

SOUTH AFRICA / JUDGMENT

Kotze and Another v MEC of Co-Operative Governance and Traditional Affairs (Land use management and administration), Province of the Eastern Cape and Others (CA300/2018) [2020] ZAECGHC 25 (10 March 2020) [2020] ZAECGHC 25

COURT

Eastern Cape High Court, Grahamstown

BEFORE

NQUMSE, N.G. BESHE, R W N BROOKS

CASE / FILE NUMBER

CA300/2018

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IN THE HIGH COURT OF
SOUTH AFRICA
(EASTERN
CAPE DIVISION, GRAHAMSTOWN)
CASE
NO. C.A 300/2018
In

the matter between:

ARNOLD
ALBERT
KOTZE First
Appellant
MARIA
REGINA
KOTZE
Second Appellant
and
THE
MEC OF CO-OPERATIVE GOVERNANCE
AND
TRADITIONAL AFFAIRS (LAND USE
MANAGEMENT
AND ADMINISTRATION),
PROVINCE
OF THE EASTERN CAPE
First Respondent
THE
KOUGA MUNICIPALITY

Second Respondent
THE
ST FRANCIS FIELD HOME OWNERS'
ASSOCIATION
Third
Respondent

JUDGMENT

NQUMSE AJ:

Introduction

- [1] This is an appeal against the order by the court below handed down on 26 June 2018, in terms of which the appellants' application was dismissed with costs.
- [2] The appellants in the court a quo sought an order reviewing and setting aside the decision of the first respondent to dismiss the appeal made to it by the appellants against the decision of the second respondent in which the second respondent dismissed the appellants' application for sub-division of immovable property.
- [3] The complaints that were taken up by the appellants against the decision of the second respondent are ostensibly the following:
 - 3.1 The reasons given for the decision are inadequate;
 - 3.2 The decision was influenced by an error of law;
 - 3.3 The decision is irrational, regard being had to the material before the first respondent;
 - 3.4 The first respondent was biased against the appellants or they reasonably suspect him of bias.
- [4] The issue before the court below was whether or not the first respondent's dismissal of the appellants' appeal in terms of section 44 of the Land Use Planning Ordinance, 15 of 1985 (LUPO) was reviewable and if so, what remedy was to be imposed.
- [5] The judgment of the court a quo is assailed on the following grounds:
 - 5.1 The court erred in not finding that at the time of the decision by the second respondent the appellants were vested with a right to have the application for sub-division in terms of LUPO considered;
 - 5.2 The court erred in not finding that, because other properties had previously been subdivided post-1993, there was no rational town planning impediment to the subdivision of their property;
 - 5.3 The court also erred in not finding that the reasons given by the first respondent for its decision were inadequate; and

5.4 The court erred in not finding that the decision of the first respondent was arbitrary and irrational.

- [6] The appeal is opposed by the first respondent. The third respondent did not enter the fray whilst the second respondent withdrew its initial opposition and elected to abide by the decision of this court.

Background

Facts

- [7] The appellants who are members of the third respondent are co-owners of an immovable property situated at St Francis Field, erf 802 Cape St Francis, which was acquired in December 2006. At the time of its acquisition, the property was not subdivided but contained two standalone houses built on the single erf.
- [8] On 14 December 1993, the Algoa Regional Services Council approved the rezoning and subdivision of portion 59 of the farm Ongegunde Vryheid No 746 (“the parent property”) in terms of section 17 of LUPO subject to a condition, inter alia, that the minimum size of the properties so subdivided has to be 6800 square meters. This minimum size condition remained in place and was applicable at the time the decision was taken.
- [9] On 11 September 2012 the appellants applied to the second respondent to further subdivide their property being erf 802 Cape St Francis Airpark, which is part of the properties that were subdivided in the parent property
- [10] On 29 March 2013 the third respondent amended its constitution to prohibit the subdivision of properties owned by its members. At the time of the amendment to the constitution, the application of the appellant to further subdivide their property had not yet culminated in any decision.
- [11] After the amendment of the constitution, the second respondent, on 20 August 2013 refused the appellants’

application stating the following reasons:

11.1 The prohibition of the subdivision of any erf in the Airpark which does not conform to the sizes as set out in its approval dated 14 December 1993; and

11.2 The prohibition against subdivision that is stated on the constitution of the third respondent.

- [12] The appellant acting in terms of section 44 of LUPO, challenged the decision of the second respondent and on 05 September 2013 lodged an appeal with the first respondent.

- [13] In response to a query from the attorneys of the appellants on the status of their appeal, the first respondent informed the appellants that it could not consider their application on the grounds that section 44 of LUPO was declared unconstitutional on 04 April 2014 and that such constitutional invalidity applied retrospectively, including 14 August 2013 a date which

preceded the appellants lodging of their appeal. This response did not resonate well with the appellants and caused them to lodge an application to compel the first respondent to make a decision on their application.

- [14] On 16 January 2017 the first respondent took a decision and refused the appeal on the grounds that:

“St Francis Field Homeowners Association did not support the application, and Coega Local Municipality has refused the application.”

- [15] It is common cause that the decision of the first respondent constitutes administrative action as contemplated in section 1 of the Promotion of Administrative Justice Act[1] and that, therefore, the provisions of PAJA are applicable to this application.

Issues

for Determination

- [16] The crisp issues for determination by this court are whether:

16.1 the reasons furnished by the first respondent in refusing the appeal of the appellant fell short of what is required as adequate reasons under PAJA;

16.2 the appellants had a vested right at the time the first respondent took its decision; and

16.3 the decision of the first respondent was irrational, warranting that it be set aside.

The Law

- [17] In its heads of argument the first respondent relying on what was said in Commissioner, South African Police Services and Others v Maimela and Another[2], that courts have emphasized that it is impossible to lay down a rule of what would constitute adequate or proper reasons because each case must depend on its own facts, submitted that the reasons furnished by the first respondent are adequate.

- [18] In support of their contention that the reasons of the first respondent were inadequate, the appellant referred the court to a number of judgments inter alia, Minister of Environmental Affairs and Tourism and others v Phambili Fisheries (Pty) Ltd; Minister of Environmental Affairs and Tourism and Others v Bato Star Fishing (Pty)Ltd[3].

- [19] In Commissioner, South African Police Services and Others[4] the court stated as follows:

“The adequacy of reasons will depend on a variety of factors, such as the factual context of the administrative action, the nature and complexity of the action, the nature of the functionary taking the action. Depending on the circumstances, the reasons need not always be full written reasons, the briefest pro-forma reasons may suffice (see Hoexter (op cit) at 246; Rean International Supply Co (Pty) Ltd and Others v Mpumalanga Gambling Board 1999 (8) BCLR 918 (T) at 927A – B) whether brief or lengthy, reasons must, if they are read on the factual context, be intelligible and informative. It must be informative in the sense that they convey why the decision-maker thinks (or collectively think) that the

administrative action is justified.”

[20] In *Koyabe and Others v Minister for Home Affairs and Others (Lawyers for Human Rights as amicus curiae)*[5] the Constitutional Court stated that:

“Although the reasons must be sufficient, they need not be specified in minute detail, nor is it necessary to show how every relevant fact weighed in the ultimate finding. What constitutes adequate reasons will therefore vary, depending on the circumstances of the particular case. Ordinarily reasons will be adequate if the complainant can make out a reasonably substantial case for ministerial review or appeal.”

The court continued and said:

“The purpose for which reasons are intended, the stage at which the reasons are given, and what further remedies are available to contest the administrative decision also important factors. The list, which is not a closed one, will hinge on the facts and circumstances of each case and the test for adequacy of reasons must be an objective one.”[6]

- [21] Therefore, the reasons stated by the first respondent must be viewed from the premise whether they were informative to meet their purpose and whether they are informative such as to convey why the first respondent thought that his refusal of the appeal were justified.
- [22] As alluded to earlier in this judgment the first respondent in its refusal of the appeal, considered the opposition by the third respondent as well as its refusal for the subdivision of the appellants’ property. To that extent, in my view, the appellants understood the reasons for the decision and were capable of making a decision on whether or not to review the first respondent’s decision.
- [23] In this regard the court a quo found that the appellants became aware of the objections of the third respondent. They further knew that the first respondent considered such an objection. The resulting effect is that the appellants knew what those objections and refusal of the second respondent referred to. The court a quo reached this finding quite alive to the concession that was made that the reasons are ‘terse’.
- [24] If regard is had to the cases referred to above in which the principle of adequate reasons is espoused, I cannot find fault in the conclusion reached by the court a quo that the reasons of the first respondent, albeit terse, achieved the objectives as required in section 5(2) of PAJA. Put differently, if those reasons are viewed objectively, they enable the appellants to decide on further steps to remedy the administrative action[7].
- [25] I now turn to deal with the assertion that the decision of the first respondent was irrational. I find the approach adopted in *Carephone (Pty) Ltd v Marcus No and Others*[8] referred to in the first respondent’s heads instructive. In that case the following was stated:

“Is there a rational objective basis justifying the conclusion made by the administrative decision-maker between the material properly available to him and the conclusion he or she eventually arrived at.”

- [26] The third respondent was governed by a constitution under which all its members, including the appellants, resort. At the time the second respondent took its decision, the constitution of the third respondent had been amended and placed a prohibition on the subdivision of properties by its members. It is common cause that this material was before the first respondent when it took its decision. Coupled with this is the 1993 minimum size condition put in place by the Algoa Regional Council as a prerequisite for subdivision of the parent property.
- [27] Both these factors were material before the first respondent and were relevant to a decision whether to allow or refuse the appeal.
- [28] In my view, the material before the first respondent, viewed objectively enabled the first respondent to make its decision and in so doing, I find its actions justifiable and rational.
- [29] The appellants further argued that prior to the amendment of the constitution by the third respondent they had a vested right which required their appeal to be considered according to the “Town Planning Principles” since their right was in existence before the amendment of the constitution. By virtue of the alleged right, it is argued that it was an error of law to have considered the appeal on factors that applied before the amendment of the constitution as opposed to those factors that applied when the appeal was launched. Effectively, this argument is found on the principle regarding retrospectivity. In further support of this contention the appellants rely on the Constitutional Court judgment of *S v Mhlungu*[9] where the court stated at para 65:

“First, there is a strong presumption that new legislation is not intended to be retroactive. By retroactive legislation is meant legislation which invalidates what was previously valid, or vice versa, i.e. which affects transactions completed before the new statute came into operation. See Van Lear (supra). It is legislation which enacts that ‘as at a past date the law shall be taken to have been that which it was not.’ See Shewan Tomes & Co. Ltd v Commissioner of Customs and Excise 1955 (4) SA 305 (A) at 311 H, per Shreiner ACJ. There is also a presumption against reading legislation as being retrospective in the sense that, while it takes effect only from its date of commencement, it impairs existing rights and obligations, e.g. invalidating current contracts or impairing existing property rights. See Cape Town Municipality v F Robb & Co. Ltd 1966 (4) SA 345 (C) at 351, per Corbett J. The general rule therefore is that a statute is as far as possible to be construed as operating only on facts which came into existence after its passing.”

- [30] In further amplification of their contention the appellants rely on *Noel-Greve v Markus Mueller and Others*[10]. The issue in that matter concerned an amendment of a by-law that had been repealed after the relevant decision had been taken by the municipality. The distinguishing feature of this matter from *Noel-Greve*, is that the amendment to the constitution of the third respondent was effected before the second respondent took its decision on the matter and before the first respondent dealt with the appeal of the appellants.

[31] It is my view therefore that the issue of retrospectivity is not an issue arising for determination in this present matter and that, therefore, the matter of Mhlungu bears no relevance in the circumstances of this case.

[32] Finally, it is my view that the cumulative factors that played out in this matter which formed the basis for the actions of the first respondent were rationally connected to the information that served before the first respondent. I, therefore, find that the first respondent had applied its mind to the appeal of the appellants. The appeal to this court falls to be dismissed.

Order

[33] In the result the following order will issue

The appeal is dismissed with costs

V NQUMSE

JUDGE OF THE HIGH COURT (ACTING)

GRAHAMSTOWN

BESHE J:

I agree

N.G. BESHE

JUDGE OF THE HIGH COURT

BROOKS J:

R W N BROOKS

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Tilana Inc.

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Date Heard

: 09 December 2019

Judgment

Delivered

:10 March 2020

[1] Act 3 of 2000 (PAJA)

[2] 2003 (5) SA 480 (T) at 487C - D

[3] 2003

(6) SA 407 (SCA) at para 40

[4] Note 2 supra

[5] 2010

(4) SA 327 (CC) at para [63]

[6] At para [64]

[7] Coutsourides NO and another v Nelson Mandela Bay Metropolitan Municipality and others
[2015] JOL 34907 (ECP)

[8]

[1998] 11 BLLR 1093 (LAC) at para 37

[9] 1995

(3) SA 867 (CC)

[10] Unreported decision of the Full Bench of the Western Cape Division in Noel-Greve v Markus Mueller and Others. case no A348/2013, dated 5 February 2014

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