

SOUTH AFRICA / JUDGMENT

Liberty Group Limited and Others v City of Johannesburg Metropolitan Municipality and Others (2023/024680) [2024] ZAGPJHC 153 (19 February 2024) [2024] ZAGPJHC 153

COURT

South Gauteng High Court, Johannesburg

BEFORE

Wright

CASE / FILE NUMBER

2023/024680

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IN

THE HIGH

COURT OF SOUTH AFRICA

GAUTENG

DIVISION, JOHANNESBURG

CASE

NO: 2023/024680

1.

Reportable : No

2.

Of interest to other judges: No

3.

Revised

Wright

J

19

February 2024

In

the matter between: LIBERTY
GROUP LIMITED
1st Applicant
PARETO
LIMITED
2nd Applicant
FIRSTRAND
BANK LIMITED
3rd Applicant
and
CITY
OF JOHANNESBURG METROPOLITAN
1st
Respondent
MUNICIPALITY
JOHANNESBURG
DEVELOPMENT AGENCY SOC LIMITED
2nd
Respondent
JOHANNESBURG
ROADS AGENCY
3rd Respondent
SOC
LIMITED STEFANUTTISTOCKS(PTY)LTD
4th Respondent
A
RE SHOMENG HOLDINGS
(PTY)
LTD
5th Respondent

JUDGMENT

WRIGHT J

- 1.The three applicants own and operate Sandton City, a large, well known and upmarket shopping centre.
2. The first three respondents are the City of Johannesburg, its Development Agency and its Roads Agency. I shall refer to them collectively as the City. The other two respondents, interested contractors, do not oppose the application.
3. The papers in this case are long and complicated. I shall attempt to cut to the chase.

Background

4. When the new town of Johannesburg was laid out all those years ago it was not laid out with the interests of all persons in mind. Long before 2007, Greater Johannesburg, including Sandton was clogged by traffic and many persons were still marginalised, being provided with less than a fair opportunity to enjoy all the benefits of the city. In that year, national government approved a broad public transport answer to congestion which allowed less privileged persons, previously relegated to the outskirts, to participate fairly in the city in all respects, including work.
5. The City began a bus programme to give local effect to this ideal. The name is Rea Vaya, meaning "We are going." The City did not limit its exercise to downtown Johannesburg. Many parts of Greater Johannesburg, including Sandton, were envisaged as being beneficiaries of Rea Vaya. Large concrete bus terminals are placed in the middle of busy roads.

Physical Layout

6. The cardinal and ordinal directions I use below are for illustrative purposes only.
7. Rivonia Road is a main road going through Sandton. It runs north south, carrying traffic in both directions. In the north, West Road goes across Rivonia Road. The Gautrain Station is on the south west corner of West Road and Rivonia Road. Moving southwards, a block later, 5th Street crosses Rivonia Road. Still moving south, another block later, Sandton Drive crosses Rivonia Road. Sandton City is between 5th Street and Sandton Drive and on the west side of Rivonia Road.
8. Katherine Street is a continuation of Sandton Drive east of Rivonia Road.
9. Pybus Road runs east west, carrying traffic in both directions. It runs from the east to Rivonia Road, forming a T-junction, with Rivonia Road as the top of the T. Pedestrians walking westwards to Sandton City along Pybus Road cross Rivonia Road and enter Sandton City through its main pedestrian entrance.
10. Pybus Road joins Rivonia Road about halfway between 5th Street and Sandton Drive. Sandton City takes up one large block, between 5th Street and Sandton Drive on the west side of Rivonia Road. Pybus Road effectively divides the east side of Rivonia Road into two smaller blocks.
11. Presently, two lanes of traffic allow a right turn from Pybus Road into Rivonia Road. If construction of the proposed terminal goes ahead, the applicants fear that only one lane will allow a right turn from Pybus Road into Rivonia Road.
12. At present, traffic moving northwards on Rivonia Road may turn right into Pybus Road using one lane. After construction, the applicants fear that no such turn will be allowed.

13. The applicants fear that after construction, pedestrians using Pybus Road will not be able to walk across Rivonia Road to get to Sandton City.
14. The proposed terminal will be lengthways along Rivonia Road and in the middle of the road. The terminal will take up the whole distance between 5th Street and Pybus Road. Two busses, travelling in each direction, north and south, will be able to be stationary simultaneously to allow passengers to get on and off the busses. In total, four busses might be stationary at the terminal at any given time.
15. The south end of the terminal will end a few metres from the main pedestrian entrance to Sandton City.

Chronology of main events

16. 2007 - Cabinet approves a broad answer to aspects of public transport.
17. 14 May 2008 - The City publishes a notice in the Provincial Gazette informing the public of eighty-five proposed Rea Vaya bus stops and stations. Three are in Sandton. One describes the station to be "At the new Gautrain Station, possibly under-or above ground." None is outside the main pedestrian entrance to Sandton City. The public is invited to comment, object or make representations.
18. 2 May 2013 - The City resolves that "the implementation of Phase 1C proceeds as detailed in this report, commencing with the 2016 routes and working towards the 2037 routes the operational detailed of which would be spelt out in a Business Plan to be submitted to the Mayoral Committee before the end of the 2013 calendar year. The Transport Department be authorized to immediately commence the detail design and construction of the infrastructure, including all processes which are required to successfully complete the infrastructure. The Planning Departments includes and actively pursues the findings of this report into the development of Strategic Area Frameworks for the Phase 1C corridors."
19. 19 June 2013 - The City resolves to rescind a previous system of delegations of authority approved on 19 June 2008 and to replace it with a fresh system of delegations.
20. May 2019, based on a study by consulting engineers retained by the City, the City initiates a new engagement process with identified business interests, including the applicants. The public is not invited.
21. 12 August 2019 - The City writes to the applicants saying that "Positioning the station on Rivonia Road between 5th Street and Pybus Road is not feasible."
22. 29 November 2019 - a file note records a meeting between various persons and noting that after a meeting with the applicants "the placement of the BRT Stations between 5th Street and Sandton Drive is the preferred location. "

23. 4 December 2019- a file note records a meeting between the two sides. It is noted that "the professional team was tasked with investigating the possibility and feasibility of moving the stations between 5th Street and Sandton Drive (opposite Sandton City Mall). "The note records that a representative of the applicants confirms that " Sandton City supports the idea of the BRT stations on Rivonia Road between 5th Street and Sandton Drive. Sandton City appreciates that CoJ has answered the calls of relocating the stations. "
24. 21 April 2020 - the earliest possible date of the decision according the applicants.
25. 12 May 2020 - the applicants write to the City, setting out much technical detail and listing different possible scenarios. The applicants confirm their support for Rea Vaya in the Sandton CBD. Numerous concerns are raised by the applicants. One example is that pedestrians will not be able to walk across Rivonia Road at Pybus Road to go to Sandton City. The applicants expressly say that placing the terminal between 5th Street and Pybus Road "represents Sandton City's most favoured option.
"
26. 13 August 2021 -the last possible date of the decision according to the applicants.
27. 11 May 2022 - The Applicants write to the City, referring to their letter of 12 May 2020 and state expressly that the same option is "the more viable option." The letter refers to encroachments on Sandton City property if construction goes ahead as planned.
28. 27 September 2022 - The City creates a press release, informing the public that it would be implementing the Rea Vaya system in Sandton. The press release informs the reader that "stations will be between Sandton Drive and Katherine Street intersection south and Fifth Street on the north. The project commencement planned for October 2022. It will involve relocation of existing services, widening roadworks and a median station building when the roadworks has been advanced. "The press release advises the reader of job opportunities. At the end of the press release the statement is made that it is issued by Kenneth Nxumalo of the Johannesburg Development Agency and "For more information: Elias Nkabinde Email: enkabinde@ida.org.za 076 961 8022 www.ida.org.za" The press release contains at least one detailed sketch plan. This document was provided by the City to the applicants as part of the Rule 53 record.
29. 21 October 2022 - The City writes to the applicants saying that "the reason for us expediting the construction of the Sandton Station is because the City receives the BRT grant from National Treasury. Should grant expenditure not be expedited, the City runs the risk of losing the allocation - and that would be dire to the Phase 1C operations, as Sandton City Station, is the terminus of the phase." The letter contains a disclosure that sidewalk space is inadequate and states "Ideally the City would embark on a land acquisition process to ensure adequate space. "The letter mentions that incorrect architectural drawings had earlier been forwarded by the City to the applicants.

30. 28 October 2022 - The applicants' attorneys write to the City, referring to incorrect architectural drawings by the City and

emphasising that construction should not start until the expropriation process is complete. A request is made for various documents, mainly relating to whether or not the City has complied with its statutory notice obligations.

31. 20 December 2022 - The City writes to the applicants, referring to the construction of a narrower station "without encroaching into your client's property. "
32. 23 December 2022 - The City's attorneys write to the applicants' attorneys saying "Our client is committed to ensuring that the construction of the Sandton CBD BRT project complies with the applicable legislation. "
33. 27 January 2023 - The City's attorneys write to the applicants' attorneys saying "our client has already commenced with preparatory work, comprising, inter alia, excavations which cannot simply be abandoned, as doing so would result in wasteful and fruitless expenditure" and saying "The contractor has not been given access to site as yet. This work, when it finally commences, will be performed in compliance with the applicable legislation. "The letter says also that the City " intends to continue with the implementation of the Sandton CBD BRT project in line with the spirit and purport of the applicable legislation."
34. 10 March 2023 - The City's attorneys write to the applicants' attorneys, referring to a decision allegedly taken by the City in May 2013 to construct the Sandton BRT Station. The City admits not having published notices under section 65bis of Local Government Ordinance, 17 of 1939 or under sections 21 and 21A of the Municipal Systems Act 32 of 2000. The letter alleges substantial compliance with legislation. The City invited the applicants to meet with it to discuss.
35. 16 March 2023 -the present application is launched, containing Parts A and B.
36. 7 June 2023 - The applicants' attorneys write to the City's attorneys stating that various documents referred to in the answering affidavit to Part A have not been attached to the affidavit. The original resolution by the Council to construct the terminal is sought. It is pointed out that no resolution by the Council to move the terminal from opposite the Gautrain to outside the main pedestrian entrance to Sandton City has been provided. A notice under Rule 35(12) and served on the City's attorneys on the same day lists many documents required by the applicants.

The relief sought

37. Mr HC Bothma SC led Mr N Alli for the applicants. Mr NH Maenetje SC led Ms M Lengane for the City.

38. In Part A of the application, the applicants sought to interdict the City from constructing the proposed bus terminal pending the final determination of Part B. Part A was heard by Fisher J on 16 November 2023 and dismissed by her on 22 January 2024.
39. In Part B, presently before me, the applicants seek, in prayer 1, the review and setting aside of the decision to commence construction of the terminal on Rivonia Road between 5th Street and Sandton Drive until the City has complied with sections 65bis, 66 and 67 of Local Government Ordinance 17 of 1939 read with sections 21 and 21A of the Municipal Systems Act, 32 of 2000.
40. In the alternative, in prayer 2, it is sought to review and set aside a failure to take the impugned decision. Prayer 2 does not expressly add the rider that the relief sought is pending compliance with the legislation referred to in prayer 1 but I take prayer 2 to be sought subject to compliance as set out in prayer 1. Mr Bothma confirmed this as correct during argument.
41. In prayer 3, what is sought is the review and setting aside of the City's decision, alternatively failure to take a decision to expropriate part of Sandton City so that the terminal can be built. This prayer, like Prayers 1 and 2 is sought subject to compliance
- with the Ordinance and Systems Act.
42. In prayer 4, it is sought that the City be interdicted from allowing the contractors to proceed with construction pending compliance with the legislation referred to in Prayer 1.
43. The prayers for review and for an interdict in Part B are not sought in the absolute.

They are sought pending compliance by the City with the notice requirements of the Ordinance and the Systems Act.

Grounds for review

44. The applicants are not sure whether the relevant decisions were taken or not. In short, if the decisions were taken, the applicants seek review on the grounds that no or inadequate notice was given by the City to the applicants or to the public, leading to unlawfulness. Other grounds for review include procedural unfairness, materially relevant matter not considered and the decision was arbitrary and capricious. Further, the decision is not rationally connected to the purpose for which it was taken, nor is it rationally connected to the empowering provision or the information before the decision maker. The decision is unreasonable. Lack of authority to take the decision or build the terminal is alleged.
45. If no decision was taken, there has been an unreasonable delay in taking it in that construction has commenced without prior compliance with the legislative provisions.
46. Specific provisions of the Promotion of Administrative Justice Act, 3 of 2000 are relied upon. In the alternative, the principle of legality is invoked.

Condonation

47. The City delivered its answering affidavit to Part B some fifty five court days late. It did so as many documents needed to be assembled and its legal team needed time to prepare the affidavit. The applicants oppose condonation, saying that the City is weak on the merits and the delay is not adequately explained. The explanation by the City is not overflowing with detail but in my view it is sufficient. Fifty-five court days, in the greater context of this case is insignificant. In any event, the applicants took the precaution of delivering a provisional replying affidavit. I would allow the answering affidavit to Part B into evidence. Regarding the costs in the condonation, the City is successful in the condonation application but it seeks an indulgence. The opposition to the late filing was reasonable. In these circumstances, the parties should carry their own costs in the condonation application.

The Constitution

48. Under section 195, public administration must be governed by democratic values and the principles enshrined in the Constitution.

These principles include transparency through providing the public with timely, accessible and accurate information.

Local Government Ordinance, 17 of 1939

49. Under section 63, the Council, in the present case, the City, shall have control and management of all roads, pavements, side-walks and the like.
50. Under section 65bis(1)(a), a council may from time to time, by resolution determine the routes to be followed by public vehicles,

either generally or between specified times or alter or cancel such routes or alter such times. Under section 65bis(1)(b), a council may fix the stopping places or cancel such stopping places and fix other stopping places.

51. Under section 65bis(2), once a decision has been taken, a council shall publish a notice in the Provincial Gazette and in one English and one Afrikaans newspaper circulating in the municipality stating that the decision has been taken and is lying for inspection at a specified place and that objection may be lodged within a certain time, such time being specified by the City but not less than twenty one days "from date of publication of the newspaper or Provincial Gazette in which such notice is published last" and calling upon any person wishing to object to do so in writing not later than the last day on which the resolution will be lying for inspection.
52. Under section 65bis(4), where objection is received, the objection is submitted to the council which may ratify, amend or revoke the resolution. Under section 65bis(5), where a resolution has been ratified or amended,

the town clerk shall give notice thereof in the Provincial Gazette and shall state the date when the resolution comes into operation.

53. Under section 66(1)(b)(i), the council may, after giving the necessary notice, close any street permanently or temporarily for any class of traffic, procession or gathering or, under section 66(1)(b)(ii) temporarily for all traffic. Under section 66(1)(c), the council may divert temporarily any street, road or thoroughfare contemplated in sub - paragraph (b).
54. Under section 67, the council may permanently close or divert any street or portion thereof after certain specified conditions have been complied with.

The Local Government Systems Act, 32 of 2000

55. Under section 21(1) - When anything must be notified by a municipality through the media to the local community in terms of

this Act or any other

applicable legislation, it must be done-

- (a) in the local newspaper or newspapers of its area;
- (b) in a newspaper or newspapers circulating in its area and determined by the council as a newspaper of record; or
- (c) by means of radio broadcasts covering the area of the municipality.

(2) Any such notification must be in the official languages determined by the council, having regard to language preferences and usage within its area.

- (3) A copy of every notice that must be published in the Provincial Gazette or the media in terms of this Act or any other applicable legislation, must be displayed at the municipal offices.

(4) When the municipality invites the local community to submit written comments or representations on any matter before the council, it must be stated in the invitation that any person who cannot write may come during office hours to a place where a staff member of the municipality named in the invitation, will assist that person to transcribe that person's comments or representations.

(5)

- (a) When a municipality requires a form to be completed by a member of the local community, a staff member of the municipality must give reasonable assistance to persons who cannot read or write, to enable such persons to understand and complete the form.
- (b) If the form relates to the payment of money to the municipality or to the provision of any service, the assistance must include an explanation of its terms and conditions.

56. Section 21A reads - Documents to be made public. - (1) All documents that must be made public by a municipality in terms of a requirement of this Act, the Municipal Finance Management Act or other applicable legislation, must be conveyed to the local community-
- (a) by displaying the documents at the municipality's head and satellite offices and libraries;
 - (b) by displaying the documents on the municipality's official website, if the municipality has a website as envisaged by section 21B; and
 - (c) by notifying the local community, in accordance with section 21, of the place, including the website address, where detailed particulars concerning the documents can be obtained.
- (2) If appropriate, any notification in terms of subsection
- (1) (c) must invite the local community to submit written comments or representations to the municipality in respect of the relevant documents.

The Expropriation Act, 63 of 1975

57 This Act, particularly sections 2,3,5,6 and 7 set out certain requirements for expropriation. It is common cause that the City has not followed any of these procedures.

Is the decision to relocate the terminal significant?

58.The placing of a large concrete terminal, in the middle of an existing busy road, is a significant engineering feat. Some of the consequences for traffic, both public and private are temporary, others permanent.

59.The decision to move the terminal from the initial location to its current location is significant sufficiently to attract the need to give notice. It is of lesser significance when considering the question of authority and delegated authority.

60.For the purposes of giving notice, the notice of the City as set out in the 2008 provincial gazette is in my view no longer relevant. It has been overtaken by events. The 2008 notice is not wide enough to include the current location. The decision to place the terminal at its current location is the operative decision and the need to invite public objection, give reasons for the decision and otherwise comply with administrative law is to be measured against the decision to relocate the terminal and against the purpose of notice.

61. Regarding the question of whether the decision was authorised, it is not necessary to determine the exact date of the decision. It appears to have been taken between 12 August 2019 and 27 September 2022. I deal below with the question of authority.

Notice to the applicants

62. Precisely when the parties started negotiating with each other is not clear. What is clear is that there has been, since before 2019, much interaction between the parties. Reams of correspondence and other documents evidence many meetings, including on site meetings, the considering of each other's points of view and proposal and counter - proposal. Much of the discussion takes place between about 2019 and March 2023.
63. By 4 December 2019 the applicants were aware that the City's representatives were minded to build the terminal outside the main

Pydestrian entrance to Sandton City and they had expressed their happiness with and appreciation for this decision.

64. The applicants have been in the loop all along. To hold that they are entitled to formal notice, over and above the detailed engagement they enjoyed for years, would be to place form over substance. The City has materially complied with its notice obligations to the applicants.

Notice to the public

65. Ms Mabuza, the City's Executive Director of Transport and the deponent to the answering affidavit deals expressly with the press release of 27 September, 2022. Choosing her words carefully, Ms Mabuza says that " the JOA also sent a press release to numerous newspapers". She says that " Accordingly, notice was given to the general public regarding the Sandton BRT terminal and the relevant detail thereof as a matter of fact. Insofar as the applicants dispute this, I respectfully submit that any such dispute is clearly controverted by the available evidence, as contained in this affidavit and the applicants' founding affidavit and, accordingly, cannot be sustained. There was exact, alternatively substantial compliance, and the purpose of the relevant statutory requirements was met. "

66. Ms Mabuza does not say that the press release was received by any of the newspapers, nor does she say that the press release was published in whole or in part. No documentary proof of any kind is attached to Ms Mabuza's affidavit, or referred to, showing that in fact the press release was published. Ms Mabuza's statement that notice was given to the public as a fact is a conclusion which she draws, apparently from the existence of the press release. It does not follow that just because a press release was sent to various newspapers, if in fact it was, that it arrived there, nor does it follow that it was published in a form which alerted the public sufficiently. Editors have and sometimes use their powers to prune what they receive.

67. It would have been a simple matter for Ms Mabuza to produce the email or other form of communication showing that the press release was sent. An affidavit by the sender of the press release, if in fact it was sent, may have provided satisfactory evidence of sending. It would have been an equally simple matter to attach a copy of the press release as it appeared in a newspaper or newspapers. This would have shown what the public saw. There is neither allegation, nor documentary evidence supporting such allegation, that any query was received by the City from any member of the public following the alleged publication of the press release. Apart from the press release itself, no documentary evidence is forthcoming in Ms Mabuza's affidavit, nor does

she explain the absence of what is clearly missing.

68. Be that as it may, these are proceedings on affidavit. The fact remains that Ms Mabuza, for the City as respondent in motion

proceedings has stated that the press release was sent and the public received notice. In my view, the City complied materially with the requirement of notice to the public.

Authority and delegation

69. On 2 May 2013, the then Executive Director of Transport presented the Rea Vaya Phase 1C Sustainability Study Report. The Mayoral Committee then resolved that Phase 1C should be implemented. No specific locations for terminals were specified. Ms Mabuza says that this latter decision making power was delegated to the Transport Department.

70. Ms Mabuza refers to a document, given to the applicants as part of the Rule 53 record headed "Delegated Framework for Municipalities - Powers and Functions Assigned to the Executive Director: Transportation."

71. These powers and functions include, in paragraph 3.3 thereof, those "To execute any power, function or duty which in terms of any legislation is relevant to the functions of the Transport Department, except when in the opinion of the Executive Director: Transport, such power, function or duty concerns matters of strategic nature or so controversial that it should be referred to the relevant Committee of Council, the MMC: Transport, the Executive Mayor or the Council, as the case may be."

72. Ms Mabuza says that the then Executive Director acted in terms of his

authority. I see no basis for dismissing what Ms Mabuza says. The decision to move the terminal from "At the new Gautrain Station" as set out in the 14 May 2008 notice, to its present location, does not fall within the matters required to be sent up the chain of command under paragraph 3.3 of the "Delegated Framework."

Traffic complaints

73. Essentially, the applicants raise three complaints.

74. First, while at present two lanes of traffic may turn right from Pybus Road into Rivonia Road, after construction only one lane will carry traffic right from Pybus Road into Rivonia Road. Mr Bothma, quite understandably could not suggest how this could have any effect on Sandton City. Traffic turning right from Pybus Road into Rivonia Road may still then turn left into Sandton City parking.

75. Second, while at present traffic may turn right from Rivonia Road into Pybus Road, after construction no such turn will be allowed. Mr Bothma, again, quite understandably could not suggest how this could have any effect on Sandton City. Ms Mabuza explains that this decision was taken for safety reasons. A right turn across oncoming traffic is inherently dangerous at the best of times. Turning right directly in front of a large piece of concrete which blocks sight of oncoming traffic is all the more dangerous.
76. Third, after construction, pedestrians walking up Pybus Road towards Sandton City will not be able to cross Rivonia Road to get to Sandton City. This fear is ill founded. The plan shows that zebra crossings will lead pedestrians using Pybus Road over Rivonia Road.

Reasons

for the decision

77. It is difficult to see why the applicants need reasons for a decision to place the terminal precisely where the applicants expressly agree it should be placed. Be that as it may, by way of reasons, Ms Mabuza says in her answering affidavit that the present location "continues to be in line with the City's objective to locate a BRT terminal within the proximity of the Gautrain Station as the City's main objective was (and still is) to integrate the Gautrain and the Rea Vaya BRT system." Reasons do not need to be formal nor do they need to use legalise. In my view, sufficient reason has been given.

The Remaining Grounds for Review

78. I have dealt specifically with certain of the grounds relied upon by the applicants. The balance of the grounds has no basis in the evidence before me.

Expropriation

79. The correspondence from the applicants to the City shows clearly the applicant's concerns that their property may be built upon. In its letter of 21 October 2022, the City states that it would "embark on a land acquisition process to ensure adequate space." The deponent to the founding affidavit, Ms Beattie says that the constructed terminal "may encroach onto the applicant's property."

80. Ms Mabuza denies any intention by the City to encroach on Sandton City's property or to expropriate it. In its letter of 20 December 2022, the City undertakes not to encroach. On these facts, the applicants raise no more than a possibility, denied by the City, that there will be expropriation. The applicants have not proved a case for relief of any kind regarding expropriation.

Interdict

81. The prayer for an interdict, sought essentially to give effect to decisions reviewed and set aside, falls given the findings above.

ORDER

1. The late filing of the first to third respondents' main answering affidavit is condoned. The parties are to carry their own costs in the condonation application.
2. Part B of the notice of motion dated 16 March 2023 is dismissed.
3. The applicants are jointly and severally to pay the costs of the first, second and third respondents in Part B, including those of two counsel.

GC WRIGHT

Judge of the High Court

Gauteng Division, Johannesburg

HEARD

16 February 2024

DELIVERED 19 February 2024

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