

SOUTH AFRICA / JUDGMENT

Dykema v Bela Bela Local Municipality and Another (91319/15)

[2017] ZAGPPHC 277 (22 June 2017)

[2017] ZAGPPHC 277

COURT

North Gauteng High Court, Pretoria

BEFORE

Cassim

CASE / FILE NUMBER

91319/15

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Source record**IN THE HIGH COURT OF SOUTH AFRICA****GAUTENG DIVISION, PRETORIA****Case No: 91319/15**

In the matter between:

ALBERT
DYKEMA Applicant
and
BELA BELA LOCAL
MUNICIPALITY First
Respondent
ARTHUR PULE
MALEBANE Second
Respondent

JUDGMENT

Cassim, AJ

1. By way of urgent application dated 11 November 2015, applicant sought interim relief interdicting the first respondent, the Municipality,

from considering the application of the second respondent or any other adjacent property owner for change in land use from farming to that designated for a filling station. The applicant owns a farm in the jurisdiction of the Municipality and, in order to develop a filling station and rest area on his property, required the approval of the Development Facilitation Tribunal for Limpopo (the “DFT”). Appropriate undertakings were furnished, disposing of the urgent application, and the

hearing before me concerns Part B of the application. The applicant seeks a mandamus against the first respondent to compel it to complete on the remaining statutory functions to finalise the approval process of

land use rights by the DFT.

Applicant's case

2. The applicant's application for land use rights from that of "resort" and "agricultural" to "special"

for the purposes of One-Stop facilities was made in terms of the Development Facilitation Act, 1995 ("the DF Act") to the DFT for the Limpopo Province on 7 August 2012. Objections were made by oil companies and other filling station operators, but there was also considerable support from SANRAL as well as the Waterberg District Municipality. In November 2012, the applicant was advised of the approval of its application in terms of the DF Act by the DFT.

3. The applicant's complaint in essence is that the Municipality is behaving badly in not finalizing the process of conversion as contemplated in the DF Act read together with section 60(2) (c) of the Spatial Planning and Land Use Management Act, 16 of 2013 ("the SPLUMA")^[1]. Moreover, cognisant of the applicant's DF Act application approval, the Municipality accepted an identical application for land use change lodged by the second respondent in respect of the latter's property located some 19km from the applicant's property.

The legislative quandrum

4. The applicant's application was heard by the DFT between the period 13 April and 5 June 2012. It would appear that extensive evidence was led and scrutinized including expert reports. By agreement the matter stood down in order for heads to be filed by 16 July 2012.
5. In the interim, the Constitutional Court found that Chapters V and VI of the DF Act were unconstitutional and they were struck down^[2]. The order of constitutional invalidity was suspended for 24 months and expired on 17 June 2012. The constitutional invalidity was premised on the basis that Chapters v and VI of the DF Act encroached upon the exclusive municipal planning authority of municipalities set out in Schedule 4 of the Constitution the Republic of South Africa, 1996.
6. This application arises from applicant's town planner being unable to promulgate the approved land use rights granted to it by the DFT because of the aforesaid orders of the Constitutional Court. As I understand the position, had the approval and/or promulgation taken effect prior to 17 June 2012 then the applicant would have been secured in the context that his land use change would have been effected. This is because the order of constitutional invalidity was suspended for the period up to 17 June 2012. SPLUMA was enacted precisely to address applications instituted in terms of the DF Act, but which were not finalized prior to the expiration period of suspension, namely 17 June 2012. SPLUMA

however came into operation on 1 July 2015. This in turn immediately raises the question as to what of applications not finalized by June 2012 – there appears to be a hiatus because SPLUMA took effect on 1 July

2015. This issue was pertinently decided recently addressed by the Supreme Court of Appeal (“SCA”) in the Shelton decision referred to below.

7. Mr du Plessis SC who appeared on behalf of the second respondent explained that whilst Chapter V of the DF Act dealt with applications

for change of land use by provincial authorities, an applicant could also follow a similar process in terms of ordinances in which the municipality decides upon the merits of such application. That there was considerable disharmony in the objectives of the DF Act and Municipality Ordinances culminated in the findings by the SCA in the Johannesburg Metro case as a recipe for a chaotic situation. It would appear that provincial authorities did not necessarily share the same objectives

and criteria of municipal authorities and hence the unlawful intrusion in the jurisdiction of the municipalities.

8. In Mr du Plessis’ chronology of material events it is pointed out that the judgment of the Constitutional Court was made on 18 June 2010 and the period of expiry of the suspension of invalidity terminated on 17 June 2012. Despite this, the applicant made

application to the DFT on 10 February 2012 aware of the fact that it had some four months to process its application, which is wholly unlikely because the process itself is long and cumbersome. I was particularly perturbed by the fact that whilst the hearings before the DFT was completed on 5 June 2012, applicant’s legal representatives agreed to file heads of argument by 16 July 2012, being a month after the expiry of the period of suspension. I would have thought that it would have been prudent to argue the case and seek a decision prior to 17 June 2012.

The opposition

9. The Municipality does not oppose the application which in effect requires the Municipality, through the appropriate official and in term of section 60(3) of SPLUMA, to give effect to the approval made by DFT in terms of the DF Act and to give practical and legal effect to the change in land use rights from agriculture to a filling station. The second respondent opposes the application. He is, in loose parlance, a competitor seeking to convert his property from agricultural use to that of a more commercially viable value. The defence is premised on the legality of the decision of DFT approving the applicant’s land development application.

10. DFT approved applicant's land development application in terms of chapter V of the DF Act on 1 November 2012, five months after the period of suspension of the order of constitutional invalidity expired. In this context I also point out that section 59 of SPLUMA read with Schedule 3 thereto makes it clear that only upon commencement of SPLUMA was the entire DF Act repealed without any exclusion of the already inoperative Chapters V and VI.

The respective arguments

11. Applicant's argument is that despite approval of his application on 1 November 2012, his land use rights were not exercisable as a right until SPLUMA came into effect on 1 July 2015. This bearing in mind that by 18 July 2012 his application was pending before the DFT. It had been lodged, the public had participated, comments have been received, a pre-hearing conference had been held, a hearing date was finalized and only final argument was outstanding.
12. Second respondent argues that the only relevant fact is that the approval was granted on 1 November 2012 and this is fatally defective in that approval was in terms of Chapter V of the DF Act, and this is the expiry of the period of suspension of the declaration of unconstitutionality and invalidity of Chapters V and VI of the DF Act.
13. In *Shelton v Eastern Cape Development Tribunal*,^[3] the SCA concluded that a development tribunal had no power to hear or deal with a land development application after the expiry of the period of suspension of the invalidity imposed by the Constitutional Court in the *Johannesburg Metro* case. To recap, the Constitutional Court ordered that Chapters V and VI of the DF Act were declared to be unconstitutional and invalid because the powers vested in the provincial development tribunals by those chapters impinged on the constitutionally guaranteed powers of municipalities with regard to "municipal planning". The order was suspended for 24 months which period expired on 17 June 2012.
14. In *Shelton*, the SCA decided that, after the expiry of the period of suspension, Chapters V and VI of the DF Act were "inconsistent with the Constitution and invalid". According to the SCA the tribunal's only "lifeline" was the period of suspension. The "lifeline" refers to the statutory power in terms of the DF Act to consider and decide land development applications during the period of suspension.
15. The SCA also held that section 60(2) of SPLUMA could not be relied upon to validate the decision of the tribunal in that case, which had also been made after 17 June 2012. That the tribunal could only decide the matter if it acted lawfully in terms of the DF Act, but the "reality was that the DF Act was invalid when the tribunal took its decision and the transitional provisions of SPLUMA cannot be utilised to validate the decision" (para 19).

16. Thus, it is contended on behalf of the second respondent that the applicant in effect requires that the decision of the DFT to approve its land development application taken in November 2012 be implemented by the Municipality. This is not feasible as the decision of the DFT was *ab initio*, in terms of *Shelton*, a nullity.
17. Mr Labuschagne SC for the applicant further argued that the relief sought by the applicant is not dependent upon the validity of the decision in November 2012, approving the applicant's application in terms of the DF Act. Its application was properly pending, he argues at the time when the DFT lost its statutory powers, i.e. at 17 June 2012, and the applicant is therefore entitled to have its application processed in terms of section 60 of SPLUMA. That the SCA's judgment at best decided the legality issue for the exercise of powers by a DFT after 17 June 2012. Where there was an exercise of such power, he further contends the consequence are the following:
 - 17.1. that the decision flowing from the exercise of public power by the DFT will stand as valid until set aside – in terms of the *Oudekraal Estates (Pty) Limited v City of Cape Town and Others* [4] principle;
 - 17.2. Alternatively, the finding of the SCA that there was no statutory power to decide a pending DFT application, meant that the decision by the DFT after 17 June 2012 was not an exercise of public power since it lacked such power at the time of the decision;
18. Either way, Mr Labuschagne contends that the SCA did not consider the effect of the invalidity of the decision subsequently taken and merely made a finding as to the lack of a statutory basis for the exercise of a decision under the DF Act after 17 June 2012;
19. In *Shelton*, says Mr Labuschagne, no reference is made to the principles applied in comparable circumstances by the Constitutional Court in the *Tronox KZN Sands (Pty) Ltd v KwaZulu-Natal Planning and Development Appeal Tribunal and Others* [5] matter. In that matter, despite the invalidity of the empowering statute, the Constitutional Court permitted a tribunal to exercise powers pertaining to land use rights, provided it did so from the perspective of a Municipality and not from the perspective of a Province;
20. In the circumstances, this Court retains a discretion, particularly where the Municipality is unwilling or incapable to constitute a tribunal under SPLUMA to consider a pending application, to authorise the DFT to exercise the powers that the Municipality would have exercised under its authorising statutory provisions (the *Tronox* approach). The effect thereof can, say applicant's counsel, be summarised as follows:
 - 20.1. If the effect of the *Shelton* judgment is that the November 2012 decision of the Limpopo Tribunal was a nullity, the application can still be decided in the applicant's favour on the basis of the pending nature of its application, which application falls to be finalised in terms of section 60 of SPLUMA;

20.2. This Court can direct the DFT of Limpopo to exercise the powers of the Municipality to finalise the application under SPLUMA from the vantage point of the Municipality and not the Province.

21. The fact that Shelton made no reference to the resolution of an impasse, as was considered by the Constitutional Court in *Tronox*, leaves the Court with a discretion to determine an equitable remedy for purposes of securing of land use rights by the applicant based on its pending application.

22. A combination of the above approaches could warrant an order by this Honourable Court:

22.1. Directing the Municipality to comply with its obligations under SPLUMA to finalise the applicant's pending application and to duly process it;

22.2. In the event of the Municipality failing to do so within a specified time period, the DFT is authorised to process and finalise the applicant's pending application under SPLUMA, which includes the power to ratify the decision taken in November 2012.

23. The applicant's case as reformulated, after *Shelton*, is based on the *Tronox* judgment of the Constitutional Court which declared an appeal from municipal planning decision in Natal to a provincial appeal tribunal, unconstitutional and invalid. Mr du Plessis points out that in paragraph 5 of the order of the Constitutional Court in *Tronox*, provision was expressly made for appeals pending in terms of section 45 of the KwaZulu-Natal Planning and Development Act, No. 6 of 2008 to continue until finalised. This is, in effect, a suspension of the operation of the order of invalidity. In other words, the Court exercised its power in terms of section 172(1) (b) (ii) of the Constitution. After all pending appeals are finalised, the KwaZulu-Natal Planning and Development Appeal Tribunal will have no further power to deal with appeals. That part of the order in *Tronox* is the equivalent of the suspension of the declaration of invalidity of the DFA for 24 months by the Constitutional Court in the DFA (CC) judgment. After the suspension period the statute in question is invalid and cannot be lawfully implemented. *Tronox* accordingly, submits Mr du Plessis, does not constitute an exception to this default position.

24. Mr du Plessis' argument is to the effect that the continued operations of the Limpopo Development Tribunal, referred to in this judgment as the DFT, after 17 June 2012 were unlawful and invalid. The DFT could not exercise powers which had been declared to be unconstitutional and invalid.

25. It is therefore not correct, he submits, for the applicant to argue as is done in paragraph 46.2 of the additional heads of the applicant that in *Tronox* a tribunal was permitted to continue acting under the impugned provisions "(d)espite such constitutional invalidity". The point Mr du Plessis makes is that for the purpose of the pending appeals the constitutional invalidity was impliedly suspended. In the present case, the suspension of invalidity came to an end on 17 June 2012. The "approval" by the DFT of the applicant's application thereafter was a nullity.

26. Thus reasons Mr du Plessis, that there is no “approval of land use rights” which the Municipality can “deal with” as envisaged in prayer 3.1.2 of the notice of motion and therefore no basis exists for the relief claimed. It follows further that there is no reason to appoint a “designated official” to deal with the purported “approved land use rights” and accordingly the relief in paragraphs 3.1.1 can also not be granted.

Analysis

27. The relief sought in prayer 3.1.2 of the notice of motion is predicated on applicant having been granted approval of land use rights pursuant to its application before the DFT. This approval of 1 November 2012 is, as Mr du Plessis correctly submits, a nullity premised on the finding in the Shelton case. The applicant had a right during the period of suspension to lodge the application. The right was as found by the SCA in Shelton qualified by the fact that, after the expiry of the suspension period, the tribunal could not exercise powers declared to be unconstitutional. In terms of paragraph 19 of the judgment which I have already referred to above, the decision of the DFT was invalid when it purported to grant the approval.
28. It follows that the applicant cannot succeed in obtaining the relief sought for in prayer 3.1.2. I further find that the relief sought for in prayer 3.1.1 of Part B is also incompetent because it presupposes that applicant has an approval and seeks a mandamus flowing from such approval. The approval relied upon by the applicant is invalid and therefore no right can validly emanate therefrom.
29. Mr Labuschagne SC prevailed upon me to exercise equitable jurisdiction and with reference to the Tronox judgment suggested I fathom appropriate orders based on the just and equitable considerations with reference to section 172 (1) B of the Constitution which provides that following a declaration of constitutional invalidity of any law or conduct that is inconsistent

with the Constitution, a court ‘may make any order that is just and equitable....’. Similarly section 8(2) PAJA grants a court or tribunal, in proceedings for judicial review in terms of section 6(3) the power to grant any order that is just and equitable. (Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others 2011 (4) SA 113 (CC)). Mr du Plessis correctly pointed out that I am not seized with a dispute concerning a constitutional issue nor a matter of review, and that I do not have equitable jurisdiction.

30. In the circumstances of this case, I see no merit in the collateral challenge that the approval of 1 November 2012 is valid until set aside on the reasoning of Oudekraal Estates and MEC for Health, Eastern Cape v Kirkland Investments (Pty) Ltd [6]. Both decisions recognise that there may be occasions where an administrative decision or ruling should be treated as invalid even though no action has been taken to strike it down (Merafong City v Anglo Gold Ashanti 2017 (2) SA 2011 at para 44). This is such a case because in terms of the reasoning of Shelton the approval relied upon by applicant is a nullity. Shelton treated it as such.

31. Ordinarily it would have been the end of this application. However, Mr Labuschagne SC prevailed upon me to make declaratory relief to the effect that there is a pending application which must be dealt with in terms of SPLUMA. He relied upon the provisions of section 60(2) of SPLUMA[7] which deals with “transitional provisions”.
32. Disputes must come to an end. Citizens and litigants are entitled to their claims being finalised by governing authorities. In my view applicants’ application for land use rights is pending before the first respondent and must be disposed of in terms of SPLUMA. This is a sensible and business-like approach to the meaning of section 60(2)(a). Such declaratory relief may have salutary relief by prompting the Municipality to deal with the application expeditiously and fairly. I see no prejudice to the second respondent. His application must also be diligently considered and the evaluation process is and must be punctuated by merit. Both applications must be determined fairly and judiciously.

Costs

33. The second respondent has successfully opposed part B of the application and is entitled to costs.

Relief

34. In the result I make the following orders:
 1. Prayers 3.1.1 and 3.1.2 of Part B of the application are dismissed.
 2. Applicant to pay the costs of the application.
 3. The First Respondent is directed to process applicant’s land use change and dispose thereof in accordance with the provisions of section 60(2)(a) of the Spatial Planning and Land Use Management Act 16 of 2013. Such process must commence within 60 days from date of order being brought to the notice of the Municipal Manager or other appropriate official of the Municipality.

NA CASSIM

ACTING JUDGE OF THE HIGH COURT

GAUTENG DIVISION

Date of Hearing: 19 June 2017

Counsel for the Applicant: Adv EC Labuschagne SC

Instructed By: Ruan Rabie Attorneys

Counsel for the Respondent: Adv SJ du Plessis SC

Instructed By: State Attorney, Pretoria

Date of judgment: 22 June 2017

[1] Section 60(2) (c) of SPLUMA provides that:

“(c) Reference to a designated officer and the registrar in terms of the Development Facilitation Act, 1995 must for the purposes of deciding or otherwise disposing of any application, appeal or other matters pending before a tribunal at the commencement of this Act must be construed as references to an official of a local or metropolitan municipality designated by such municipality to perform such function”.

[2] City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and Others 2010 (6) SA 182 (CC) (the “Johannesburg Metro case”)

[3] (489/2015) [2016] ZASCA 125 (26 September 2016)

[4]

[2004] 1 All SA 1 (SCA)

[5] 2016 (3) SA 160 CC

[6] 2014 (5) BCLR 547 (CC)

[7] Section 60(1) and (2) provides that: “60.

(1) The repeal of laws referred to in section 59 or by a provincial legislature in relation to provincial or municipal planning does not affect the validity of anything done in terms of that legislation.

(2) (a) All applications, appeals or other matters pending before a tribunal established in terms of section 15 of the Development Facilitations Act, 1995 (Act No. 67 of 1995) at the commencement of this Act that have not been decided or otherwise disposed of, must be continued and disposed of in terms of this Act.

(b) A reference to a tribunal in terms of section 15 of the Development Facilitations Act, 1995 must for the purposes of deciding or otherwise disposing of any application, appeal or other matters pending before a tribunal at the commencement of this Act must be construed as a reference to a local or metropolitan municipality.

(c) Reference to a designated officer and the registrar in terms of the Development Facilitation Act, 1995 must for the purposes of deciding or otherwise disposing of any application, appeal or other matters pending before a tribunal at the commencement of this Act must be construed as references to an official of a local or metropolitan municipality designated by such municipality to perform such function.

(d) The Minister may prescribe a date by which such applications, appeals or other matters must be disposed of, and may prescribe arrangements in respect of such matters not disposed of by that date.”

[7] Section 60(1) and (2) provides that:

“60.

- (1) The repeal of laws referred to in section 59 or by a provincial legislature in relation to provincial or municipal planning does not affect the validity of anything done in terms of that legislation.
- (2) (a) All applications, appeals or other matters pending before a tribunal established in terms of section 15 of the Development Facilitations Act, 1995 (Act No. 67 of 1995) at the commencement of this Act that have not been decided or otherwise disposed of, must be continued and disposed of in terms of this Act.
(b) A reference to a tribunal in terms of section 15 of the Development Facilitations Act, 1995 must for the purposes of deciding or otherwise disposing of any application, appeal or other matters pending before a tribunal at the commencement of this Act must be construed as a reference to a local or metropolitan municipality.
(c) Reference to a designated officer and the registrar in terms of the Development Facilitation Act, 1995 must for the purposes of deciding or otherwise disposing of any application, appeal or other matters pending before a tribunal at the commencement of this Act must be construed as references to an official of a local or metropolitan municipality designated by such municipality to perform such function.
(d) The Minister may prescribe a date by which such applications, appeals or other matters must be disposed of, and may prescribe arrangements in respect of such matters not disposed of by that date.”

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