

SOUTH AFRICA / JUDGMENT

Heine v Mbombela Local Municipality (3246/2019) [2020] ZAMPMBHC 27 (23 September 2020) [2020] ZAMPMBHC 27

COURT

Mbombela High Court, Mpumalanga

BEFORE

B A Mashile

CASE / FILE NUMBER

3246/2019

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REPUBLIC OF SOUTH
AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA
(MPUMALANGA
DIVISION, MBOMBELA)

(1)

REPORTABLE: NO

(2)

OF INTEREST TO OTHER JUDGES: NO

(3)

REVISED: YES

CASE

NO: 3246/2019

In

the matter between:

Lizane
Heine
Applicant
And
MBOMBELA
LOCAL MUNICIPALITY
Respondent

JUDGMENT

MASHILE J:

INTRODUCTION

[1] This is a review application brought in terms of Rule 53 of the Uniform Rules of Court. The Applicant is troubled by the reversal of the decision of Mr X T Mabila (“Mabila”) by the Respondent, to whom it had delegated authority of approval of an application for Security Access Control Measure for Neil, Vosstok and Yuri Streets, Nelspruit extension 10 (“the application for security access”). Mabila approved the application for security access of the Applicant on 27 May 2020. The Applicant now applies to court seeking the following relief:

1.1. “reviewing and setting aside the Respondent’s decision to withdraw the letter of approval with regard to the application for Security Access Control Measure at Neil Street, Vosstok Street, and Yuri Street Nelspruit Extension 10 dated 25 July 2019;

1.2. declaring valid and legally binding on all parties concerned the approval of the application for Security Access Control Measure for Neil Street, Vosstok Street and Yuri Street, Nelspruit extension 10 dated 27 May 2019 by Mr X T Mabila dated 27 May 2019; and

1.3. an order for the return and reinstallation of the security fence and structures removed by or on behalf of the Respondent on 25 July 2019 within 14 days of the service of this order.”

[2] In opposing the Application, the Respondent contends firstly, that the approval of the application for security access is illegal because Mabila did so without the fulfilment of conditions [prescribed for the approval of such applications. Secondly, Mabila did not exercise his powers in accordance with his delegated authority as:

2.1 The approval was not in accordance with the traffic impact study;

2.2 The adjacent property owners where the envisaged gate stands had not approved the location in writing;

2.3 The Applicant did not submit the plans for the envisaged security gate for approval before construction;

2.4 Access to the public road cannot be limited to non-residents;

2.5 The approval was not in accordance with the approved delegation authority and policy

[3] In addition, the respondent launched a counterclaim wherein it seeks: “The Decision by Mr Mabila to approve the application for Security Access Control Measure for Neil, Vosstok and Yuri Streets, Nelspruit, Extension 10, is declared invalid and set aside.” It should follow as a matter of course that if this application succeeds, the counterclaim will necessarily fail and vice-versa.

FACTUAL MATRIX

- [4] The area that is the subject of the application herein has allegedly over a protracted period been beleaguered by break-ins and armed robberies. This persuaded the overwhelming majority of the residents of the area to constitute themselves into a BODY OF RESIDENTS OF THE AREA and to appoint Mr Johan Heine (“Heine”) as a project co-ordinator and their representative. Heine has since been substituted for the Applicant due to business commitments. In execution of his mandate, on 12 April 2019, Heine made a formal application to the Respondent for the establishment of a security gate at the entrance of Neil Street to prevent further break-ins and armed robberies.
- [5] The Applicant avers, which averment is denied, that the reasons for the need to erect the security gate was to protect the residents of the area. At the time when the application was made, the Applicant alleges that the crime statistics of the area consisted in more than 64 break-ins, armed robberies and attempted break-ins. The Applicant alleges further that since April 2019 until the date of deposition to the founding affidavit, a further 13 break-ins and/or attempted break-ins have befallen the area thereby imperilling the lives of the residents resulting in incalculable financial loss.
- [6] Following acknowledgment of the application by the Respondent, Mr Leon Hallatt (“Hallatt”), the Respondent’s Senior Manager: Roads and Storm Water, sent an e-mail message to the affected residents to which he appended the 2010 procedures and conditions to close a road for security purposes. In the same letter, Hallatt confirmed that the Respondent would not require a traffic study as there was no through traffic with which to contend. To approve the application, Hallatt requested a response to certain specific items in the attachment to his letter. In a follow-up e-mail message of 12 April 2019, Hallatt also requested Heine to attend to further items to his attachment. Additionally, Heine enquired how municipal and emergency vehicles would get access to the properties beyond the closed road without effort.
- [7] In her e-mail message of 23 May 2019, the Applicant addressed all the issues raised by Hallatt in the preceding paragraph. In response to Hallatt’s request for plans, the Applicant sent an e-mail message to him dated 27 May 2019 with the name and number of the builder of the security gate to which the Respondent reverted on the same day with a formal approval of the application subject to:

7.1 The Applicant taking out and maintaining a public liability cover sufficient to cover any claim as may be instituted against the Council and/or the Applicant for whatever damages suffered directly or indirectly by any person as a result of the access control structure put up by the applicant. The copy of such cover shall be provided to the General Manager: Public Works, Roads and Transport before the structure is erected;

7.2 The Applicant indemnifying Council against any liability or claim whatsoever, which may be instituted by any person directly or indirectly due to the use or other reason associated in any manner with the structures constructed by the applicant;

7.3 No person would be denied access into the subject area;

7.4 The subject area would be accessible 24 hours;

7.5 Emergency, maintenance and other vehicles would be granted unlimited and unrestricted access;

7.6 The access control structures must not infringe upon any servitude or infrastructure located within the subject area;

7.7 The structure must be to the satisfactory specifications as approved by the Senior Manager: City Planning and Development and General Manager Public Works, Roads and Transport;

7.8 The Applicant would, on the face of the access gate, display in bold the address and contact details of the General Manager Safety and Security or his delegate to whom complaints regarding the use of the facility and access into the subject area shall be communicated plus the name and contact details of the person designated by the applicant to attend to the complaints as above.

[8] In complying with the conditions as outlined above, the Applicant advised Hallatt that public Liability Cover would be obtained as soon as the gate has been erected. Insofar as indemnity Forms were concerned, the Applicant obtained 77 of them from the residents. On the question of indiscriminate access to the area for 24 hours daily, she informed Hallatt that the residents had decided on a monitoring system. The system is designed such that anyone, whether on foot or not, wishing to access the area, would push a button to open the gate. In the process of doing so, A CCTV WOULD RECORD THE person gaining access into the area.

[9] Furthermore, the SNIPR Camera installed at the gate will capture the registration particulars of motor vehicles that go through. The security company responsible for the area will receive a prompt signal where the specific vehicle entering the gate has been flagged by the South African Police services to which the SNIPR system is connected to its national data base. As such, stated the Applicant, anyone would be at liberty to enter or leave the area at any time of the day but potential criminals would be discouraged. Additionally, the monitoring system accommodates access by emergency, maintenance

and other vehicles. The Applicant further confirmed that the access control structure would not infringe any servitudes or infrastructure

located within the area,

[10] The Applicant advised that she did not have knowledge whether or not the structure was to the satisfaction of the senior manager City Planning and Development's. She stated that she was nonetheless aware of the approval of the application but remained oblivious of the internal mechanisms of the Respondent. With regard to the placement of the address and

contact details of the general manager Safety and Security or his delegate on the face of the access gate, the Applicant said that compliance would only become possible post the erection of the structure.

- [11] On 12 July 2019, The Applicant received a letter from the Respondent's municipal manager, Mr Neil Diamond ("Diamond"), withdrawing the approval of the application. Diamond alleged that he withdrew the approval because:

11.1 The application and its subsequent approval does not meet the criteria set out in the Council Policy on the closure of roads and possible enclosure of suburbs for security reasons; and/or

11.2 The Applicant had indicated to officials that she intended to close and limit access to non-residents of the area; and/or

11.3 No evidence was presented to demonstrate that a traffic impact study and detailed building plans of the envisaged structure/gate were submitted for approval prior to any construction taking place.

ASSERTIONS OF THE PARTIES

- [12] The Applicant maintains that she has complied with all the requirements other than those that she was not expected to observe anyway. Falling in this category is the requirement that a traffic impact study was necessary before approval could be granted, which Hallatt dispensed with. Furthermore, the Applicant asserts that the Respondent failed to submit to the dictates of the Audi alteram partem rule insofar as it did not afford her and her fellow residents opportunity to react to the claims described in Diamond's letter to her dated 12 July

2019. As such, concludes the Applicant on the subject, the Respondent's decision to withdraw the approval of the application for Security Access was taken capriciously and impetuously.

- [13] Moreover, the withdrawal of the approval of the application for Security Access happened even before the installation of the access gate. In the circumstances, the withdrawal of the approval was precipitous because if the access gate was not present no access could have been refused to anyone wishing to enter the area. The Respondent did not give the Applicant and the other residents of the area opportunity to attempt to meet the respondent's new requirements or to demonstrate that all of the initial requirements were satisfied. The Respondent's withdrawal of the application for security access has left the Applicant and the other residents vulnerable to criminals who are prowling residences and holding residents at gun point.

- [14] It was my understanding during argument in court that while there might have been several areas of disagreement prior to the matter coming to court, the only dispute that required adjudication was reduced to whether or not a traffic impact study was still necessary given that all streets inside the area ended up in various cul-de-sacs. The respondent argued that the requirement of a traffic impact study could not be waived by a delegate and in any event,

the Respondent could revoke or withdraw decisions of a person to whom it has delegated powers. The Respondent asserted further that it had given the Applicant and her fellow residents opportunity to present their version albeit that it was admittedly ex post facto.

ISSUES

[15] It emerges from the factual background described above and the parties' argument in court on the date of hearing that the issues have been narrowed to whether or not:

15.1 In approving the application for the road closure for security reasons, Mabila exercised his powers illegally in that: –

15.1.1 The Applicant had indicated to officials that she intended to

close and limit access to non-residents of the area;

15.1.2 No evidence was presented to demonstrate that a traffic impact study and detailed building plans of the envisaged structure/gate were submitted for approval prior to any construction taking place;

15.2 Was the Applicant and her fellow residents afforded opportunity to present their version of events prior to the withdrawal of the approval of the application?

LEGAL POSITION

[16] The Applicant alleges that the Respondent in withdrawing the decision of Mabila to approve the application for security access has contravened the Audi alteram partem rule in that she and the other residents were not afforded opportunity to deal with what the Respondent had raised against their application for security access. Accordingly, the starting point in dealing with such violations should be Section 33 of the Constitution of the Republic of South Africa, which is headed, Just administrative action. The Section provides:

- (1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.
- (2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.
- (3) National legislation must be enacted to give effect to these rights, and

must: -

- (a) provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal;
- (b) impose a duty on the state to give effect to the rights in subsections (1) and (2); and
- (c) promote an efficient administration.”

[17] Section 33 of the Constitution finds expression in the Promotion of administrative Justice Act, 3 OF 2000 (“paja”) in particular Section 3 thereof entitled, procedurally fair administrative action affecting any person. The Section stipulates:

“(1) Administrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair.

(2)

- (a) A fair administrative procedure depends on the circumstances of each case.
- (b) In order to give effect to the right to procedurally fair administrative action, an administrator, subject to subsection (4), must give a person referred to in subsection (1)-
 - (i) adequate notice of the nature and purpose of the proposed administrative action;
 - (ii) a reasonable opportunity to make representations;
 - (iii) a clear statement of the administrative action;
 - (iv) adequate notice of any right of review or internal appeal, where applicable; and
 - (v) adequate notice of the right to request reasons in terms of Section 5.”

[18] As could be anticipated, case authority has crystallized around this subject. It will therefore be instructive to refer to relevant cases. One such case is *M & J MORGAN INVESTMENTS (PTY) LTD AND ANOTHER v PINETOWN MUNICIPALITY AND OTHERS*

[1997] ZASCA 60; 1997 (4) SA 427 (SCA) where the Supreme court of appeal stated:

“The rules of natural justice, of which Audi alteram partem is one, form a cornerstone of administrative law. They

'... facilitate accurate and informed decision-making; secondly they ensure that decisions are made in the public interest;

and, thirdly, they cater for certain important process values'. (Baxter Administrative Law at 538.)
The Audi alteram

partem rule was said by Voet 2.4.1 (Gane's translation) to 'rest on the highest equity'. Ptahhotep in the 6th Egyptian Dynasty (2300--2150 BC) lauded the rule (Baxter (op cit at 539)) and coined the dictum:

'Not all one pleads for can be granted, But a good hearing soothes the ear.'”

[19] Equally significant in understanding the operations of the Audi alteram partem rule is what was stated by the Supreme Court of Appeal in *Du Preeze AND ANOTHER v TRUTH AND RECONCILIATION COMMISSION* [1997] ZASCA 2; 1997 (3) SA 204 (A):

“The Audi principle is but one facet, albeit an important one, of the general requirement of natural justice that in the circumstances postulated the public official or body concerned must act fairly. (Compare the remarks of Farlam J in Van Huyssteen and Others NNO v Minister of Environmental Affairs and Tourism and Others 1996 (1) SA 283 © at 304A-305D.) The duty to act fairly, however, is concerned only with the manner in which decisions are taken: it does not relate to whether the decision itself is fair or not (Traub's case supra at 758H-I). What does the duty to act fairly demand of the public official or body concerned? In the answering of this question useful guidance may be derived from some of the English cases on the subject. In Doody v Secretary of State for the Home Department and Other Appeals [1993] 3 All ER 92 (HL) Lord Mustill stated the following in a speech concurred in by the remaining members of the Court (at 106d-h):

'What does fairness require in the present case? My Lords, I think it unnecessary to refer by name or to quote from, any of the often-cited authorities in which the Courts have explained what is essentially an intuitive judgment. They are far too well known. From them, I derive the following. (1) Where an Act of Parliament confers an administrative power there is a presumption that it will be exercised in a manner which is fair in all the circumstances. (2) The standards of fairness are not immutable. They may change with the passage of a time, both in the general and in their application to decisions of a particular type. (3) The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects. (4) An essential feature of the context is the statute which creates the discretion, as regards both its language and the shape of the legal and administrative system within which the decision is taken. (5) Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result, or after it is taken, with a view to procuring its modification, or both. (6) Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests fairness will very often require that he is informed of the gist of the case which he has to answer.”

EVALUATION

[20] The legal framework described above ought to serve as guidance to this Court to arrive at a solution. It is common cause or at least it is not contested that the Respondent is an administrator and that Diamond in withdrawing the approval of the application for security access was its functionary performing an administrative action as contemplated in Section one of the PAJA. The Respondent contends that procedurally it cannot be found wanting because it has given the Applicant opportunity to present her case on 23 July 2019.

[21] It is disturbing that on 12 April 2019, Hallatt wrote to one Johan copying Diamond, Frans Greyling and the Applicant stating that: “If we approve this application we will be flooded with applications.” Was it in fact coincidental that it so turns out later that the municipal manager, Diamond, withdrew the approval of the application for security access without any warning to the Applicant? It is manifest from Section 3(1) of the PAJA that an administrative action that materially and adversely affects the rights or legitimate expectations of any

person must be procedurally fair. The administrative action of the Respondent has significantly and negatively affected the Applicant and the other residents of the area.

- [22] The administrative action of the Respondent is not only in violation of Section 3(1) of the PAJA but it has also flouted the provisions of Sections 3(2)(b)(I) and (ii) insofar as the Applicant was not given notice, let alone adequate notice, of the nature and purpose of the proposed administrative action and a reasonable opportunity to make representations. If the Respondent did, it was after it had withdrawn the approval, if the sequence of the dates on the correspondence exchanged is anything to determine this fact. In this regard, I refer to the letter of Diamond dated 12 July 2019 withdrawing the approval

and the meeting of the 23rd of July 2019 between the parties, which of course occurred after the fact.

- [23] The meeting of 23 July 2019 could not have been intended to afford the Applicant and the other residents opportunity to make representations before or after the withdrawal of the application for security access. Indeed, how would a person affected by the administrative action hope to persuade the administrator not to take the decision when it has resolved and finalised it. Besides, the Applicant was told that nothing that she could do would change the decision that had been taken. The letter of the 25th of July 2019 serves no purpose because it is merely as confirmation of the decision that the Respondent had taken on 12 July 2019. As such, it cannot be construed as affording the Applicant opportunity to present her case before the Respondent. Accordingly, the decision was immutable as the Applicant was categorically advised that it would not be reversed no matter what she did.
- [24] It is evident from case law referred to above that an administrator has a duty to act fairly when administering its actions and that such duty is concerned only with the manner in which decisions are taken and has nothing to do with the fairness of the decision itself. See, Du Preeze's case *supra* and cases mentioned therein. In the same vein see, *NORTJE EN 'N ANDER v MINISTER VAN KORREKTIEWE DIENSTE EN ANDERE* 2001 (3) SA 472 (SCA). The Respondent might be thinking that the decision that it took is fair but that is not the criterion. The point is that the procedure adopted in taking that decision is awfully and despairingly flawed rendering it susceptible to being reviewed and set aside.

CONCLUSION

- [25] The finding that the Respondent disregarded the *Audi alteram partem* rule makes it gratuitous to consider any of the other issues that I have mentioned above as it is dispositive of the whole application. In the same vein, the success of the application necessarily means that the counterclaim must for the reasons above fail.

ORDER

- [26] In the circumstances, I make the following order:

1. The decision of the Respondent to withdraw the letter of approval of the application for security access control measure: Neil, Vosstok and Yuri Streets, Nelspruit, Extension 10, dated 12 July 2019 and confirmed on 25 July 2019 is reviewed and set aside;
2. The Respondent's approval of the application for security access control measure: Neil, Vlsstok and Yuri Streets, Nelspruit, Extension 10, dated 27 May 2019 is declared valid and legally binding on all parties concerned;
3. The respondent is to return and reinstall the security fence and structures removed by it on 25 July 2019 within 14 days of date of service of this order on it;
4. Should the Respondent fail to observe the preceding order (3), the Applicant is authorised to reinstall the security fence and structures at her own cost;
5. The costs for the reinstallation of the security fence and structures shall be recoverable from the Respondent within 14 days of date of receipt of written demand from the Applicant;
6. The Respondent shall be liable for the costs of this application;
7. The counterclaim is dismissed with costs.

B A MASHILE

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

MPUMALANGA DIVISION, MBOMBELA

This judgment was handed down electronically by circulation to the parties' and/or parties' representatives by email. The date and time for hand-down is deemed to be 10h00 on 23 September 2020.

APPEARANCES:

Date of Hearing:

27 May 2020

Date of Judgment:

23 September 2020

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