

SOUTH AFRICA / JUDGMENT

Mogalakwena Local Municipality v Semmogo Property Development (Pty) Ltd and Others (18585/2013) [2013] ZAGPPHC 559 (6 May 2013) [2013] ZAGPPHC 559

COURT

North Gauteng High Court, Pretoria

BEFORE

Mothle

CASE / FILE NUMBER

18585/2013

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IN THE NORTH GAUTENG HIGH COURT, PRETORIA
(REPUBLIC OF SOUTH AFRICA

(1)

REPORTABLE

(2)

NOT OF INTEREST TO
OTHER JUDGES

(3)

REVISED

DATE: 6 May 2013

CASE

NO: 18585/2013

In the matter between:

MOGALAKWENA LOCAL MUNICIPALITY

Applicant

and

SEMMOGO

PROPERTY DEVELOPMENT (PTY) LTD

First Respondent

LAFATA

INVESTMENT(PTY) LTD

Second Respondent

LIMPOPO

DEVELOPMENT

TRIBUNAL

Third Respondent

MEC

FOR CO-OPERATIVE GOVERNANCE HUMAN SETTLEMENT

AND
TRADITIONAL AFFAIRS, LIMPOPO PROVINCE
Fourth
Respondent
PREMIER,
LIMPOPO
PROVINCE
Fifth Respondent
MINISTER OF RURAL DEVELOPMENT AND LAND
REFORM
Sixth Respondent

JUDGMENT

MOTHLE J

INTRODUCTION:

1. This application came by way of urgency in terms of Rule 6(12) of the Uniform Rules of Court in the Motion Court for urgent applications. The Applicants seek a final interdict prohibiting the Third

Respondent ("the Tribunal") from conducting a hearing scheduled for the 9th May, 2013 or at any other date ...thereafter, to consider an application for the establishment of land development in the area of jurisdiction of the Applicant. Further relief is sought in the form of a declarator that the Tribunal was, as from midnight on 17 June 2012, divested of its powers and functions provided for in Chapter V of the Development Facilitation Act, 67 of 1995 ("the DFA") and consequently, it should be interdicted from performing any functions or exercising any of the powers provided for in that Chapter. It is contended that these powers were divested by the order of the Constitutional Court in the matter of Johannesburg Metropolitan Municipality v The Gauteng Development Tribunal and Others, 2010 (6) SA 182 (CC).

2. The First and Second Respondents ("the Respondents") who submitted an application for the establishment of land development before the Tribunal, oppose this application. The Tribunal as well as the Fourth to the Sixth Respondents (organs of state), chose not participate in these proceedings.

3. The Respondents oppose this application on various grounds, including

in limine, that the application is not urgent; and the deponent to the founding affidavit of the Applicant and its attorneys lack authority to bring this application. On the merits, and in the event this Court does not uphold the points raised in limine, the respondents contend that the order of the Constitutional Court declaring Chapter V of the DFA invalid, did not affect the applications for land development that were submitted during the period of suspension of that order: The order of the Constitutional Court was suspended for a period of twenty four (24) months when it was granted, to enable Parliament to correct the affected Chapters in DFA.

BACKGROUND:

4. In 1995, the DFA was enacted, with the stated object of the Act being amongst others to "facilitate and speed up the implementation of reconstruction and development programmes and project in relation to land". Chapter Iii of DFA established tribunals for each of the nine provinces, with their functions outlined in section 16 thereof as being to deal with «any matter brought before it in terms of section 30(1), 33, 34, 40, 42, 51, 48(1), 57 or 61 or any matter arising therefrom". These sections, with exception of section 61, fall under Chapters V and VI of OFA. Chapters V and VI contain sections that provide for land development procedures, including the submission and consideration of applications for land use and development..
5. It is common cause between the parties that during or about 2009 the Johannesburg Metropolitan Municipality launched a court attack against the Constitutional validity of Chapters V. and VI of the DFA, which-came before the Supreme Court of Appeal ("SCA"). The reason for the attack was...that the functions of the. Tribunals, in this case the Gauteng Development Tribunal, as provided for in Chapters V and VI of the DFA; encroaches on the Constitutional powers of development by the municipalities in whose area the affected land would fall. Municipalities derive their powers from section 152 of the Constitution of the Republic of South Africa Act, 1996 ("the Constitution"), read with Part D of schedule 4 thereof.
6. The SCA in its judgment, reported as Johannesburg Metropolitan Municipality v The Gauteng Development Tribunal and Others, 2010 (2) SA 554 (SCA), declared Chapters V and VI of the DFA invalid in terms of the Constitution and referred the matter to the Constitutional Court.
7. This order of invalidity was confirmed by the Constitutional Court in the same case between the same parties, as reported in 2010 (6) SA 182 (CC). In declaring these sections invalid, the Constitutional Court suspended its order of invalidity on 18 June 2010 for a period of 24 months. The period of suspension expired on 17 June 2012.
8. It is significant to point out that prior to the expiry of the suspension period, an unsuccessful attempt was made in another application to request the Constitutional court to extend the period. of suspension.

It was apparent at that time that Parliament would not be able to timeously pass the necessary legislation in order to address the effects of the declaration of invalidity of the affected Chapters.

9. The Respondents contend that they filed their application for land development with the Tribunal during the period of suspension and therefore have a "legitimate expectation" to have their application heard by this Tribunal after the expiry of the suspension period. The meeting of the Tribunal to consider this application is scheduled for the 9th May 2013. This application before me is amongst others, a request for an order to prohibit this pending hearing.

POINTS IN LIMINE:

10. The Respondents contend two grounds in limine, firstly that this application is not urgent and secondly that the deponent to the founding affidavit of the Applicant and their attorney lack the necessary authority to bring this application.

Urgency

11. The Respondents submit that the matter is not urgent in that the Applicant can obtain "substantial relief in due course. The reason advanced in support of this submission is that it is open to the Applicant to attend the hearing scheduled for the 9th May 2013 to raise their objections in that hearing.
12. It is trite that to make out a case for urgency, the Applicant must give reasons why the matter is urgent and satisfy the Court why he will not be afforded substantial redress at the hearing in due course. See Rule 6(12)(b) and the degrees of urgency as set out in *Republikeinse Publikasies (edms) Bpk v Afrikaanse Pers Publikaasies (Edms) Bpk* 1972 (1) SA 773 (A) and *Luna Meubelvervaardigers (Edms) Bpk v Makin (t/a Makin's Furniture Manufacturers)* 1977 (4) SA 135 (W). The Applicant has complied with the Practice Directives of this Court in regard to setting the matter down for hearing.
13. It seems to me that this matter presents one of those instances where in order to determine urgency, it is necessary to have regard to the nature of the relief sought and decide, on the merits, whether "the

Applicant may not obtain substantial" redress in due course. The relief sought is basically twofold, first, in the form of a declarator (in fact a confirmatory order) that as a matter of law, the Tribunal's functions to consider applications for land

development have been declared invalid by the order of the Constitutional Court. Secondly, as a consequence of this declaration

of invalidity, the Tribunal must be prohibited from considering applications for land development lodged in terms of the expunged

sections in Chapters V and VI of the DFA, in its meeting scheduled for 9 May 2013. or at any other time thereafter.

14. It is clear that what the Applicant seeks as relief is a final interdict, aimed at prohibiting the Tribunal permanently, from exercising the functions of which it has been divested by order of the Constitutional Court. Thus the attendance of this Tribunal meeting to raise this issue as advocated by the Respondents would not assist the Applicant to obtain this final interdict. The Tribunal has no basis in law to adjudicate on the question whether it has or has not been divested of the functions provided for in the expunged chapters of the DFA. It cannot be a judge in its course and the principle of *nemo iudex sua causa* applies.
15. If this Court finds on the merits that the Tribunal has indeed been divested of its functions by the order of the Constitutional Court, then it will be apposite to grant the interdict before the meeting of 9 May 2013, and not in due course. It will be futile and moot to prohibit the Tribunal from exercising the expunged functions after the meeting has been held. It would make no sense for any Court where a case is made out justifying such relief, to consider and grant an interdict prohibiting a meeting already held. I am therefore of the view: that this is a case where substantial relief for the interdict would not be granted at a hearing in due course and that this application is indeed urgent.

Lack of authority.

16. The Respondents allege in the answering affidavit that firstly, the municipal manager failed to allege in the Founding Affidavit that he was duly authorised to make the affidavit and secondly that he did not have a resolution by the council of the Applicant, authorising the launching of this application. A further attack was launched in the form of a formal notice issued in terms of Rule 7 of the Uniform Rules of Court, challenging the authority of attorneys Mohale Incorporated, to act on behalf of the Applicant.
17. At the outset, I am of the view that the Rule 7 challenge has no merit, in that there is correspondence on record from Messrs Mohale Inc. Attorneys, addressed to the Respondents' former attorneys, Messrs Couzyn Hertzog & Horak of Brooklyn, Pretoria, preceding this application. wherein it is stated clearly by Messrs Mohale Inc that they act on instructions of the Applicant. Further, as it will appear hereunder, the municipal manager, who is the deponent to the Founding Affidavit of the Applicant, is authorised to appoint attorneys to act on behalf of the municipality.
18. In reply to the Respondents' challenge, the municipal manager contends that his authority to launch these proceedings and depose to the affidavits derives from the system of delegation of powers adopted by the municipality, in which he is also authorised to appoint attorneys to litigate on behalf of the municipality.
19. The structure of governance as it appears in the national and provincial spheres of government generally reflects adherence to the doctrine of separation of powers between the legislature and executive. This is not the case with the municipalities. Section 11

- (1) of the Local Government: Municipal Systems Act 32 of 2000 ("the Systems Act") provides: "(1) The executive and legislative authority of a municipality is exercised by the council of the municipality, and the council takes all the decisions of the municipality subject to section 59."
20. Section 59 of the Systems Act provides that a municipality must develop a system of delegation of powers to the executive functionaries. This delegation is intended to facilitate governance and provide an efficient administration. It would not be practical for the council to exercise the day to day functions. The Applicant's municipal manager, under council resolution of 27 November 2012, item A27, has been delegated certain powers under this system. One such power is to authorise the appointment of an attorney after consultation with the manager: corporate support services, in respect of actions or claims 'by or against the municipality, as well as an advocate where the appointed attorney deems it necessary to do so.
21. In *Gaines v Telekom Namibia* 2003 (3) SA 615 (SCA) at 624B, the Court established the principle that the institution of proceedings must be authorised but not the authority to depose to an affidavit. The Court stated the principle thus: "The deponent to an affidavit in motion proceedings need not be authorised by a party concerned to depose to the affidavit...In the present case the proceeding were instituted and prosecuted by a firm of attorneys purporting to act on behalf of the Respondent...and such firm of attorneys was duly authorised to represent the Respondent."
22. In the instance such as in this case where the council of a municipality has delegated to the municipal manager, administrative powers to engage the services of legal representatives to act on its behalf in instituting or defending litigation, such manager does not require another resolution of council in every instance he or she is engaged in litigation. To expect such resolution in every case would lead to practical difficulties as council cannot be expected to meet daily to be at hand when the exigencies of urgent applications, for or against, descend on the municipality
23. I therefore find that the municipal manager and Messrs Mohale inc attorneys were duly authorised to launch this application and the attack by the Respondents to the contrary in limine has no merit.
24. The Respondents also introduced arguments that the application is premature in the sense that the tribunal still had the powers in terms of Chapter III of the DFA which it can exercise. This, allegation does not qualify as a point in limine within the context of his application, as it raises the very issue that is at the heart of this application. Ideal with it hereunder.

ON THE MERITS:

25. The essence of the dispute between the parties is the interpretation of the order of the Constitutional Court in which the affected chapters of the DFA were declared invalid. On the one hand the Respondents contend that this order by the Constitutional Court has left the

door open for the extension of the lives of Chapter V and VI of the DFA, beyond the period of suspension, in regard to any applications for land development received by the Tribunals in terms of the affected Chapters, before and during the period of suspension. The contention of the Applicant on the other hand, is that the correct interpretation of the order means that all applications, including those of the Johannesburg Metropolitan Municipality or Ethekwini Municipality, received before or during the "period of 'suspension, ·could only. be accepted and adjudicated upon or determined by the Tribunal within the period of suspension. What exactly was. the order of the Constitutional Court in the matter of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and Others supra? To answer this question one needs to backtrack to the SCA decision.

26. In declaring the invalidity of Chapters V and VI of the DFA the SCA, amongst others, decided thus;

"1. Chapters V and VI of the Development Facilitation Act 67 of 1995 are declared to be invalid.

2. This declaration of invalidity is suspended for 18 months from the date of this order subject to the following:

(a) No development tribunal established under the Act may accept for consideration or consider any application for the grant or alteration

of land use rights in the municipal area.

(b) No development tribunal established under the Act may on its own initiative amend any measure that regulates or controls land use

within a municipal area."

27. When the matter came before the Constitutional Court, paragraph 2 of the SCA order relating to the suspension of the order of invalidity, as quoted above, was set aside. In its place, the Constitutional Court formulated its own period of suspension of the order as follows:

"5. The o/der of constitutional invalidity made by the Supreme court of Appeal in respect of Chs V and VI of the Development Facilitation Act 67 of 1995 is-confirmed.

6. Paragraph 2 of that order relating to the suspension of the order of invalidity is set aside.

7. The declaration of invalidity is suspended for 24 months from the date of this order to enable Parliament to correct the defects or enact new legislation.

8. The suspension is subject to the following conditions:

(a) Development tribunals must consider the applicable integrated development plans, including special development frameworks and urban development boundaries, when determining applications for the grant or alteration of land use rights.

- (b) No development tribunal established under the Act may exclude any by-law or act of Parliament from applying to land forming the subject matter of an application submitted to it.
- (c) No development tribunal established under the Act may accept and determine any application for the grant or alteration of land use rights within the jurisdiction of the City of Johannesburg

Metropolitan Municipality or Ethekwini Municipality after the date of this order.

- (d) The relevant development tribunals may determine applications in respect of land falling within the jurisdiction of the City of Johannesburg Metropolitan Municipality or Ethekwini Municipality only if these applications were submitted to it before the date of this order."

- 28. The Respondents' contentions are based primarily on Chapter III of the DFA which establishes and empowers the Tribunals to exercise

functions which are referred to in section 16 of the DFA. In their view, a development tribunal established in terms of Chapter III of the DFA may continue performing such powers as are contained in Section 16 of the DFA. The argument continues to state that since section 16 falls under Chapter III of the DFA and is unaffected by the constitutional invalidity, the functions contained therein may still be executed.

29 This argument attempts to bring to bear a strained interpretation on the order of the Constitutional Court and is, in my view, misplaced. As stated in the Background part of this judgment, section 16 of DFA provides for functions which the Tribunals are empowered to exercise in regard to considering land development applications. In terms of the provisions of Section 16(a) of the DFA, the Tribunal is empowered to deal with any matter brought before it in terms of various sections which includes Section 30(1), 33, 34, 40, 42, 51, 48(1), 57 or 61 or any matter arising there from. It makes this provision by reference to these specific sections of the DFA, where the content of these functions are to be found: These sections; which contain the functions are; with the exception of section 61, all located in the expunged Chapters V and VI. Section 61 is located in Chapter VII and has thus survived the order of Constitutional invalidity. In other words, of the initial functions in section 16 which the Tribunals were initially empowered to exercise, only those located in section 61 may now be exercised. Presently, a Tribunal can therefore only "grant" or decline approval, or impose conditions to its approval, of any application made to it in terms of the Act concerning Section 61 applications.

- 30. The application for land development brought by the Respondents to the Tribunal is based on the provisions of Section 31 of the DFA. This section is one of those affected by the declaration of invalidity of the order of the Constitutional Court, as it is part of Chapter V of the DFA.
- 31. As already stated, an attempt was made early in 2012, to extend the life of the period of suspension when it was realised that Parliament would not be able, timeously to introduce legislative measures to correct the anomaly. An application was brought on urgency before

the Constitutional Court. under case number: CCT 30/2012 in the matter between South African Council for Consulting Professional Planners and Others v The City of Johannesburg Metropolitan Municipality and. Others. The Applicants requested direct access in order to have the period of suspension of the declaration of invalidity of the Chapters

V and VI of the DFA to be extended. In that application, a statement dated 22 March 2012, issued by the Department of Rural Development and Land Reform was referred to and attached. This statement stated that applications (for land development in terms of Chapters V and VI of the DFA) received before 17 June 2012 (the date of expiry of the suspension of the order of the Constitutional Court) "will continue to be heard and determined by the Tribunals even after 17 June as if the Constitutional Court had not declared invalid Chapters V and VI of the DFA..." The Respondents' interpretation of the order of the Constitutional Court is precisely a repeat of this view as expressed by the Department.

32. The Constitutional Court then issued an order dated 30 May 2012 on this urgent application, which stated as follows:

"The Constitutional Court has considered the applications. It has concluded that the application by Napa J Property Investments and Development (Pty) Ltd to intervene in these proceedings must be granted but that the application for direct access must be dismissed, as it bears no reasonable prospects of success.

Order:

1. Napa J Property Investments and Development (Pty) Ltd admitted as a party to these proceedings.
2. The application for direct access is dismissed.
3. There is no order as to costs."
33. A belated application by the City of Tshwane Metropolitan Municipality to intervene in the urgent application for access, met with the same fate, in a further order by the Constitutional Court expressed thus:

"Since the main application for direct access to have the period of suspension of the declaration of invalidity of certain chapters of the Development Facilitation Act, 67 of 1995 further suspended has been dismissed, the application by the City of Tshwane- Metropolitan Municipality for leave to intervene is hereby also dismissed. The order was that:

1. The application by the City of Tshwane Metropolitan Municipality for leave to intervene, is dismissed.
2. There is no order as to costs."

34. This latest order of the Constitutional Court is unambiguous. The life of the period of suspension of the order of the Constitutional Court terminated on 17 June 2012. The Constitutional Court clearly has no intention to extend it. It

is relevant for the purposes of this application that the very issue raised by the Respondents, was before the Constitutional Court in the form of the statement of the Department, when it considered and rejected the urgent application. As it stands, no Tribunal in the country is authorised, with effect from the 17th June 2012 (the date of expiry of the 24 months of the period of suspension) to consider an application brought in terms of any of the sections falling within Chapters V and VI of the DFA, whether lodged during or before the period of suspension.

35. The Respondents, however, argue that by submitting their application during the period of suspension, a legitimate expectation arose for their application to be heard and that the Tribunal is enjoined to adjudicate on their application even outside the expiry date of the period of suspension. I do not agree. A legitimate expectation, no matter how justified, cannot confer statutory functions on an organ of state, where such functions have been declared

invalid. The sections are still in the statute but have been declared invalid by the order of the Constitutional Court and as such they cannot be exercised. I am inclined to agree with the Applicant's submission that Tribunals were expected to accept and deal with any application in terms of the expunged Chapters V and VI. of the DFA during the period of suspension. This door of opportunity now appears to be firmly shut by the 30 May 2012 order of the Constitutional Court, pronouncing on the urgent application lodged in an attempt to extend the life of the expunged chapters.

36. The Respondents also referred me to Sections 11 and 12 of the Interpretation Act, 33 of 1957 dealing with repeal and substitution as well as effect of repeal of a law. Section 11 of the Interpretation Act states that when a law repeals wholly or partially any formal law and substitutes provisions for the law so repealed, the repealed law shall remain in force until the substituted provisions come into operation. In particular, Section 12(2) (c) thereof states that where a law repeals any other law, then unless the contrary intention appears, the repeal shall not:

"(c) Affect any right, privilege, obligation or liability acquired, accrued or incurred under any law so repealed; or

- (e) Affect any investigation, legal proceedings or remedy in respect of any such right, privilege, obligation, liability, forfeiture or punishment as it is in this subsection mentioned, in any such investigation, legal proceedings or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed: as if the repealed law had not been passed."

37. The Applicant, correctly so, in reply submits that Section 11 of the Interpretation Act only pertains to instances where a law repeals any formal law. "Law is defined in Section 1 of the Interpretation Act to mean any law, proclamation, ordinance, act of Parliament or other enactment having the force of Law". The declaration of constitutional invalidity is not covered by this definition. The declaration of invalidity did not come as a result of an amendment or repeal by Parliament but rather through the order of the Constitutional Court. The power of the Constitutional Court to declare statutes or statutory provisions invalid derive from the Constitution.

38. It seems to me therefore that the Tribunal cannot, outside the period of suspension of the declaration of invalidity of Chapters V and VI of the DFA, exercise any functions contained in the sections located in those

chapters, to consider the Respondents' application, even if it was lodged before the expiry of the period of suspension of the order of the Constitutional Court. The Respondents' application should have been validly considered during the period of suspension. This application to prohibit the Tribunal from considering the Respondents' application on 9 May 2013 or on any date thereafter'

should therefore succeed.

39. In regard to the question of costs, counsel for the Respondents submitted that this being a matter affecting the Constitution, the Court should not in its decision order any payment of costs by the Respondents in the event the application succeeds. I do not agree that this matter raises a constitutional issue. It simply raises the question of interpretation of an order by the Constitutional Court. I am mindful of the fact that the Respondents participated in this application in order to protect their application for land development, which the Tribunal failed to consider before the expiry of the period of suspension. It became necessary for them to do so realising that the Tribunal as well as other organs of state cited as Respondents in the proceedings, abstained from participation. I also accept that the Respondent's grounds of opposing this application were not frivolous. I am therefore of the view that this is one such matter where an order of costs against the Respondents would not be just and reasonable.

40. In the premises! make the following order:

1. The application is urgent within the provisions of Rule 6(12) of the Uniform Rules of Court and condonation is granted to the Applicant for non-compliance with the prescribed time limits, forms and service in relation to this application.
2. The points in /imine raised by the Respondents in regard to the alleged absence of authority on the part of the deponent to the founding affidavit and the Applicant's attorneys, is dismissed.

3. It is declared that the Third Respondent was, as from midnight on 17 June 2012, divested of those powers and functions provided for in Chapters V and VI of the Development Facilitation Act, 67 of 1995 by virtue of the order of the Constitutional Court in the matter of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and Others 2010 (6) SA 182 (CC).
4. The Third Respondent is interdicted from performing any of the functions or exercising any of the powers provided for in Chapter V of the Development Facilitation Act, 67 of 1995 in respect of an application for the establishment of a land development area submitted to it by the First and Second Respondents. Concerning Portions 14, 15, 16 and 18 of the farm Lisbon No. 288, Registration Division KR, Limpopo Province.
5. The Third Respondent is prohibited from conducting a hearing to consider the application for the establishment of a land development area in respect of the property referred to in 4 above on the 9th May 2013 at 10H00 or at any other date and time after the said date.
6. There is no order as to costs.

For the Applicant

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Date of Judgment: 6 May 2013.

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