 All SA 201 (SCA) (22 September 2009) para 50; City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and Others (CCT89/09)

[2010] ZACC 11; 2010 (6) SA 182 (CC); 2010 (9) BCLR 859 (CC) (18 June 2010).

[2] Section 37 (4) & (5).

[3] Section 33 (1).

[4] See s 42 (1).

[5] (CCT114/15)

[2016] ZACC 2; 2016 (4) BCLR 469 (CC); 2016 (3) SA 160 (CC) (29 January 2016) at para 34.

[6] (873/11)

[2012] ZASCA 186; [2013] 1 All SA 306 (SCA); 2013 (2) SA 395 (SCA) (29 November 2012) paras 24 - 35.

[7] (226/2017)

[2017] ZAECGHC 76; [2017] 4 All SA 584 (ECG) (22 June 2017) para 71.

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