

SOUTH AFRICA / JUDGMENT

Mwezi Service Station CC v Rustenburg Local Municipality and Others (M62/2017) [2018] ZANWHC 2 (8 March 2018)

[2018] ZANWHC 2

COURT

North West High Court, Mafikeng

BEFORE

M M Leeuw

CASE / FILE NUMBER

M62/2017

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IN

THE HIGH COURT OF SOUTH AFRICA

NORTH

WEST DIVISION, MAHIKENG

CASE

NO: M62/2017

In

the matter between:

MWEZI
SERVICE STATION CC
APPLICANT
And
RUSTENBURG
LOCAL MUNICIPALITY
FIRST RESPONDENT
THE
MUNICIPAL MANAGER SECOND
RESPONDENT
THE DIRECTOR,
PLANNING
AND HUMAN SETTLEMENT THIRD
RESPONDENT
EXECUTIVE MAYOR,
MPHO
KHUNOU FOURTH
RESPONDENT

JUDGMENT

LEEUEW JP:

Introduction

[1] The applicant is seeking an order in terms of which the first and fourth respondents are found in contempt of an order by Gutta J dated 20 December 2013 and confirmed by the Supreme Court of Appeal on 1 December 2014 (the Court Order) and that the fourth respondent be committed to imprisonment for 30 days for such contempt: The court

order reads as follows:

“That the Respondent (the first respondent) be and is hereby ordered to comply with the Town Planning and Township Ordinance 15 of 1986, read together with the Rustenburg Town Planning Scheme 2005 for the rezoning of a portion of President Thabo Mbeki Street for the establishment of the Central Bus Station in the Rustenburg Rapid Transport 20 Network.”

[2] In the alternative, the applicant seeks an order that:

- a) the fourth respondent’s committal to prison for 30 days be suspended for a period of 1 year with the condition that the first and fourth respondents comply with the court order in (1) above;
- b) should the first and fourth respondents fail to comply with the order sought, the applicant be allowed to approach this Court for an order of committal against the fourth respondent on the same or supplemented papers, if necessary;
- c) the first respondent be ordered to proceed with the rezoning application of President Thabo Mbeki Drive, between Nelson Mandela and Oliver Tambo Street, and to set the matter down for hearing before a tribunal; and
- d) that the first respondent be interdicted from proceeding with the installation of services and the building of the central bus station in President Thabo Mbeki Drive, pending the hearing of the rezoning application of President Thabo Mbeki Drive.

[3] The applicant further seeks an order that the first respondent be ordered to recognize and participate in the arbitration process and the pre-arbitration meeting, on a date to be arranged per agreement in terms of the Uniform Rules of this Court; and in the alternative,

[4] that it be declared that: a) President Thabo Mbeki Drive was closed on the 2nd February 2016 in terms of Section 67 of the Local Government Ordinance 17 of 1939 (the 1939 ordinance) at the instance of (probably), the first respondent, consequently; b) that the applicant delivered a claim in terms of section 67 (4) (a) of the ordinance; c) the applicant is authorized to issue summons against the first respondent; d) the claim submitted will stand as notice in terms of section 3 of the Institution of Legal Proceedings against certain Organs of State Act, Act 40

of 2002; and e) that the first and fourth respondents be ordered to pay costs jointly and severally.

- [5] The application is opposed by the first, second, third and fourth respondents (respondents). The first respondent also filed a counter-application seeking a declaratory order in the following terms:

“1. Declaring that the contract, “RLM/MM/0063/2015/16 - The implementation of Turnkey Project by a Civil Contractor to Provide Services for the Detail Design and Construction of the Rustenburg Rapid Transport (RRT) Contract A, CBD North, Section B”, concluded between the First Respondent and M Civils (Pty) Ltd on 8 July 2016 (‘the Contract’), does not conflict with the land uses permitted by the current zoning of President Thabo Mbeki Drive in the Rustenburg Central Business District, namely “existing public road”, and that the First Respondent is accordingly entitled to proceed with the contract until the performance of all obligations thereunder is complete;

2. Directing that the costs of this counter-application be paid by the Applicant in the main application;
3. Granting the First Respondent such further and/or alternative relief as the court in the circumstances may deem fit.”

The Counter-application is opposed by the applicant in the main application.

- [6] At the commencement of this hearing, it was agreed between the parties that the applicant will not proceed with the orders sought in paragraphs [3] and [4] above.

Parties

- [7] The applicant is Mwezi Service Station CC, (Mwezi) which is a close corporation trading as BP Emporium conducting a fuel filling station at the corner of President Thabo Mbeki and Nelson Mandela Drive in Rustenburg. Mwezi is represented in these proceedings by Andrew George Webb, (Webb) who is the only member of Mwenzi.
- [8] The first respondent is the Rustenburg Local Municipality (the Municipality) and the second respondent is the Municipal Manager who is the authorized representative of the Municipality. The third respondent is the Director, Planning and Human Settlement Department of the Municipality, and the fourth respondent Mpho Khunou, is the Executive Mayor of the Municipality (Executive Mayor).

Factual

Background

- [9] The Municipality embarked on a project known as the Rapid Road Transport System (the RRT Project) which is located between the

intersections of Oliver Tambo Drive in the North East and Nelson Mandela Street in the South West of the Rustenburg Central Business

District (CBD). The RRT project was adopted and implemented in compliance with the national policy, tabled in 2007 and adopted in Parliament by the National Department of Transport and is contained in its Public Transport Strategy and Action Plan (the Plan). The plan, which was approved by Cabinet, provides for the planning, design and development of the integrated rapid transport networks in urban areas. Rustenburg CBD was identified as one of the 12 urban centres for the implementation of the RRT system. The

Municipality intimates that the integrated rapid transport networks (IRPTNs) is a high quality car-competitive public transport system, with the aim of bringing integrated rapid public transport within 500 metres' walk of the majority of households”.

- [10] In 2008, the Municipality called for tenders and advertised for a position of project manager for this IRPTN in Rustenburg. Pursuant thereto, in 2009, the Rustenburg Integrated Joint Venture (RIJV) was appointed as a successful bidder and it commenced with the feasibility study, planning and design of the scheme as well as the development of financial and operational models. The RRT project was officially launched in Rustenburg, during July 2011 by the Executive Mayor. Prior to the launch, the Municipality engaged broadly with both stakeholders from the public and private sector.
- [11] The RRT project is major infrastructural project which is being implemented in phases. The initial planning and designs of the project were completed in mid-2012 as well as the construction of certain roads and the establishment of the project lanes in some of the outlying areas of Rustenburg with environmental authorizations as required.
- [12] The RRT project includes amongst others, the building of the multi portal central bus station in the median or middle of the President Thabo Mbeki Drive, which entails the construction of supporting infrastructure facilities such as a bus station, ticket information booths, sheltered passenger waiting areas, and podiums for embarkment and disembarkment of passengers. When the Municipality initiated the RRT project, Mwenzi objected thereto on the grounds that the planned central bus station was not permissible under the present zoning prescribed in the Rustenburg Town Planning Scheme 2005 (the scheme). The project had progressed to the next part of the first phase and commenced with the project network within the Rustenburg CBD as well as the creation of the central bus station where the multi portal structure will be built. The dispute was lodged in this Court by Mwenzi and the court order by Gutta J referred to in paragraph [1] above was granted in favour of Mwenzi, and confirmed by the Supreme Court of Appeal.
- [13] It is common cause that pursuant to the Supreme Court of Appeal decision which was handed down on the 1st December 2014, a Mayoral Committee meeting was convened on the 22nd January 2015 to brief the Municipal Council on the Court order. The matter was tabled at the Council meeting of the 30 January 2015 where amongst others, the following issues were discussed and adopted:

“ 12. APPLICATION FOR PERMISSION TO CONTINUE WITH THE REZONING WITH REGARD TO THE ESTABLISHMENT OF THE RUSTENBURG RAPID TRANSPORT CENTRAL BUS STATION (CBS) LOCATED IN THE PRESIDENT THABO MBEKI DRIVE/SMIT STREET-CC

1. That the report be noted;
2. That the Council approve the partial street closure in the extend of approximately 7 200m2 as submitted in terms of Section 67 of the Local Government Ordinance 17 of 1939, (Ordinance 17 of 1939) and give the necessary permission that the notification and the other steps for the finalization of the partial street closure continue;
3. That Council gives permission that all the other legal applications such as the finalization of the street closure, subdivision and rezoning be submitted simultaneously with the notification of the street closure and be finalized;
4. That all the costs forthcoming from the procedures as well as the appointment of a service provider to execute the above mentioned be for the account of the Rustenburg Rapid Transport.”

[14] On 26 January 2016, the Municipality published a Notice 15 of 2016 (the notice) in the provincial newspaper No 7599, informing the public about the closure of a portion or island in the middle of President Thabo Mbeki Drive. A notice of rezoning or amendment of the Rustenburg Land Use Management Scheme, 2005 (Revision 2009) was simultaneously published with the notice in respect of the partial street closure. Pursuant thereto, a document “Explanatory Memorandum” was received by Mwezi, containing detailed information regarding the proposed closure of a portion of President Thabo Mbeki Drive as part of RRT System. On 22 February 2016, Mwezi’s Town Planner, Tino Ferrero & Sons delivered an objection to the rezoning or amendment to the scheme. Mwezi also

submitted a claim for compensation in terms of Section 67 of the Ordinance, which related to the closure of a portion of President

Thabo Mbeki Drive.

[15] On 16 February 2017 at the CBD Stakeholder Engagement Meeting, the Executive Mayor announced that the RRT project is work in progress. The communication was captured as follows in an extract from the minutes of this meeting:

“Rezoning and Thabo Mbeki Drive Station

- CM lodged an application for rezoning, and the matter is up for consideration by the Municipal Planning Tribunal (MPT).
- Friday 17 2017 (as I see), was set aside for the meeting which would also consider objections. A report on the recommendations and decisions thereof, will be communicated.”

Submissions

[16] Mwezi submits that the closure of a portion of the President Thabo Mbeki Drive as well as the underground construction that is happening at the median or middle of the President Thabo Mbeki Drive and certain utterings or statements made by the Executive

Mayor, coupled with the inordinate delay in processing the rezoning application, is an indication that the Municipality or the

respondents have commenced with the RRT project in wilful defiance and contempt of the court order.

[17] The respondents argue that:

- (b) Mwezi has not succeeded in proving, beyond a reasonable doubt, that the respondents are in contempt of the court order and further that the Executive Mayor cannot be committed to prison for contempt of the court order since he is not the accounting officer of the Municipality; and
- (b) that the rezoning application has commenced albeit there is an inordinate delay in finalizing the process which is occasioned by the systemic processes within the Municipality.
- (c) that the construction work in the Rustenburg CBD is part of the RRT project, which, in terms of the contract, includes the building or construction of the dedicated bus lanes and installation of substructure services consistent with the current zoning of “existing public road” which substructure will be used for the central bus station (if the rezoning application is approved) and other services incidental to “existing public road”.

Issues

[18] The issues to be decided are:

- (a) Whether the Municipality and the Executive Mayor are in contempt of the court order;
- (b) Whether the respondents should be compelled to process the rezoning application;
- (c) Whether the respondents should be restrained from proceeding with the installation of the substructure at the location of the central bus station in President Thabo Mbeki Drive; and
- (d) With regard to the counter-application, whether the implementation of the Turnkey Project contract concluded on 28 July 2016 is in conflict with the land uses permitted by the current zoning of the President Thabo Mbeki Drive in the Rustenburg CBD.

The Law

[19] It is trite law that the applicant has the onus to show beyond reasonable doubt, that there is a wilful and mala fide non-compliance with the court order. The test to be applied in determining contempt to a court order was dealt with in *Fakie NO v CC11 Systems (Pty) Ltd* [2006] ZASCA 52; 2006 (4) SA 326 (SCA). In paras [9] and

[10] Cameroon JA (as he then was) said the following in relation to the test for disobedience or contempt of a court order:

“9. The test for when disobedience of a civil order constitutes contempt has come to be stated as whether the breach was committed ‘deliberately and mala fide’. A deliberate disregard is not enough, since the non-complier may genuinely, albeit mistakenly, believe him- or herself entitled to act in the way claimed to constitute the contempt. In such a case good faith avoids the infraction. Even

a refusal to comply that is objectively unreasonable may be bona fide (though unreasonableness could evidence lack of good faith).

10. These requirements – that the refusal to obey should be both wilful and mala fide, and that unreasonable non-compliance, provided it is bona fide, does not constitute contempt – accord with the broader definition of the crime, of which non-compliance with civil orders is a manifestation. They show that the offence is committed not by mere disregard of a court order, but by the deliberate and intentional violation of the court’s dignity, repute or authority that this evinces. Honest belief that non-compliance is justified or proper is incompatible with that intent.

[20] Furthermore, in paragraphs [41] and [42] the Court stated that:

“[41] Finally, as pointed out earlier (in para [23]), this development of the common law does not require the applicant to lead evidence as to the respondent’s state of mind or motive: Once the applicant proves the three requisites (order, service and non-compliance), unless the respondent provides evidence raising a reasonable doubt as to whether non-compliance was wilful and mala fide, the requisites of contempt will have been established. The sole change is that the respondent no longer bears a legal burden to disprove wilfulness and mala fides on a balance of probabilities, but need only lead evidence that establishes a reasonable doubt. It follows, in my view, that Froneman

J was correct in observing in *Burchell* (in para [24]) that, in most cases, the change in the incidence and nature of the onus will not make cases of this kind any more difficult for the applicant to prove. In those cases where it will make a difference, it seems to me right that the alleged contemnor should have to raise only a reasonable doubt.

[42] To sum up:

(a) The civil contempt procedure is a valuable and important mechanism for securing compliance with court orders, and survives constitutional scrutiny in the form of a motion court application adapted to constitutional requirements.

- (b) The respondent in such proceedings is not an 'accused person', but is entitled to analogous protections as are appropriate to motion proceedings.
- (c) In particular, the applicant must prove the requisites of contempt (the order; service or notice; non-compliance; and wilfulness and mala fides) beyond reasonable doubt.
- (d) But, once the applicant has proved the order, service or notice, and non-compliance, the respondent bears an evidential burden in relation to wilfulness and mala fides: Should the respondent fail to advance evidence that establishes a reasonable doubt as to whether non-compliance was wilful and mala fide, contempt will have been established beyond reasonable doubt.
- (e) A declarator and other appropriate remedies remain available to a civil applicant on proof on a balance of probabilities."

[21] In an earlier decision in Consolidated Fish Distributors (Pty) Ltd v Zive and others 1968

- (2) SA 517 (C) at p.522 H to p.523 A the court held (in addition to the requirements as stated in Fakir above) that "...Once it is shown that an order was granted and that respondent has disobeyed or neglected to comply with it, wilfulness will normally be inferred (R.

v. Mcunu, 1928 N.P.D. 237; R.

- v. Rosenstein, 1943 T.P.D. 65 at p. 70; Wickee v. Wickee, 1929 W.L.D. 145 at p. 148) and the onus will then be on respondent to rebut the inference of wilfulness on a balance of probabilities (Waterston v. Waterston. 1946 W.L.D. 334; R. v. Van der Merwe, 1952 (1) S.A. 647 (O) at p. 650; Jacobs v. Jacobs, 1911 T.P.D. 768 at pp. 770-771; Wickee v. Wickee, supra; Reed v. Reed, 1911 E.D.L. 157; see also Traut v. Rex, 1931 S.W.A 29 at p.,32). Where it appears ex facie the applicant's own affidavits that respondent was unable to comply with the order, wilfulness will not have been proved..." (Brown v Le Roux and Others, 1906 T.S 857). It is essential that the element of wilfulness be present in the act or omission alleged to constitute a contempt."

[22] On the issue of an order of contempt sought against officials of Public bodies, the Court in Meadow Glen Home Association and Others v Tshwane City Metropolitan Municipalities and Another 2015 (2) SA 413 (SCA) at para [23] and [24], held the following.

"[23] There are numerous legislative provisions regarding the person or persons responsible for the administration of local authorities. Section 82 of the Local Government: Municipal Structures Act 117 of 1998 determines that the municipality must appoint a municipal manager as the person responsible for the administration of the municipality and such person will also be the accounting officer of the municipality. In terms of s 56(3) of the same Act, the executive mayor, in performing his duties must monitor the management of the municipality's administration in accordance with the direction of the municipal council (s 56(3)(d)) and oversee the provision of services to communities in the municipality in a sustainable manner (s 56(3)(e)). Section 54A of the Local Government: Municipal Systems Act 32 of 2000 also provides that the municipal council must appoint a municipal manager as the head of administration of the municipal council. Furthermore, s 55 sets out the responsibilities of the municipal manager as head of the administration, subject to the policy directions of the municipal

council. Section 55(1)(b) determines that the municipal manager is responsible and accountable for the management of the municipality's administration. Section 60 of the Local Government: Municipal Finance Act 56 of 2003 provides that the municipal manager is the accounting officer of the municipality.

[24] From the abovementioned provisions it is clear that the municipal manager is, so far as the officials of a municipality are concerned, the responsible person tasked with overseeing the implementation of court orders against the municipality. The municipal manager would know, as the accounting officer, what is feasible and what is not. The municipal manager cannot pass responsibility for these administrative duties to a manager or director who is not directly accountable in terms of their duties."

Analysis

Contempt of the Court Order.

[23] The respondents filed a supplementary affidavit, which was handed up with the leave of the Court, wherein a detailed explanation regarding the status of the rezoning application is outlined. In this supplementary affidavit, Prediction Mongae (Mongae), who is the acting director of the RRT project, gives a detailed account of the progress made by the Municipality in lodging the rezoning application with the Municipal Planning Tribunal (Planning Tribunal). The progress relates to amongst others, the submission of a traffic impact study; the reasons for the inordinate delay in attending to responses from the town planners and an expert, who was to comment and advice on objections received pursuant to the notices relating to the rezoning and which also contributed to the delay in the submission of the application to the Planning Tribunal. The expert transmitted his opinions to the Municipality on 7 September 2017. Consultations in that regard, which were attended amongst others, by Ms Ronette Barnard of the Municipality's Department of Planning and Human Settlements, were to be held in September 2017.

[24] The experts also advised, after consultation, that the application for rezoning should follow the procedure prescribed by section 65 bis of the 1939 Ordinance in respect of the route determination and stopping places for the RRT system and follow procedures prescribed in section 66 of the Ordinance for closing portions of public streets to certain classes of traffic. The internal procedures of the Municipality are such that the relevant Portfolio Committee would first deliberate on the proposal and either approve or disapprove same, before it can serve before the Mayoral Committee. On approval by the Mayoral Committee it will be placed before the Municipal Council.

[25] The Portfolio Committee, which meets on a monthly basis, could not sit in October 2017. However, the Portfolio Committee of the Department of Planning and Human Settlement sat on Friday 3 November 2017, and rezoning was one of the agenda items. The Portfolio Committee approved the item and the issue was placed on the agenda of the Mayoral Committee meeting for the 14 November 2017. If the item is approved, the matter will be

tabled at the scheduled Municipal Council meeting of the 28 November 2017. If it is approved, notices in terms of section 65 bis (2) and section 66 of the 1939 Ordinance will be published in January

2018. The final preparation of the rezoning application will proceed after the publication of the notice in terms of section 65 bis

(2) barring objection that may be noted.

[26] In the event of any objections being filed, the municipality will have to respond thereto. Written submissions will have to be filed, full reasons in a form of memoranda for the rezoning submitted, and several documents, that ultimately will form part of the rezoning application, will be prepared and lodged with the Municipal Planning Tribunal. This entire process is an effort to comply with the Court order. The Municipality filed confirmatory affidavits by Ronette Barnard, Masukwane Ngwasheng the Legal Officer at the Municipality and Zanele Nkosi an attorney for the Municipality.

[27] Mwezi submits that there was a partial attempt by the Municipality to comply with the court order which intent was abandoned at the stakeholders meeting referred to in paragraph [15] above, in that the Executive Mayor announced that the construction of the central bus station will proceed notwithstanding the court order. A careful perusal of the minutes of this meeting, reveals that Webb did not attend the meeting, but that Merie Van Der Byl attended the meeting on behalf of Mwezi. There is no confirmatory affidavit from Merie Van Der Byl. These minutes are confirmed by Linda Hlatswayo, who is the Unit Manager of Marketing and Communications, Roads and Transport and who chaired or presided over the meeting, as well as the Executive Mayor, in her confirmatory affidavit.

[28] Mwezi further submits that the Municipality does not intend to proceed with the rezoning application in that it was reported in the newspaper article dated 18 November 2016 that the Executive Mayor announced that the construction of the central bus station will proceed notwithstanding the court order; Several letters addressed to the respondents and their attorneys seeking confirmation of the newspaper article were ignored. The respondents submit that the source of the newspaper article is not known and it is hearsay evidence, which should not be considered because it is admissible.

[29] I alluded in paragraph [14] above that Webb states that he submitted a claim for compensation in terms of Section 67 of the Ordinance. His concern or complaint is that there is an inordinate delay by the Municipality to process the rezoning application. However, the court order does not prescribe a period within which the rezoning application should or ought to be processed. Although some time has elapsed since the court order, 01 December 2014, Mwezi could not gainsay the fact that the process of the rezoning application has been set in motion.

[30] There is therefore, nothing on record to substantiate the allegations of contempt of the court order, neither on the part of the Municipality or the Executive Mayor. Furthermore, there can be no inference drawn that the respondents wilfully and mala fides neglected to comply with the court order. See Consolidated Fish Distributors (Pty) Ltd v Zive and others supra at p.522. In Meadow Glen Home Owners Association and Others v Tshwane City Metropolitan Municipality and Another supra at para [20], the court held the view that “... there is no basis in our law for contempt of court to be made against officials of public bodies, nominated or deployed for that purpose, who are not themselves personally responsible for the wilful default in complying with a court order that relies at the heart of contempt proceedings”. I am of the view that Mwezi should be non-suited in respect of the order of contempt of court sought against the respondents.

Counter-application

[31] In December 2015, the Municipality invited bids for the implementation of a turnkey project by service providers, who would

provide service for the construction of the RRT project which bid was for Contract A (B1) North, Section (the contract). Marks Rapoo (Rapoo), who was the Acting Director responsible for the RRT project states that the invitation for tenders did not include the superstructure of the central bus station. The contract was awarded to M Civils (Pty) Ltd and was concluded on 29 July 2016. The scope and terms of the contract relate to (a) the traffic lanes and dedicated lanes on Thabo Mbeki Drive between Oliver Tambo and Nelson Mandela Drives; and (b) the substructure services for the planned central bus station.

[32] The Municipality avers that the contract is not for the construction of the multi portal central bus station building and its platform, and that the plans for the building of the central bus station have been indefinitely postponed pending the finalization of the rezoning application. The concept design of the substructure indicates that there will be a protrusion above the ground level on the portion of the RRT cross-section, which will run on both sides of President Thabo Mbeki Drive. The architectural sketches for the main building of the central bus station have not yet been drawn. The costs in terms of the contract is R4, 836,972-60, and does not include the costs of the super structure.

[33] I have alluded to the fact that the Municipality submits that the scope of work already in construction in terms of the contract,

serves a dual purpose. The construction of the substructure will be used for the central bus station as well as other land uses

consistent with the current zoning of “existing public roads” and that in the event that the application for rezoning is unsuccessful, the construction of the superstructure of the planned central bus station will not be proceeded with. Rapoo submits that the construction presently embarked upon, will be utilized in a manner permissible within the current zoning of the “existing

public roads” as defined in the scheme. The scope of the contract comprises the laying of foundations and water pipes, the

storm water drainage and the laying of electrical services, information and communication technology sleeves.

- [34] Rapoo states that the foundation will be used as a bus stop, which falls within the scope of the permitted land use “taxi rank” as defined in the scheme, the concrete slab will be thrown over the current foundation which will form the platform of an open stopping place for the RRT busses, where members of the public will embark and disembark the busses. There will also be shelters provided for the members of the public who commute through the buses;
- [35] The plumbing services installed will be an upgrade of the already existing public toilets on the median of President Thabo Mbeki Drive; the electrical services and information and technology sleeves to be installed, will be used for lighting and for the electronic bus signs as part of the intelligent transport management at the bus stop. The storm water drainage work will be used to ensure proper drainage of storm water on and around the bus station
- [36] In as far as the issue of the creation of the dedicated bus lanes is concerned, it is common cause that Mwezi does not oppose the concept of the RRT project, save for the concern raised that the creation or dedication of two lanes for the exclusive use of busses, would negatively impact on its business in that at least 40% of its business in respect of taxis operating in the CBD will be reduced.
- [37] This argument was raised on appeal at the Supreme Court of Appeal, when the court order was made and it is again raised by Mwezi in the present application. The issue which was to be decided by the Supreme Court of Appeal related to whether or not Mwezi would be entitled to compensation in terms of section 67 of the 1939 Ordinance. In dealing with this issue, Poonan J on behalf of the Court remarked, as follows in paragraphs [11] and [12] of the judgment:
- “[11] Mwezi’s service station presently has four access points – two in each of Nelson Mandela and President Thabo Mbeki Drive. It is not in dispute that the RRT will not affect any of these access points.*
- [12] On its plain meaning the words ‘permanently close or divert any street or portion of a street’ can hardly find application in circumstances where all that is hoped to be achieved is the simple alteration of traffic flows on a street. Nor, in my view, does it apply to a situation such as this, where the establishment of dedicated bus lanes will result in the reserving of no more than just a portion (not the whole) of those streets for the exclusive use of buses, notwithstanding how adversely that may affect

a particular party such as Mwenzi in this case. As other vehicular traffic will continue to have unrestricted access to the remaining

portions of those streets,, the reserving of dedicated bus lanes for the exclusive buses, will not amount to a closing of streets (or even a portion of those streets) permanently to, all classes of traffic as contemplated by s 67. On the contrary that is the very situation contemplated by s 66(1)(b) (i), namely the permanent closure of a part of a street for a particular class of traffic. It must thus follow that s 67 of the Ordinance does not find application.”

[38] The issue of the street closure in the present case was referred to arbitration per agreement between the parties. However it is imperative to note the Supreme Court of Appeal in substance did not order or restrain the Municipality from proceeding with establishing dedicated bus lanes in accordance with the project. The RRT project had to proceed with the exception that the multi portal building should not be constructed without rezoning the President Thabo Mbeki Drive as ordered in the Court order. The question therefore is whether the establishment of the dedicated bus lanes will necessarily entail the construction of the substructure embarked upon by the Municipality.

[39] Mwezi argues that, a bus stop does not have electricity, water and fibre optic connections and that these kind of services would not be required for building a bus “shelter” or have one with a footprint of 7200 square metres. It is submitted that the building of a foundation is unnecessary and the proposed services are unjustified and a waste of taxpayer’s money; furthermore that the respondents are circumventing the court order, in that a substructure is part of a building as defined in the Town Planning Ordinance read with the scheme as depicted in the detailed design of the central bus station.

[40] Mwezi further argues that the respondents are seeking an order to contravene the Court order and the National Building Regulations and Building Standards Act, Act 103 of 1977 (Building Act). For the latter submission, Mwezi attached a supporting affidavit of Floris Petrus Van der Walt (Van der Walt), who is a professional architect, registered with the South African Council of Architectural

Profession, who expresses an opinion that the construction of buildings and structures are regulated by the Building Regulations,

which are applicable within the local authority in terms of Section 2

(1) thereof. He further states that a foundation of a building is defined and/or set out in the definition of “Erection” and “Structural System”, and further that the

construction of a building starts with the foundation and installation of services (Electrical, Water and Sewerage); that in terms of Section 4 of the Act, no person shall, without the prior approval of a local authority, erect any building in respect of which

plans and specifications are to be drawn and submitted in terms of the Act. Van Der Walt avers, with relation to other requirements for the submission for approval of the building plans of the nature described by the respondents, that the proposed conduct of the respondent will be in contravention of the scheme and the Building Act.

[41] Counsel for the respondents, Mr. d' Oliveira submits that Mwezi cannot rely on another law or statute in order to substantiate its objection to the counter-application and that reliance on the Building Act should not be relied upon in order to determine whether or not the project embarked upon is in accordance with the Ordinance and the scheme. I agree with the submission.

[42] The following remarks by Margo J in *Coin Operated System (Pty) Ltd and Another v Johannesburg City Council* 1973 (3) SA 856 (W) at page 860 E are apposite:

"The test of whether the use claimed by the applicants is lawful or unlawful is therefore not simply whether the premises are being business activities. The test is whether the use in question is legitimately part of, or incidental to, one or other of the uses or activities included in the definition of "residential building".

It must be emphasized that in this case we are concerned only with such uses as are permitted or prohibited under the Town Planning Scheme. There may be prohibitions and restrictions on use imposed by other laws but such may lie outside the present enquiry."

[43] The respondents submission regarding the creation of a "taxi rank" and "shelter" were argued in the Supreme Court of Appeal. Respondents' contention was that the multi portal central bus station was nothing more than a shelter and that the zoning of a taxi rank allows for busses to stop, thus qualifying a multi portal building of central bus station as a taxi rank. This argument was rejected by the Supreme Court of Appeal.

[44] In dealing with this issue, the Supreme Court of Appeal analysed the definition of "taxi rank" as follows:

"In the Scheme, the land use 'taxi rank' is defined as 'a place at which mini busses (taxis) and busses are allowed to wait and/or stop for passengers boarding or alighting'. The Scheme makes provision as well for: (a) a taxi holding area, which is defined as 'an area, usually off-street, where mini buses (taxis) hold before proceeding to loading points and where generally there is no passenger activity. A holding area can either be included within or separate from a Taxi rank; and (b) a taxi parking area, which is defined as 'a demarcated part of a parking lot which may be used by minibuses (taxis) aiming to provide a public transport service.' None of those related land uses contemplate the erection or use of buildings unlike for example uses such as 'electrical purposes', 'railway purposes' and 'telecommunications' - each of which are defined to mean 'the use of land or a building designed or used for [that particular purpose]'. (Emphasis added)

[45] The Supreme Court of Appeal held the view that the erection or use of buildings is not a related land use contemplated in the definition of "taxi rank". However, although it did not pertinently pronounce on this issue, I am of the view that a an erection of a platform for the public to embark and disembark, with a shelter provided, falls within the purview of the definition of taxi rank because it is not an erection or use of a building. This project cannot be viewed as a scheme or ploy used to circumvent the court order. The respondents have not abandoned the intention to apply for the rezoning of the President Thabo Mbeki Drive, but rather decided to scale down the project and proceed with the phase of the RRT project that

complies with the present zoning of that street.

[46] Counsel for Mwezi Mr. De Villiers, referred to the case of *Readam v BSB International* 2017

(5) SA 183 (GJ), which matter related to contempt of a court order. The facts in this case are distinguishable in that the respondents are not proceeding with the multi portal building of the central bus station (which was declared unlawful) but are rather proceeding with a construction that falls within the prescripts of a phase of the RRT project, which has not been declared unlawful by the court, and is squarely within the present zoning of that public road.

[47] Mwezi opposition to the implementation of the Turnkey contract does not raise any real or genuine or even a bona fide dispute of fact. Mwezi's version is far-fetched and untenable, to the extent that it relies on an unrelated statute, opinions and conjectures which do not pertinently address the facts disputed. See *Wrightman t/a JW Construction v Headfour (Pty) Ltd and Another*

[2008] ZASCA 6; 2008 (3) SA 371 (SCA); *Faki NO vs CCII Systems (Pty) Ltd supra* at paragraph [55] and [56]. Compare the remarks by Van Wyk JP in *Clarensville (Pty) Ltd v Cape Town Municipality* 1974 (4) SA 974 (C) where he held the view that: "In disputes of this kind a final interdict should be granted only if the facts as set out by the respondent together with the admitted

facts

in the applicant's affidavits justify such an order. Where it is clear that facts though nor formally admitted cannot be denied they must be regarded as admitted. Arguments, submissions and opinions contained in the affidavits are of course not facts and will not be regarded as such. (See *Stellenbosch Farmers' Winery Ltd v Stennnvalle Winery (Pty) Ltd.*, 1957 (4) SA 234 (C)."

[48] With regard to the scope of the contract, Rapoo states that the construction work in the Rustenburg CBD relates to the RRT project. The majority of work in terms of the contract with the service provider, includes the building or construction of

the dedicated bus lanes. It is common cause that Mwezi is not against the RRT project but only takes issue with the Municipality's

delay in processing the rezoning application. The Supreme Court of Appeal held that the dedication of certain lanes to buses falls

within the scope of the RRT project. The complaint by Mwezi, especially as regards the delay in processing the rezone application,

seems to be related to the compensation in terms of Ordinance which was occasioned by the closure of a portion of the President Thabo Mbeki Drive. I am of the view that Mwezi's grounds of opposition have no merit, and can thus not be sustained.

Costs

[49] The respondents have substantially succeeded in both the main and counter-applications. The respondents tendered costs in respect of the order sought in paragraphs [3] and [4] referred to above, which matter was referred to arbitration per agreement between the parties. I am of the view that costs should follow the result.

Order:

[50] I accordingly make the following order:

- (1) The application is dismissed.
- (2) In respect of the counter-application:

It is hereby declared that the implementation of the Contract “RLM/MM/0063/2015/16 Turnkey Project by a Civil Contractor to provide services for the Detail Design and Construction of the Rustenburg Rapid Transport (RRT) Contract A, CBD North, Section B”, concluded between the Rustenburg Local Municipality (the first respondent) and M Civils (Pty) Ltd on 08 July 2016 (the contract) does not conflict with the land uses permitted by current zoning of President Thabo Mbeki Drive in the Rustenburg Central Business District, namely “existing public road”, and that the first respondent is accordingly entitled to proceed with the contract until the performance of all obligations thereunder is complete.

- (3) The applicant is ordered to pay the costs including costs of the counter-application.

M M LEEUW

JUDGE PRESIDENT OF THE HIGH COURT

NORTH WEST DIVISION

Date of Hearing

: 30 NOVEMBER 201

Judgment

Handed Down on : 08 MARCH 2018

Counsel for the Applicant :

ADVOCATE DE VILLIERS

Instructed by

: SMIT STANTON INC.

Counsel for the Respondent : ADVOCATE d' OLIVEIRA

Instructed by

: MOTSHABI & MODIBOA ATT.

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Prepared on 12 October 2026 · Esheria