

SOUTH AFRICA / JUDGMENT

Mwesi services station CC v Rustenburg Local Municipality (718/2013) [2014] ZANWHC 27 (24 April 2014) [2014] ZANWHC 27

COURT

North West High Court, Mafikeng

BEFORE

Gutta

CASE / FILE NUMBER

718/2013

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IN THE HIGH COURT
OF SOUTH AFRICA
NORTH WEST
DIVISION, MAHIKENG
CASE
NO.: 718/2013

DATE:

24 APRIL 2014

In the matter

between:

MWESI SERVICES
STATION
CC.....Applicant
And
RUSTENBURG LOCAL
MUNICIPALITY.....Respondent
APPLICATION
FOR LEAVE TO APPEAL
GUTTA J

DATE OF HEARING :

28 MARCH 2014

DATE OF

JUDGMENT : 24 APRIL 2014

FOR THE

APPLICANT : ADV DE VILLIERS

FOR THE

RESPONDENT : ADV MARITZ

JUDGMENT

GUTTA J:

[A] INTRODUCTION

- [1] An application for leave to appeal part of the judgment delivered by this court on 12/12/2013 was filed by the respondent (in the court a quo) on the 8 January 2014 and on the 9 January 2014, the applicant (in the court a quo) filed a leave to appeal alternatively cross appeal part of the judgment. For ease of reference, I will refer to the respective parties as they were referred to in the court a quo.
- [2] The respondent applied for the condonation of the late filing of its heads of argument. This application is not opposed and a reasonable explanation has been preferred for the late filing.
- [3] The applicant also launched an application in terms of Rule 49 (11) which the respondent opposed which will be dealt with here in below.

[B] LEAVE TO APPEAL

- [4] Both the applicant and the respondent have set out their respective grounds of appeal and cross appeal in their applications and have canvassed the said grounds comprehensively in their heads of argument. I do not intend to repeat the grounds or to deal with each and every ground raised in this judgment.
- [5] It is trite that the requirements for leave to appeal has been held to be the existence of a reasonable prospect of success an appeal.
- [6] Judicial authority requires of a Judge considering an application for leave to appeal to reflect dispassionately upon the decision sought to be appealed against and decide whether or not there is a reasonable prospect that another court may come to a different

conclusion.

- [7] The legislation applicable in this matter is the:-
 - a) Town Planning and Townships Ordinance 15 of 1986 read together with the Rustenburg Town Planning Scheme 2005.
 - b) The Local Government Ordinance 17 of 1939.

- [8] I have considered the grounds of appeal raised in both the applicant's and the respondent's applications. Both applications require careful considerations of the facts and the applicable legislation as this matter involves statutory and factual interpretations and another court may have a different interpretation and may reach a different conclusion to the one I reached. Hence there is reasonable success on appeal in both the applications for leave to appeal and the cross appeal.
- [9] Counsel for the applicant, Mr Maritz asked for leave to appeal to the Supreme Court of Appeal because of the importance of this matter and the urgent implementation of the Rapid Transport network. I agree as I am of the view that the Rapid Transport Network is aimed at providing reliable public transport system and this is an important issue which affects the Rustenburg community.

[C] RULE 49

- [10] The applicant has also applied in terms of uniform rule 49 (11) for the following order :-

10.1 It is declared that Paragraph 71 "a" and "c" of the order handed down on the 12th of December 2013, under the above case number, will remain in full force and effect, notwithstanding the appeal by the Respondent.

10.2 It is confirmed that the Respondent is interdicted from the implementing or establishing the central bus station in the central business district of Rustenburg, pending compliance by the Respondent with the Town-planning and Townships Ordinance 15 of 1986 and the Rustenburg Town Planning Scheme 2005.

- [11] In the affidavit deposed to by Mr Horn in support of the application, it is alleged inter alia that:-

11.1 The respondent is proceeding with the planning and implementation of the central bus station which is contrary to the terms of the court order. The ground works and preparations for installation of services in Rustenburg that will also be used by the central bus station is also observed. The Respondent at a public meeting held in Rustenburg on the 12th March 2014 further stated that nothing will stop the Rustenburg Rapid Transport Network.

11.2 In addition no re-zoning application was made, or even launched, no notice was given of any contemplated application and there is no such application pending for the re-zoning for the central bus station that will be built on President Mbeki Drive. The Applicant sought an undertaking from the Respondent that they comply with the court order handed down on the 12th of December 2013. On the 5 March 2014 the Respondent answered the request for the undertaking mentioned wherein they stated:-

"We are instructed that as our client is charged with the constitutional mandate it would not be prudent for him to make an undertaking which might have the effect on harnessing the powers and limiting the power and decisions and scope of operation of council"

11.3 It is apparent that the Respondent does not consider itself bound by the court order. The order made by this Court will become academic in nature if the Respondent proceeds with the implementation and construction of the central bus station building before applying for the mentioned re-zoning of the immovable property which is now a public street (President Mbeki Drive).

[12] The respondent filed an opposing affidavit wherein they denied any unlawful and improper conduct. They denied the allegation that they are planning and implementing the central bus station and vehemently denied that they are conducting themselves in a manner that disregards the order of this court.

[13] Counsel for the respondent, Maritz SC remarked that notwithstanding the fact that the application for leave to appeal suspends the execution of the order, the respondent has not taken any steps in the constitution of the Central Bus Station.

[14] The respondent submitted that the RTP project is being implemented in terms of policy adoption by National Government as well as in terms of the Rustenburg Integrated Development Plan which has statutory force and is binding on the Respondent and that it accordingly must be implemented.

[15] Mr Maritz conceded that the respondent had not applied for rezoning but submitted that this does not constitute evidence of a disregard for the order of court.

[16] He further submitted that they were unable to give the applicant an undertaking because the respondent has a constitutional mandate to proceed with the establishment of RRT in Rustenburg.

[17] It was further alleged by the respondent that:-

17.1 It would not be prudent for the Respondent to provide an undertaking that may restrain the Respondent from performing its statutory duty in circumstances where:-

17.1.1 The point is reached when the Respondent can no longer hold off on the construction of the Central Bus Station as this would prejudice the RRT project as a whole; and

17.1.2 There is at the stage no interdict in operation preventing the Respondent from doing so;

17.1.3 That the respondent will not proceed with the building of the Central Bus Station should there be an operative order in effect preventing it to do so. That if the order of the Honourable Court is suspended and should circumstances be such that it becomes necessary for the Respondent to proceed with the building of the Central Bus Station, then the Respondent will endeavour to proceed with the construction of the planned Central Bus Station subject to the advice of its legal representatives on how it may lawfully and most expeditiously do so;

17.3 Should the decision be to proceed to build the Central Bus Station on the present planned site without re-zoning (in circumstances where no operative order of court prevents it from doing so), then he submitted that this will still not render the suspended order

“academic”, because should the court on appeal uphold the Court’s judgment, then it would (at least) have the effect of confirming the statutory right of compensation provided for in the Town Planning and Township Ordinance 15 of 1986 and the Applicant will not suffer harm, still less irreparable harm, if the construction of the planned Central Bus Station is proceeded with prior to the determination of the appeal;

17.4 By its nature, a right of compensation entails the payment of money. Such money and the amount thereof can be qualified and paid at any stage, including after the Central Bus Station is built;

17.5 there are, in addition, no other persons identified in the supporting affidavit who would suffer harm and would seek to be compensated as a result of the establishment of the Central Bus Station;

17.6 On the other hand, the harm that will be suffered by the Respondent and by the people of Rustenburg as a whole will be serious and, in certain respects, irreparable should the Respondent be interdicted from proceeding with construction of the Central Bus Station pending the appeal.

[18] The respondent in addition alleged that the balance of harm weighs heavily in favour of a refusal of the application for leave to execute for the following reasons:-

- a) The Respondent is under a constitutional and statutory duty to carry out the implementation of the RRT project.
- b) The Central Bus Station is a key to the whole system in that all of the planned RRT routes converge on Central Bus Station, which serves as the strategically located.
- c) Should the Central Bus Station construction not commence during the course of 2014, the Respondent will fail in its constitutional and statutory duty to implement an integrated rapid transport system within Rustenburg by 2016.
- d) The planned construction time of Central Bus Station is 24 months.
- e) The construction should therefore begin immediately, unless contingency arrangements are made that will involve the Central Bus Station being partly incomplete and inoperative in March 2016.
- f) The establishment of the Central Bus Station is set to play a key role in the rejuvenation of the city centre of Rustenburg.
- g) The construction of the Central Bus Station will provide temporary jobs to not less than 500 people for a period of approximately two years.
- h) Once completed, and with the onset of operations, the RRT project will provide at least 600 permanent jobs for the residents of Rustenburg.

- i) The Central Bus Station, which is a key part of Phase One of RRT, is also a critical component of the success of the RRT scheme.
 - j) The Respondent will also face real and lasting consequences in its ability to obtain funding from central Government should the Central Bus Station not be built with the current funds provided for this purpose.
- [19] It is trite that this court exercise a discretion in granting or refusing the application to enforce the order in terms of Rule 49(11) and this discretion should be exercised judiciously taking into consideration what is just and equitable in the specific circumstances.
- [20] What is apparent from the Respondent's submission is that the respondent intends to proceed with the constitution of the Central Bus Station pending the appeal. Mr Maritz in submitting that the respondent can still apply for rezoning if the applicant is successful on appeal and that the applicant can still claim compensation, fails to consider the audi alteram partem principle in that the applicant and any other interested person would be denied the right to register their objection to the construction of the Bus Station as the bus station would already be constructed.
- [21] I have considered the circumstances as referred to by the Applicant in its affidavit, namely:-
- 21.1 The potentiality of irreparable harm or prejudice being sustained by the Respondent if leave to execute were to be granted, and;
- 21.2 The potentiality of irreparable harm or prejudice being sustained by the Applicant in this application if leave to execute were to be refused.
- 21.3 The prospects of success on appeal, including more particularly the question as to whether the appeal is frivolous or vexatious or has been noted not with the bona fide intention of seeking to reverse the judgment but for some indirect purpose, for example, to gain time or to harass the other party.
- 21.4 Where there is the potentiality of irreparable harm or prejudice to both Applicant and Respondent, the balance of hardship or convenience, as the case may be.
- [22] Although the respondent is under a constitutional and statutory duty to carry out the implementation of the RRT project, the applicant's rights as well as the rights of the people in Rustenburg should not be compromised.
- [23] I am of the view that it is indeed just and equitable when having regard to the pain or prejudice the applicant will suffer and the balance of convenience, that the applicant is entitled to the relief in terms of Rule 49(1).

[D] ORDER

[24] In the result, I make the following order:-

- [1] The respondent's application for condonation is granted.

- [2] The application for leave to appeal and cross appeal to the Supreme Court of Appeal is granted.
- [3] The costs of the application to be costs in the appeal.
- [4] The application in terms of Rule 49(1) is granted with costs.

N. GUTTA

JUDGE OF THE HIGH COURT

ATTORNEYS:

FOR THE APPLICANT : SMIT STANTON INC

FOR THE RESPONDENT : KGOMO MOKHETLE & TLOU ATTORNEYS

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