

SOUTH AFRICA / JUDGMENT

Midstream Home Owners Association and Others v Shoprite Checkers (Pty) Ltd and Others

(57688/2010) [2011] ZAGPPHC 223 (21 April 2011)

[2011] ZAGPPHC 223

COURT

North Gauteng High Court, Pretoria

BEFORE

Pretorius

CASE / FILE NUMBER

57688/2010

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NOT

REPORTABLE

IN

THE HIGH COURT OF SOUTH AFRICA

(NORTH

GAUTENG HIGH COURT)

Case

number: 57688/2010

Date: 21 April 2011
In

the matter between: MIDSTREAM
HOME OWNERS
ASSOCIATION1st
Applicant
MIDFIELD
HOME OWNERS
ASSOCIATION.....
2nd Applicant
MIDLANDS
HOME OWNERS
ASSOCIATION.....
3rd Applicant
MIDSTREAM
COLLEGE (PTY)
LTD.....

4th Applicant
 RETIRE
 @ MIDSTREAM HOME OWNERS ASSOCIATION
5th
 Applicant BONDEV MIDRAND (PTY)
 LIMITED.....6th
 Applicant
 MARTHINUS
 JOHANNES DU
 TOIT.....7th
 Applicant
 and
 SHOPRITE
 CHECKERS (PTY)
 LIMITED
 1stRespondent
 THE
 CITY OF TSHWANE METROPOLITAN MUNICIPALITY
2nd Respondent
 HERITAGE
 HILL HOME OWNERS
 ASSOCIATION.....3rd
 Respondent

JUDGMENT

PRETORIUS J,

This is an application which was launched as an urgent application, but was heard on an arranged date. The applicants are four homeowners'

associations, a private school, a developer and a resident of the Midstream Estate,

The applicants seek:

"2. That the first respondent be interdicted and restrained from constructing, completing or in any manner utilising for access

purposes the access point which is currently constructing on a portion of Brakfontein road in respect of which there is an operative

line of no access imposed in terms of the approved amendment scheme 945, an amendment to the then Centurion Town Planning Scheme, 1992 and now the Tshwane Town Planning Scheme, 2008;

3. in the alternative to the final relief in prayer 2 above, that interim interdictory relief, in accordance with the terms of prayer 2 above, be granted in favour of the applicants against the first respondent, pending the finalisation of one or more of the following

proceedings:

'3.1 An application to review and set aside any authorisation or permission which the second respondent might have granted for the

construction of the access referred to in prayer 2 above;

3.2 An application for a final Interdict against the first respondent stopping any developments or construction in breach of the current existing environmental authorisation;

3.3 An appeal to the Township Board;

3.4 An application for a mandamus against the second respondent, compelling it to act against the first respondent in order to procure

suitable orders against the first respondent from stopping it to conduct any further unlawful activities

4. The final proceedings have to be instituted within 20 days from granting of this order;

5. That the first respondent be ordered to pay the costs of this application"

All the applicants are resident or located within the boundaries of Midstream Estate. The first respondent, Shoprite Checkers (Pty) Ltd (Shoprite), is the owner of Erf 906 Louwlandia Ext 25, Pretoria which lies south of Brakfontein Road and east of Olievenhoutbosch Road.

The third respondent is the Heritage Hill Home Owners Association. Heritage Hill is situated on the northern side of Brakfontein Road. The third respondent supports the application.

Although the second respondent had filed an opposing affidavit, the second respondent did not oppose the application and did not argue the matter. The applicants sought no costs from the second respondent should the application succeed.

On 19 September 2001 the second respondent, City of Tshwane Metropolitan Municipality, approved an application by the first respondent to establish a township on the property. The township was proclaimed on 14 September 2002. The first respondent constructed a distribution centre upon the property after the second respondent had approved it. Only one access was approved at the time from Brakfontein Road onto the first respondent's property.

The intended and present use of Brakfontein Road by the first respondent has led to the current application. The first respondent alleged that the second respondent granted the first respondent authorisation to construct a second access from Brakfontein Road onto the first respondent's property. The applicants are requesting the court to find that the first respondent should be prevented from utilizing the new second access on Brakfontein Road as it was not specifically approved and granted by the second respondent. The applicants rely on the existence of a "line of no access" which was imposed on Brakfontein Road in Amendment Scheme 945 to the Centurion Scheme. The applicants argue that the revocation process should have been subjected to the procedure prescribed in clause 7 of the Tshwane Scheme before the second respondent could

have consented to the construction of the new second access from Brakfontein Road.

Clause 7 (2) provides:

"The municipality may prohibit the entrance to or exit from a property to a public street from any boundary of such property, this boundary is indicated by the following symbol on the map: With the proviso that the Municipality may revoke such access prohibition on receipt of a written application for its permission, subject to any conditions that the Municipality may impose, except in the case of access . restrictions in respect of National or Provincial roads." (Court's emphasis)

The applicants request the court to find that the second respondent had not revoked the line of no access along Brakfontein Road. Subject to the court's finding the applicants will either seek final relief or interim relief. Should the court find that the second respondent had not revoked the line of no access, the applicants will seek a final interdict, Should the court,, however, find that the second respondent did revoke the line of no access, the applicants request an interim interdict pending an appeal to the Township Board, or review proceedings to the High Court, of mandamus proceedings or final interdict proceedings before the High Court on environmental grounds.

Due to the fact that the applicants were undecided whether to request an interim interdict or a final interdict they left it to the court to decide which form of relief should be granted, if any. The result was that counsel for both the applicants and the respondents argued on the basis of a final interdict and an interim interdict.

The question whether a final interdict should be granted must be considered on the facts as stated by the applicants in their affidavits with the admitted facts by the respondent and the alleged facts by the respondents as there are several factual disputes on the papers.

In *Plascon Evans Paints Ltd v Riebeeck Paints (Pty) Ltd* [1984] ZASCA 51; 1984 (3) SA 623

(A) at 634 H and 635 A - C where Corbett JA found:

"it is correct that, where in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicants affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order. The power of the Court to give such final relief on the papers before it is, however, not confined to such a situation. In certain instances the denial by respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or bona fide dispute of fact (see in this regard

Room Hire. Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd at 1163 -5; *Da Mata v Otto* NO 1972 (3) SA 858 (A) at 882D - H). if in such a case the respondent has not availed himself of his right to apply for the deponents concerned to be called for cross-examination under Rule 6

(5)

- (g) of the Uniform Rules of Court (cf Petersen v Cuthbert & Co Ltd 1945 AD 420 at 428; Room Hire case supra at 1164) and the Court is satisfied as to the inherent credibility of the applicant's factual averment, it may proceed on the basis of the correctness thereof and include this fact among those upon which it determines whether the applicant is entitled to the final relief which he seeks..." (Court's emphasis)

This finding was confirmed in *National Director of Public Prosecutions v Zuma* [2009] 2 All SA 243 (SCA) where Harms JA held at para 26:

Motion proceedings, unless concerned with interim relief, are all about the resolution of legal issues based on common cause' facts. Unless the circumstances are special they cannot be used to resolve factual issues because they are not designed to determine probabilities. It is well established under the Plascon-Evans rule that where in motion proceedings disputes of fact arise on the affidavits, a final order can be granted only if the facts averred in the applicant's (Mr Zuma's) affidavits, which have been admitted by the respondent (the NDPP), together with the facts alleged by the latter, justify such order. It may be different if the respondent's version consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting them merely on the papers. (Court's emphasis)

The court has to find whether there are actual factual disputes on the papers and that the first respondent had set it out adequately in the replying affidavit so that the court can decide whether there are factual disputes, (n *Wichtman t/a JW Construction v Headfour (Pty) Ltd and Another* [2008] ZASCA 6; 2008 (3) SA 371

SCA the court held at p 375:

"[13] A real, genuine and bona fide dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed. There will of course be instances where a bare denial meets the requirement because there is no other way open to the disputing party and nothing more can therefore be expected of him. But even that may not be sufficient if the fact averred lies purely within the knowledge of the averring party and no basis is laid for disputing the veracity or accuracy of the averment"

The factual disputes on the papers before court is whether the second respondent had approved the revocation of the line of no access;

whether it was necessary for the second respondent to expressly approve the revocation of the line of no access; whether the first

respondent had to apply for the revocation of the line of no access and whether it was an implied approval by the second respondent. The further dispute is whether the applicants suffer inconvenience as a result of traffic volumes and whether the value of their properties have

declined as a result of the use of the second access on Brakfontein Road. The further dispute is whether the first respondent had already implemented the use of the second access as the applicants deny these submissions by the first respondent. The evidence of both the experts for the applicants and the first respondent is in dispute regarding the Traffic Impact Study.

Mr Marlitz, for the applicants, argued that there was never a person who had taken the decision to revoke the line of no access, whilst counsel for the first respondent denied these allegations and set out in detail what had transpired, which are denied by the applicants in their founding and replying affidavits. The court cannot but find that there are factual disputes on the papers which entitles the court to deal with the matter according to the Plascon-Evans rule.

The requirements for a temporary interdict were formulated in *LF Boshoff Investments (Pty) Ltd v Cape Town Municipality* 1969 (2) SA 256 (C) at 267 A - F by Corbett J (as he then was):

"Briefly these requisites are that the applicant for such temporary relief must show-

- (a) that the right which is the subject-matter of the main action and which he seeks to protect by means of interim relief is clear or, if not clear, is *prima facie* established, though open to some doubt;
- (b) that, if the right is only *prima facie* established, there is a wellgrounded apprehension of irreparable harm to the applicant if the interim relief is not granted and he ultimately succeeds in establishing his right;
- (c) that the balance of convenience favours the granting of interim relief; and
- (d) that the applicant has no other satisfactory remedy.

(See *Gool v Minister of Justice and Another*, at pp. 687 - 8; *Pietermaritzburg City Council v Local Road Transportation Board* at p. 772). Where the applicant cannot show a clear right, and more particularly where there are disputes of fact, the Court's approach

in determining whether the applicant's right is *prima facie* established, though open to some doubt, is to take the facts as set

out by the applicant, together with any facts set out by the respondent which the applicant cannot dispute, and to consider whether, having regard to the inherent probabilities, the applicant should on those facts obtain final relief at the trial of the main action" (Court's emphasis)

Brakfontein Road is the only access to Midstream Estate. The undisputed facts in the present application are that Brakfontein Road, a public road, connect the Midstream estate with the N1 highway, the first respondent established a commercial site south of Brakfontein Road halfway between the N1 highway in the east and Midstream Estate in the west, the first respondent applied to the second respondent to establish a township on the 49 hectare property adjacent to Brakfontein - and Olievenbosch Roads during 2001, which had been

granted in 2001.

During 1999 the first respondent had developed a blueprint for the design of the distribution centre which at that time already included the first respondent's intended expansion plans and three future access points, two on Brakfontein Road and one on Olleventhoutbosch Road,

The applicants contend that only approximately 58 meters are allowed for access from Brakfontein Road and that a line of no access had been imposed by the second respondent upon the entire northern cadastral boundary along Brakfontein Road. The only other access allowed by the second respondent, according to the applicants is 85 meters in the south western sector of the property where there is access to Olleventhoutbosch Road. Thus there are only two approved breaks in the line of no access imposed by the second respondent, according to the applicants, one on Brakfontein Road and one on Olleventhoutbosch Road.

The second respondent approved the application and in principle approved a FSR of 0.4 on the property on 19 September 2001 in condition 4 (2)

(c) of its approval which reads as follows:

"The FSR will be restricted to 0.4, but can be increased to a maximum of 0.4 with the written consent of the local authority (Clause 15 consent use procedure excluded.)" (Court's emphasis)

This condition was inserted at the request of the first respondent as the first respondent did not intend to pay rates and taxes on the higher FSR of 0.4 until such time that they had to apply for the higher FSR as set out in condition 4 (2) (c).

The service agreement concluded on 16 August 2001 between the first and second respondents made provision that the first respondent's

contributions to the second respondent for external engineering services were calculated on the FSR of 0.4:

"It is recorded that the bulk service contributions and the proportionate bulk contribution have been calculated and determined on the maximum development potential of the land use rights of the township i.e. a floor space ratio of 0.4 which will for purposes of this agreement apply notwithstanding the fact that such rights or part thereof are not fully and immediately exercised by the developer or are subject to future restrictive conditions." (Court's emphasis)

Mr Grobler, on behalf of the first respondent, argued that at the time that the sixth respondent marketed the Midstream Estate the only entrance to the Estate was on Brakfontein Road. Prospective buyers of residential property in Midstream had to pass the first respondent's distribution centre on Brakfontein Road and had to be aware of this fact at the time of buying a property in Midstream Estate or establishing an entity on the Estate. An industrial corridor had been established in that area in the late 1980's and early 2000's, before the residential area was proclaimed.

During April 2008 the first respondent applied to the second respondent, who had already consented to the establishment of a township on the first respondent's property, on condition that the difference between the FSR of 0,21 and the in-principle approved FSR of 0,4 could be applied for without subjecting the application to public participation and an advertising process as set out in clause 15 of the then governing Centurion Scheme to increase the FSR from 0,21 to 0,4. In the consent on 19 September 2001 it was set out by the first respondent:

"The FSR will be restricted to 0,21, but can be increased to a maximum of 0,4 with the written consent of the local authority (Clause 15 consent use procedure excluded.)"

On 9 October 2008 the second respondent approved the application by the first respondent:

"The City of Tshwane approved your application to increase the Floor Area Ratio from 0,21 to 0,4 on Erf906} LOUWLARDIA subject to the following conditions:

That the Floor Area Ratio shall not exceed 0,4;

That the requirements of the Centurion Town-planning Scheme, 1992 remain applicable.

That the Municipality's approval in the above regard, should not be seen or interpreted thus being so, as approval or approval in principle, of any application that may follow on the relevant erf. Attached please find the comments from the various departments for your attention."

This approval was signed by a Mr van den Berg on behalf of Ashok Sudu, Acting Strategic Executive Director/City Planning, Development and Regional Services. The second respondent attached the comments of the various departments of the second respondent to the approval which provided in clause 8 of the City Planning, Development and Regional Services that:

"Entrances to and exits from the erf shall be located, constructed and maintained to the satisfaction of the Municipality

During February 2009 the first respondent submitted a Traffic Impact Study to the second respondent for approval of the:

"Proposed New Accesses for Extended Distribution Centre Facilities at Shoprite Centurion, Erf 906 Louwlandia Extension 25."

It set out specifically in paragraph 5 with specific reference to Brakfontein Road:

"The proposed extended warehousing facilities will have the following accesses:

- Access 1 from Brakfontein Road, proposed new access 570m to the east of the Ollevenhoutbosch Drive/Brakfontein Road intersection: This access will be used only for inbound heavy vehicle traffic.

- Access 2 from Brakfontein Road, 300m to the east of the Olleventhoutbosch Drive/ Brakfontein Road .intersection: This existing access to the office building will only be a left-in, left-out access in the

future for the office park in the northeast corner of the development and to the parking area for the personal cars of the truck drivers of the Shoprite Distribution Centre."(Court's emphasis)

The Traffic Impact Study was severely criticized by the applicants' expert, Dr Joubert Dr Joubert was of the opinion that there was a fundamental flaw in the study of the division of incoming traffic as inter alia, no mention is made of pedestrians. He further criticized the time the traffic signal will be green and states that it will result in long queues and pile-ups at the relevant intersection.

Dr Krogscheepers, on behalf of the first respondent, indicated that no pedestrian access is allowed on the new access road as agreed with the second respondent. Pedestrians will have to utilize the intersection at either Olleventhoutbosch Road or Emus Erasmus Road. He further indicates that the traffic signal will be adjusted according to the relevant traffic patterns. The first respondent is correct in averring that these differences are factual disputes which can only be addressed at a proper hearing where both experts can testify and be cross-examined. Therefore the Ptascon Evans rule is applicable. The applicants are of the view that even if an extra point of access was contemplated when the property was fully developed that interested persons should have been afforded an opportunity to make their views known / to the second respondent.

On 28 April 2009 the Traffic Impact Study was approved which allowed for the new access on Brakfontein Road. On 28 April 2009 the Executive Director: Roads and Stormwater provided in regards to the Traffic Impact Study:

"The applicant must comply with the access arrangements, parking demands and road upgrades as have been stated in the Impact study. All road improvements as have been stated in this impact study must be in place or satisfactory guarantees for the construction of the said road-upgrades must have been provided to the CoT. "

Mr Maritz, counsel for the applicants, argued that the person who had taken the decision to revoke the line of no access did not have the authority to do so. This issue was never pleaded by the applicants and the court agrees with counsel for the respondent that this court should not entertain this issue as it was not part of the applicants' case.

The applicants main complaint is that there is no evidence that a specific decision was taken to revoke the line of no access on

Brakfontein Road. It is clear from the minutes of the mayoral committee meeting held on 14 November 2007 that the powers arising

from the Tshwane Townplanning Scheme 2007 were delegated to the Executive Mayor who may sub delegate the following to the Municipal

Manager and who may sub-delegate it to the to the Strategic Executive Director: City Planning, Development and Regional Sehvcres.

This delegation is applicable in terms of clause 2 of the delegation on:

"To revoke or maintain access prohibition in terms of clause 7 (2) for the entrance to or exit from a property to a public street from any boundary of such property and to lay down conditions."

The applicants rely on the fact that according to the first respondent the line of no access was revoked on 9 October 2008 when approval to increase the floor area ratio was approved.

According to the second respondent the date was 29 September 2009 when the Site Development Plan was approved - a year later. The applicants are of the opinion that both respondents rely on the implied revocation of the line of no access as an afterthought. On 29 September 2009 the Site Development Plan was approved by the Building Control Officer as set out in the letter:

"Application for approval of the siting and appearance of proposed additions to distribution centre for Shoprite Checkers on erf 906, Louwlandia extension 25

Your application in above regard as indicated on drawings received on 23 January 2009 was approved on 29 September 2009, subject to the following condition(s):

1. This approval will lapse within 12 months after date, if building plans are not submitted.
2. All signage to be a separate application with Street Scape Management
3. This approval must not be construed as being approval of the building plans."

The second respondent agreed that clause 7 (2) of the Tshwane Scheme makes provision for the revocation of an access prohibition "on a written application for its permission". This application is in terms of the provisions of clause 15 of the Tshwane Scheme. Both the first and second respondents are of the view that clause 16 does not apply as no advertisement was necessary.

According to the second respondent the first respondent did comply with the provisions of clause 7 (2) as the Traffic impact Study dealt extensively with the new accesses as can be seen by the documents "Traffic impact Study, Proposed New Accesses for Extended

Distribution Centre Facilities at Shoprite Centurion, Erf 906 Louwlandia Extension 25" dated 9 February 2009 and is regarded

as the motivating memorandum by the second respondent. The power of attorney, copy of the title deed and the zoning certificate had already been submitted with the application for written consent to increase the floor space ratio.

On 15 July 2010 the second respondent approved the first respondent's application for the installation of a new traffic signal on

Brakfontein .-Road which would be paid for by the first respondent. The first and second respondents rely on the approval of the Site Development Plan and the Traffic impact Study as an express or implied approval of the second access on Brakfontein Road as the Traffic Impact Study dealt specifically with the two access roads on Brakfontein Road.

On 25 January 2010 the second respondent granted a way-leave to the first respondent authorising the first respondent to commence with the construction of the widening of the road in order to create the new access. This was approved and signed by the Executive Director - Roads and Storm Water of the second respondent.

By October 2010 the new access road was completed and by January 2011 the traffic signal was installed and commissioned. These facts are disputed by the applicants as they submit that they have not seen trucks using the new access as stated by the first respondent. Once again the court has to decide these facts on the applicants' version as confirmed by the first respondent's version and where the two versions differ the respondents' version must be accepted.

The applicants argue that the line of no access on Brakfontein Road had not been revoked by the second respondent and therefore a second access on Brakfontein Road cannot be sustained and should not be allowed. The first respondent submitted that the process that was followed as set out above implies that the line, of no access had been expressly, alternatively by implication revoked by the second respondent. The second respondent confirmed this submission by the first respondent.

The second respondent indicated to the court that the Tshwane Scheme itself does not prescribe a process that has to be followed when an application is made for the revocation of a line of no access in terms of clause 7(2).

It is clear from the minutes of the second respondent's council meeting on 29 November 2007 that the council had resolved:

"The Tshwane Scheme, as amended, be adopted.

That the procedure for permissions in terms of the Tshwane Scheme,
as set out in Annexure 5, be approved."

The process prescribed by this resolution provided for in clause 7(2) has been set out above, The Tshwane scheme does not contain a definition of "application" and does not prescribe any procedural or other conditions that must be followed when an application is made. Clause 15: Permission of the Municipality provides:

"The permission of the Municipality to use land and buildings or to relax certain conditions stipulated in the Scheme, Us Schedules and Annexures, where such permission is explicitly stated, shall be subject to an application procedure as required by the Municipality
and such application shall be subject to the following:

- (1) documents as prescribed by the Municipality shall be submitted with the prescribed fee;
- (2) the prescribed advertisement procedure shall be complied with and the Municipality may waive this requisite wholly or partly if it is satisfied that such non-compliance is not of such a material nature that it is likely to effect anyone detrimentally;
- (3) the Municipality may approve or refuse such application subject to such condition the Municipality deems necessary to regulate such nermisshn; and
- (4) the Municipality- may require that a contribution in respect of engineering services is payable in terms of section 20 of the

Town-planning and Townships Ordinance, 1986 (Ordinance 15 of 1936} as and when required by the Municipality."

The first respondent's counsel, Mr Grobler, argued that by compliance with the conditions as set out in clause 7 (2) the second respondent had revoked the line of no access when approving the Traffic Impact Report and the Site Development Plan.

The procedure to be followed in terms of clause 7 (2) is;

1 'Written application must be submitted to City Planning and shall 1 contain the following:

- a) A motivating memorandum;
- b) Power of attorney if the applicant is not the owner;
- c) Copy of the title deed;
- d) Site plan indicating the access required;
- e) Zoning certificate and/or Annexure B/ Annexure T/ Annexure or Schedule or Consent use
- f) Application fee.

Advert not necessary Circulate to Transport Engineers and Traffic section." (Court's emphasis)

The first respondents complied with these provisions as the documents which had not been supplied with the original application to establish a township were provided to the second respondent with the further documents in the application to increase the FSR from 0,21 to 0,4, the Traffic Impact Report and Site Development Plan during 2008 and 2009 and approved by the second respondent.

The applicants request an interim interdict pending a review to the High Court. Mr Grobler, for the first respondent, argued that the applicants will not have locus standi in an application for the review of an administrative decision as they will not be able to show a direct and substantial interest in the matter.

In Roodepoort Nlaraisburg Town Council vs Eastern Properties (Prop.) Ltd. 1933 AD Wessels CJ found at p 101;

The actio popularis is undoubtedly obsolete, and no one can bring an action and allege that he is bringing it in the interest of the public, but by our law any person can bring an action to vindicate a right which he possesses (interesse) whatever that right may be and whether he suffers special damage or not, provided he can show that he has a direct interest in the matter and not merely the Interest which all citizens have. *Nemo enim privatorum populares persequitur actiones quoad interesse publicum. Pro suo autem Interesse cuilibet sive per se sive per procuratorem agere licet* - Groenewegen, de Leg.- Abr ad D. 47.23."

The first respondent argued that the applicants have to show that the Tshwane Scheme was enacted for their benefit or for the benefit of a class of which they are members, alternatively that they have suffered or is likely to suffer damage. Mr Grobler, for the first respondent, argued that the applicants' properties are all in the Municipality of Ekurhuleni whilst the first respondent's property and Brakfontein Road at that juncture fall in the area of the second respondent. The court finds that fact immaterial to adjudicate the present application.

In VandenHende v Minister of Agriculture, Planning and Tourism, WC 2000

(4) SA 681 CPD Thring J held at 686 I - 687 A -B;

"In my view the most useful source of guidance as to the approach which should be adopted in this case is to be found in the decisions of our Courts which, over the years, have dealt with the intervention and joinder of parties, I say this because at all stages of this matter up to the launching of this review application the dispute about the rezoning of the property has been between the sixth and seventh respondents, as its owners, on the one hand, and the objectors, and, in particular, the fifth respondent, on the other. By launching the review application the applicant is, it seems to me, in effect seeking to intervene in that dispute as an interested party. There is authority as to whether, and in what circumstances, a party may intervene in litigation, or be joined as a party to it

In United Watch & Diamond Co (Pty) Ltd and Others v Disa Hotels Ltd and Another Corbett J, as he then was, said at 415A- C:

'In my opinion, an applicant for an order setting aside or varying

a judgment or order of Court must show, in order to establish locus standi, that he has an interest in the subject-matter of the

judgment

or order sufficiently direct and substantial to have entitled him to intervene in the original application upon which the judgment was given or order granted.'" (Court's emphasis)

The applicants will rely on review that they had had a right to be heard as interested persons as residents of Midstream before the decision was made. The decision by the second respondent to grant access constitutes "administrative action" as defined in section 1 of PAJA, The only parties involved in the application for granting of access were the first and second respondents.

The applicants have to show a direct and substantial interest in the matter to bring an application for review of an administrative

decision as set out in *Vandenhende* v Minister of Agriculture, Planning and Tourism, WC [supra] at 690 i - 691 A:

"For the applicant to have locus standi to bring this application, then, it seems to me that it must be established that:

- (a) he has a direct and substantial interest;
- (b) in the right which is the subject-matter of this litigation;
- (c) which is not merely a commercial or financial interest, but which constitutes a legal interest; and
- (d) which could be prejudicially affected by the outcome of the litigation,"(Court's emphasis)

in *Walelo v City of Cape Town and Others* [2008] ZACC 11; 2008 (6) SA 129 CC at para 27 Jaffa AJ held:

"There can be no doubt that when approving building plans, a local authority or its delegate exercises a public power constituting administrative action,,. What gives rise to the right to be heard is the negative impact of the decision on the rights or legitimate expectations of the person claiming to have been entitled to a hearing before the' decision was taken." (Court's emphasis)

The applicants afieged that they had to be heard by the first respondent before the decision was taken as they are residents of Midstream and as such are interested persons.

It is clear that none of the applicants were involved in the administrative relationship between the first and second respondents

when the decision was taken. They were not objectors in this instance at the time the decision was taken. Furthermore, Brakfontein Road is a public road for the use of ail road users and as such the applicants do not have sole use of the road.

No review will be entertained by another court until the applicants had exhausted their internal remedies against the revocation of the line of no access. Section 7 (2) (a) of PAJA provides:

"(2)

- (a) Subject to paragraph (c) , no court or tribunal shall review an administrative action in terms of this Act unless any internal remedy provided for in any other law has first been exhausted."

The first respondent was exempted in 2001 from following the public participation process for an increase of FSR from 0,2.1 to 0,4 as set out in clause 15 of the Centurion Scheme, This process was sanctioned by the second respondent on 21 September 2001 which specifically abolished any advertisement requirement

It is so that the decision of the second respondent to grant access and to revoke the line of no access constitutes administrative action. Section 3 of PAJA provides:

"3 Procedurally fair administrative action affecting any person:

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

fair,

(2) (3)

(4)

(a) If it is reasonable and justifiable in the circumstances, an administrator may depart from any of the requirements referred to in subsection (2),

(b) In determining whether a departure as contemplated in paragraph (a) is reasonable and justifiable, an administrator must take into account all relevant factors, including-

(i) the objects of the empowering provision;

(ii) the nature and purpose of, and the need to take, the administrative action;

(iii) the likely effect of the administrative action;

(iv) the urgency of taking the administrative action or the urgency of the matter; and

(v) the need to promote an efficient administration and good governance."

The only parties involved in the application for granting of access were the first and second respondents from the start; In *Walele* (supra) it was found at 10 paragraphs 31 and 32:

"[31] On a proper construction of s 3, the applicant's claim to a hearing can only succeed if he establishes that the decision to approve the building plans materially and adversely affected his rights or legitimate expectations. The parties involved in the application for the approval were the respondents and the City. The applicant was not a party to that process nor was he entitled to be involved. The building plans in question were drawn at the instance of the respondents who wanted to erect the four-storey block of flats on their own property. The granting of the approval could not, by itself, affect the applicant's rights.

[32] It will be recalled, however, that the applicant's case is that the erection of the flats will devalue his own property and may trigger other disqualifying factors in s 7(1) (b) (ii) of the Building Standards Act. He does not contend that the approval itself will lead to those consequences. The question is whether 'administrative action' as contemplated in s 3 of PAJA should be

construed to encompass the subsequent erection of flats, I think not. Such interpretation would not constitute a reasonable reading of the section which requires a pre-existing right or legitimate expectation to be materially and adversely affected by the administrative decision itself/ (Court's emphasis)

Unfortunately for the applicants they did not prove a pre-existing right or legitimate expectation that they would be materially and adversely affected by the administrative action of the second respondent by the revocation of the line of no access on Brakfontein Road.

The decision in *Walele* (supra) is applicable in the current application before court where Thring J found at paragraph 42:

"[42] I fail to appreciate how the second fact could have given rise to a legitimate expectation. Being the owner of the neighbouring property cannot give rise to an expectation to be heard in circumstances such as the present, let alone a reasonable expectation. A legitimate expectation may arise from an express promise or a regular practice. It cannot arise from ownership of a neighbouring property, it follows that the applicant has failed to establish that he had a right or a legitimate expectation materially and adversely affected by the approval of the plans. Absent an affected right or a legitimate expectation, the applicant cannot challenge the approval on the basis that he ought to have been heard and was denied a pre-decision hearing." (Court's emphasis)

I must agree with Mr Grobler, for the applicants, that no legitimate expectation had been alleged or proved. The requirements for a legitimate expectation are set out in *Duncan v Minister of Environmental Affairs and Tourism* 2010 (6) SA 374 SCA by Brand JA in paragraph 15:

"[15] Reliance on the doctrine of legitimate expectation for any purpose presupposes that the expectation qualifies as legitimate. The 1C requirements for the legitimacy of such expectation have been formulated thus:

- (a) The representation inducing the expectation must be clear, unambiguous and devoid of any relevant qualifications,
- (b) The expectation must have been induced by the decisionmaker,
- (c) The expectation must be reasonable,
- (d) The representation must be one which is competent and lawful for the decision-maker to make." (Court's emphasis)

None of these requirements are met In the present application by the applicants.

Furthermore the applicants have not yet exhausted all the internal remedies and cannot apply for a review in terms of PAJA until it has been done. The applicants could, according to Mr Grobler, establish a clear right by proving that they've suffered or is likely to suffer damage. No actual evidence was supplied apart from vague allegations relating to the inconvenience suffered by the applicants due to the traffic volumes and loss of property values. There is a factual dispute in this regard and therefore according to the *Piascon Evans* rule the court must deal with it on the applicants' version as admitted by first respondent on the papers before court and where it differs from the applicants' version the respondent's version will be accepted.

The resolution taken by the second respondent did not require public participation as was set out in the approval of the application on 19 September 2001 where the provisions of clause 15 were excluded, in any event no court will hear the review application before the internal remedies have been exhausted.

The applicants further, in the alternative, requested the court to grant interim relief pending the outcome of the appeal to the Townships Board. The first respondent set out the reasons why the first respondent believes that the applicants have no chance of success at abovementioned proposed actions. The first respondent argues that in this instance the applicants have no locus standi to appeal to the Townships Board in terms of section 139 of the 1988 Ordinance.

It is common cause that the applicants did not attend any hearing before second respondent. In *Vandenhende v Minister of Agriculture, Planning and Tourism, WC (supra)* Thring J held at 688 B - E: ;

The only locus standi which the applicant had to participate in the rezoning application as a party in his own name was as an objector."(Court's emphasis)

Counsel for the first respondent argued that it will be impossible for the applicants to convince this court that the Townships Board appeal hearing will have a favourable outcome for the applicants, The hearing before the Townships Board will entail a *de novo* hearing. The applicants do not deal with the aspect of the success they expect to have on the hearing of the appeal before the Townships Board: The first respondent argues that the fact that an appeal has been lodged does not provide a *prima facie* case to have the revocation set aside without any information" as to the prospects of success on the merits of the appeal or any reference to a town planning expert. There is no indication before the court of any reasons that the applicants will succeed on the merits in the pending appeal to the Townships Board.

Mr Grobler, for the first respondent, argued that the applicants had not made out a case on their founding papers that the Record of Decision (RoD) had lapsed. The applicants did not set out in the founding affidavit that the RoD did not cover the expansion of the warehouses and that the first respondent is engaging in construction activities within an area which had to be preserved, contrary to the RoD, it is clear that the first respondent had not acted contrary to the provisions of the RoD.

In Bayaf v Hansa 1955 (3) SA 547 IN) at 553 C - E the court stated;

"...an applicant for relief must (save in exceptional circumstances) make his case and produce all the evidence he desires to use in support of it, in his affidavits filed with the notice of motion, whether he is moving ex parte or on notice to the respondent, and is not permitted to supplement it in his replying affidavits (the purpose of which is to reply to averments made by the respondent in his answering affidavits), still less make a new case in his replying affidavits." (Court's emphasis)

In Titty's Bar and Bottle Store v ABC Garage and Others 1974 (4) SA 363

(TPD) Viljoen J found at 369 B:

"It lies, of course, in the discretion of the Court in each particular case to decide whether the applicant's founding affidavit contains sufficient allegations for the establishment of his case. Courts do not normally countenance a mere skeleton of a case in the founding affidavit, which skeleton is then sought to be covered in flesh in the replying affidavit" (Court's emphasis)

The issue of the Rod is not a new issue and was known to the applicants when they launched the application. They do not explain why this issue was only mentioned in their replying affidavit and supplementary replying affidavit for the first time. The court has to agree with Mr Grobler that it is too late for the applicants to rely on the RoD. They only mention in the replying affidavit sets out that it had lapsed that it, did not cover the expansion activities of the first respondent and that the first respondent is engaging in construction activities in a preservation area.

I must agree with Mr Grobler that it seems as if the environmental issues were raised at a late stage to create atmosphere. It is

obvious that the applicants had not relied on the environmental issues when launching the application as they do not make a case that the new access is situated on a preservation ' area or on what basis they will succeed in a review application based on environmental

issues. The chances of success in a review application on the environmental issues seem to be slim.

The court has considered the applicants prayer in the notice of motion for a mandamus against the second respondent compelling the second respondent to stop the first respondent from "any further unlawful activities," "There are no facts before court which would entitle the court to grant a mandamus against the second respondent.

The first respondent argued that the applicants delay in bringing the application must be taken into consideration. The second respondent,

approved the establishment of a township on the first respondent's property: from 0,21 to 0,4 without following the Centurion Scheme.

The second respondent's approval to increase the FSR from 0,21 to 0,4 is dated 9 October 2008 and if the second respondent's date is taken as to be correct for granting a revocation it is 29 September 2009 . This provides, inter alia, for a new access to be created in Brakfontein Road. The first decision was thus taken almost ten years ago and the second decision two years and five months or 1 year and 5 months respectively prior to the launching of the application. The second respondent approved the first traffic impact study on 28 February 2009. It is common cause that the access has been built, that a traffic signal has been installed and that the first respondent has spent in excess of R345 million on the further development of the property and have created the new access to implement the one-direction system of traffic-flow which has since been implemented.

In *Wolgroeiërs Afslaers v Munisipaliteit van Kaapstad* 1978 (1) 13 A the principle was laid down that the court

first has to decide whether the proceedings had been instituted within an unreasonable time, and if so, whether the court should

condone the unreasonable time.

in the first instance the court does not have a discretion, but the court has to consider all the facts to decide whether the delay has been unreasonable. In the second instance the court has a discretion to decide whether the unreasonable delay should be condoned.

In *Gqwetha v Transkei Development Corporation Ltd and Others* 2006 (2)

SA 603 SCA Nugent AR found in par 22:

"it is important for the efficient functioning of public bodies (i include the first respondent) that a challenge to the validity of their decisions by proceedings for judicial review should be Initiated without undue delay The rationale for that longstanding

rule - reiterated most recently by Brand JA in *Associated Institutions Pension Fund and Others v Van Zyl and Others* at 321 - is

twofold: First, the failure to bring a review within a reasonable time may cause prejudice to the respondent. Secondly, and in my view more importantly, there is a public interest element in the finality of administrative decisions and the exercise of administrative

functions. As pointed out by Miller JA in *Wolgroeiërs Afsfaers (Edms) Bpk v Munisipaliteit van Kaapsiad* at 41F - F (my translation):

'It is desirable and important that finality should be arrived at within a reasonable time in relation to judicial and administrative

decisions or acts. It can be contrary to the administration of justice and the public interest to allow such decisions or acts to be set aside after an unreasonably long period of time has elapsed - interest reipublicae ut sit finis litium Considerations of this kind % undoubtedly constitute part of the underlying reasons for the existence of this rule.¹

[23] Underlying that latter aspect of the rationale is the inherent potential for prejudice, both to the efficient functioning of the public/ body and to those who rely upon its decisions, if the validity of its decisions remains uncertain." (Court's emphasis)

In *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2004 (6) SA 222 SCA te 249 H -1 the court find:

"In weighing the question whether the lapse of time should preclude a court from setting aside the invalid administrative act in question an important - perhaps even decisive - consideration is the extent to which the appellant or third parties might have acted in reliance upon it"

and in *Oudekraal Estates (Pty) Ltd v City of Cape Town* 2010 (1) SA 333 SCA in par 33 Navsa AR find:

"in reviewing and considering whether to set aside an administrative decision, courts are imbued with a discretion, in the exercise of which relief may be withheld on the basis of an undue and unreasonable delay causing prejudice to other parties, notwithstanding substantive grounds being present for the setting aside of the decision. The application of the delay rule would in a sense 'validate' a nullity This rule evolved because, prior to the Promotion of Administrative Justice Act 3 of 2000 (PAJA), no statutorily prescribed time limits existed within which review proceedings had to be brought The rationale was an acknowledgment of prejudice to interested parties that might flow from an unreasonable delay as well as the public interest in the finality of administrative decisions and acts." (Court's emphasis)

The 180 day period prescribed in PAJA cannot be relied on as in this Instance ten years, two years and five months: and 1 year and five months have elapsed since the respective administrative decisions had been taken. The applicants can thus not rely on the provisions of PAJA as they are so far out of time. However in *Zuurbekom Ltd v Union Corporation Ltd* 1947 (1) SA 514 (A) at 537 the court found:

"But if it is correctly stated in the Laws of England, mere delay should not deprive the plaintiff of his right to an injunction; the circumstances must be such that the enforcement of the right by the plaintiff would really be an act of bad faith on his part. Whatever the nature of the inequity must be to justify the application of the doctrine according to English law, the question before us is in what circumstances in interdict proceedings can according to our law the plaintiff's delay be set up successfully by the defendant as a bar to the granting of the interdict? I am prepared to assume, for the purposes of the argument, that something falling short of conduct constituting an estoppel against the plaintiff may be embraced by the defence known as the exceptio doll But even on that assumption it seems to me that, before the plaintiff's delay can be a valid obstacle to his claim for an interdict, it must be shown (as the very name exceptio doll 1 indicates) that in the

circumstances of the particular case the enforcement of that remedy by the plaintiff would cause some great inequity and would amount to unconscionable conduct on his part," (Court's emphasis)

In the present application, however, the first respondent has already implemented the expanded strategy and everything is in use, including the disputed access. The court has to consider these facts along with all other facts when determining the balance of convenience.

The court has to consider whether the applicants are entitled to a final interdict. The applicants seek a final interdict as, according to them, they have a clear right of enforcing the provisions of the Amendment Scheme 945 which forbids the second access on Brakfontein

Road, It is trite that the weaker the applicants prospects of success the greater the need for the applicants to establish that the balance of convenience favours them for interim relief.

In *Patz v Greene & Co* 1907 TS 427 at 437 the Full Bench through Solomon J held:

"If then the applicant can satisfy the Court that his business is without doubt suffering through the respondents illegal competition, the first requisite for an interdict would be present in this case, namely, "a clear right on the part of the applicant" On the same hypothesis the second requisite, namely "an injury actually committed on the part of the person to be interdicted," would also be present." (Court's emphasis)

The first respondent submits that there is no proof of injury which would entitle the applicants to a final interdict. I find that the applicants have not made out a case that they are suffering any injury at present, apart from inconvenience and vague submissions as to the properties of the applicants losing value and experiencing heavy traffic as a result of the respondents' actions, without any expert evidence to confirm the allegations. The requirement of injury was not addressed at all by counsel for the applicants. No facts were presented to the court to show on which facts the applicants are relying in these instances. No future injury is alleged. The access is complete and has been in use for some time, The applicants had known of the distribution centre of the first respondent before Midstream Estate was established.

The court has to determine whether the applicants have a prima facie right. 10 To determine this court has to consider all the facts to decide whether the applicants have proved a "prima facie right though open to some doubt" Even if the court considers all the facts, arguments and authorities and take into consideration whether the applicants could obtain final relief at trial and that a lesser degree of proof is required for an interlocutory interdict, the court cannot find that the applicants have established a prima facie right on a balance of probabilities.

The requisites for a final interdict must be met for the court to grant such relief. The court finds, after having listened to the arguments by counsel, reading all the papers and considering all the authorities, that the applicants have not proved a clear right on a balance of probabilities. The facts stated by the first respondent taken in conjunction with the admitted facts in the applicants' affidavits do not justify the court to find in favour of the applicants and to grant a final interdict.

Furthe'rmore there is no specific and clear evidence of any committed or apprehended injury to the applicants. In *von Moltke v Costa Areosa (Pty) Ltd* 1975 (1) SA 255 C at 258 D-E Diemont J held:

"It is not necessary to labour the point further. Whether he proceeds by way of summons or on motion the party seeking relief must show that he is suffering or will suffer some injury, prejudice, or damage or invasion of right peculiar to himself and over and above that sustained by the members of the public in general. It is not enough to allege that a nuisance is being committed, he must go further and at the very least allege facts from which it can be inferred that he has a special reason for coming to Court." (Court's emphasis)

Even when the court applies the objective test to determine whether there is a reasonable apprehension that the applicants may suffer injury the court cannot find that the apprehension as set out in the applicants' affidavit is well grounded,

In this matter the applicants themselves mentioned other remedies, when applying for an Interim interdict. It thus follows that they cannot overcome the hurdle of "no other remedy."

As to the requisites for an interlocutory interdict the applicants did not provide the court with any facts having regard to the reasonable apprehension that irreparable harm will ensue should the alleged wrong continue whilst the applicants finalize the pending legal actions. The test to decide whether irreparable harm will be done to the applicants if the interim interdict is not granted is an objective test. The court has dealt with this aspect when the court considered whether a final interdict should be granted. To determine whether the balance of convenience favours the applicants to grant interim relief the court has to weigh the prejudice the applicants will suffer if the interim interdict is not granted against the prejudice the first respondent will suffer should it be granted. The weaker the prospects of success the greater the need for the balance of convenience to favour the applicants.

The applicants set out in the founding affidavit that it is expected that "a huge number of heavy duty vehicles and trucks are going to enter the relevant property from the entrance at Brakfontein Road". According to the applicants this would cause "huge traffic pile-ups, frustration, Inconvenience and prejudice for the residents of Midstream". No facts are furnished to support these submissions. A further complaint by the applicants is:

"Brakfontein Road was designed and constructed to convey residential .traffic and was never intended for the residential traffic to have to mingle on a permanent basis with heavy duty articulated trucks entering and leaving the first respondent's property"

This has not been proved as Brakfontein Road is situated in an Industrial Zone and it is clear that the distribution centre was approved before the establishment of Midstream Estate, They contend that unlawful and illegal businesses will come to the area the serving truck drivers who will be waiting to enter the first respondent's property. There is no such evidence before court to sustain these averments.

This application is being dealt with when the construction of the new access has been completed and the traffic signal at the interchange

with the new access and Brakfontein Road had been commissioned. The system of one directional traffic flow has already been implemented

as can be seen from the attached photos.

The Traffic Impact Study was approved on 28 April 2009 and the site Development Plan on 29 September 2009. A period of 17 months has lapsed since the approval of the Traffic Impact Study before the present application was launched during October 2010. This

application was commenced 12 months after the approval of the SDP. The delay in the bringing of this application has resulted in the first respondent investing more than R 345 million in costs developing the access road and new warehouse. The first respondent

had at all times complied with the legitimate requests by the second respondent when the relevant permissions were granted. The second respondent does not deny that permission for the revocation of the no access line had been authorized, and states that it was authorized when approval for the FSR of 0.4 was granted.

Should a temporary Interdict be granted the prejudice to the first respondent includes that the first respondent will not be able to continue to rely on a cost effective logistical network to dominate the retail market by supplying products on the shelves of its' outlets at the lowest possible costs. The first respondent will lose the opportunity to fully exploit the development on its' property as granted by the second respondent

The one directional flow system as designed by the first respondent will be severely compromised should the court grant an interim interdict. The distribution centre would not be utilized as a distribution centre, resulting in huge expenditure by the first respondent to obtain rental space in retail centres, pending the outcome of any of the legal steps the applicants intend to take.

Supply agreements between the first respondent and producers will be compromised and they will not be able to deliver products and produce on a daily basis. The expenditure of R5 million on the new access by the first respondent on the property will go to waste should the first respondent be interdicted from using the new access.

It is clear that the prejudice the first respondent would suffer should the court grant an interim interdict far outweighs the prejudice to be suffered by the applicants. The balance of convenience favours the first respondent in all respects. The further requirement that there is no other satisfactory remedy cannot be sustained. The applicants have already launched an appeal to the 1 Township Board, but are requesting the court to grant interim relief pending the outcome of certain legal actions already instituted or to be instituted.

If regard is had to the court's findings regarding the absence of irreparable harm to the applicants, this Court cannot find that the applicants have proved on a balance of probabilities that there is no other satisfactory remedy. Furthermore the court finds that after weighing and considering the applicants' prospects of success in the application for review, the absence of a prima facie clear right the availability of the appeal to the Township Board, the balance of convenience not favouring the applicants and the prejudice to the respondents that the application for an interim interdict cannot succeed.

Due to the fact that the third respondent supported the applicants any cost order against the applicants should also be applicable against the third respondent.

I make the following order:

1. The application is dismissed with costs, including the cost of two counsel;
2. The third respondent is ordered to pay the costs jointly and severally with the applicants the one to pay the other to be absolved.

Judge Pretorius

Case number : 57688/2010

Heard on : 10 March 2011

For the Applicant : Adv Maritz SC

: Adv van der Merwe instructed by : Tim du Toit & Co Inc

For the First Respondent : Adv Grobler SC

: Adv Liversage instructed by : Werksmans

For the Second Respondent: Adv Voster instructed by : Hugo & Ngwenya

Date of Judgment : 21 April-2011

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