

SOUTH AFRICA / JUDGMENT

**Van Waveren N.O and Others v Municipal
Manager City of Polokwane Local
Municipality and Others (7946/2024)
[2024] ZALMPPHC 87 (12 August 2024)
[2024] ZALMPPHC 87**

COURT

Limpopo High Court, Polokwane

BEFORE

M Bresler

CASE / FILE NUMBER

7946/2024

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REPUBLIC OF SOUTH

AFRICA

IN THE HIGH COURT OF

SOUTH AFRICA

LIMPOPO DIVISION,

POLOKWANE

CASE NO: 7946/2024

REPORTABLE:

YES/NO

OF INTEREST

TO THE JUDGES: YES/NO

REVISED

DATE:

12.08.2024

SIGNATURE:

In the matter between:	JAN WILLEM VAN WAVEREN N.O. (ID 4[...]) FIRST APPLICANT NICOLAAS VAN WAVEREN N.O. (ID 7[...]) SECOND APPLICANT JAN WILLEM VAN WAVEREN N.O. (ID 8[...]) THIRD APPLICANT LIZELLE ERASMUS N.O. (ID 7[...]) FOURTH APPLICANT In their capacities as the Trustees for the time being of the AGA LESWIKENG TRUST (IT 2[...] (L)) -and- THE MUNICIPAL MANAGER: CITY OF POLOKWANE LOCAL MUNICIPALITY FIRST RESPONDENT CITY OF POLOKWANE LOCAL MUNICIPALITY SECOND RESPONDENT
THE CHAIRPERSON:	MUNICIPAL PLANNING TRIBUNAL, CITY OF POLOKWANE LOCAL MUNICIPALITY THIRD RESPONDENT
THE CHAIRPERSON:	MUNICIPAL APPEAL TRIBUNAL, CITY OF POLOKWANE LOCAL MUNICIPALITY FOURTH RESPONDENT THE CONTROLLER OF PETROLEUM PRODUCTS FIFTH RESPONDENT SHELL DOWNSTREAM SOUTH AFRICA (PTY) LTD SIXTH RESPONDENT GOLOKENG (PTY) LTD SEVENTH RESPONDENT

JUDGMENT**BRESLER AJ:****Introduction:**

- [1] The Applicants are the trustees for the time being of the AGA Leswikeng Trust (the ‘Applicant Trust’). The Applicant Trust applies for interim interdictory relief pending the finalization of the review contained in Part B of the application.
 - [2] The application is opposed by the Seventh Respondent only being Golokeng (Pty) Ltd.
 - [3] The matter came before court on the 30th of July 2024 as an urgent application. The issue of urgency was argued, and this court found the matter sufficiently urgent to warrant the hearing of the merits on the same day. Reasons for the finding of sufficient urgency were given in court and will not be repeated herein.
 - [4] Having regard to the technical nature of the matter, the parties were invited to deliver supplementary Heads by Friday, 2 August
2024. The Seventh Respondent delivered the said Supplementary Heads comprising some 42 pages prompting the Applicant Trust to request this Court an indulgence to deliver a reply thereto by the 6th of August 2024. This indulgence was granted by the Court to enable both parties a fair opportunity to fully ventilate the prevailing disputed issues. More specifically, the contentious issue of locus standi of the Applicant Trust.
- [5] Consequently, this Court is now called upon to determine if the interim relief, contemplated in Part A of the Applicants’ application stands to be granted.

Factual synopsis:

- [6] What lies at the heart of the dispute is the development of the Applicant Trust’s property vis-à-vis the development of the Respondent’s property directly adjacent thereto. The development of the Seventh Respondent's property has purportedly since been approved and they are adamant to continue notwithstanding the pending review. The interim relief is opposed on the basis that the Applicant Trust has no reasonable prospect of success in the review, rendering the proposed interim relief unnecessary.
- [7] The Applicant Trust’s case is briefly the following:
 - 7.1 The Seventh Respondent has applied for and was granted developmental rights for its township known as ‘Lion Hill’ by means of an incomplete, irregular and non-compliant Application for Township Establishment.
 - 7.2 The Applicant Trust’s property already formed the subject matter of applications for land use rights for similar purposes, being fuel station facility development rights.

7.3 The co-existence of two similar Filling Station facilities virtually adjacent to each other, in the highly competitive and regulated Petroleum Industry in South Africa, is in practice improbable from a Town Planning and Economic Viability point of view.

7.4 The Municipality erred to process and approve the irregular and unsubstantiated township of the Seventh Respondent, if regard is had to the compulsory processes, the statutory requirements and criteria stipulated in the prevailing Town Planning legislation. In its Heads of Argument, the grounds for review are inter alia summarised as follows:

7.4.1 The Seventh Respondent's township development was never duly authorised.

7.4.2 The Township Development Application was substantially incomplete and not processable.

7.4.3 The public participation process embarked upon in respect of the Township Development Application was flawed and not in compliance with the Spatial Planning and Land Use Management Act, Act 16 of 2013 (SPLUMA) or the By-Law.

7.4.4 The Township Development Application was amended by the Seventh Respondent after the flawed public participation process was completed and continued, without compliance with the compulsory amendment procedures required in terms of the By-Law or any public participation process having been followed in that regard.

7.4.5 The Third Respondent, without condonation authority having been conferred upon it, wrongfully condoned the aforesaid flaws and decided to process the Township Development Application and approve same.

7.4.6 The Fourth Respondent unreasonably refused a substantiated Application for Postponement of the Applicant Trust and defied the principles of fair administrative justice enshrined in the Constitution, and the Promotion of Administrative Justice Act, Act 3 of 2000 (PAJA). The Applicant Trust was therefore deprived of their right to argue the appeal. The Fourth Respondent furthermore disqualified the Applicant Trust as a lawful objector purely on the basis of a point in liminé raised by the Seventh Respondent and argued in the absence of the Applicant Trust.

7.5 As to the Applicant Trust's locus standi, they have explained in detail that, as a result of the protracted land use change process, which commenced in 2010 / 2011, which included the involvement of the Jannie van Waveren Trust and that was ultimately finalised in 2024, the property forming the subject of their application has changed hands and is currently registered in the name of the Applicant Trust. Mr. Jan Willem van Waveren (Senior), who was the initial registered owner of the property, is still engaged as Trustee in the Applicant Trust. The right to object to the Seventh Respondent's development was ceded and delegated by means of Power of Attorney, delegation of powers and Trust resolutions, all of which are contained in the Founding affidavit.

[8] The crux of the Seventh Respondent's opposition is summarised in its Heads of Argument as follows:

8.1 The Applicant Trust's land use rights application was approved on the 12th of June 2024. Therefore, at the time when the Seventh Respondent's application was approved, the current Applicant Trust had no contingent or direct or substantial interest in it. Mr Jan Willem van Waveren owned the property at this stage and neither the Jannie van Waveren Trust nor the Applicant Trust had any interest therein.

8.2 The Applicant Trust was neither the holder of the rights, nor an objector before the Third or Fourth Respondent. The land use rights, and participation was therefore conducted by different parties.

8.3 The Seventh Respondent furthermore submit that the relief prayed for constitutes convoluted relief to the extent that their actual objection, and interest, relates to the filling station only whilst the said relief is aimed at prohibiting the development as a whole.

Legal Framework:

[9] To succeed with interim relief, the Applicant Trust is obliged to address the following requirements:

8.1 A clear or prima facie right;

8.2 A reasonable apprehension of irreparable harm;

8.3 Balance of convenience in favour of granting the relief;

8.4 No other satisfactory remedy.

[10] As to the clear and / or prima facie right, this court does not intend to embark on an elaborate disposition of the concerns raised by the Applicants in their review application in view of making a final determination on the merits thereof. The merits of the review will be determined in due course and through the appropriate forum.

[11] This Court must however determine if the Applicant Trust has the required locus standi to launch the review proceedings and consequently the current proceedings for interim relief.

[12] As a point of departure, the Supreme Court of Appeal in the case of Grey's Marine Hout Bay (Pty) Ltd and Others v Minister of Public Works and Others^[1] declared as follows:

'Administrative action is rather, in A general terms, the conduct of the bureaucracy (whoever the bureaucratic functionary might be) in carrying out the daily functions of the State, which necessarily involves the application of policy, usually after its translation into law, with direct and immediate consequences for individuals or groups of individuals.'

[13] And further:^[2]

'[30] While 'rights' may have a wider connotation in this context, and may include prospective rights that have yet to accrue, it is difficult to see how the term could encompass interests that fall short of that. It has not been shown that any rights - or even prospective rights - of any of the appellants (or of any other person) have been adversely affected by the Minister's decision. None

of the appellants has any right to use the property that has been let, or to restrict its use by others, nor has any case been made out that their rights of occupation of their own premises have been unlawfully compromised. As pointed out in Kyalami Ridge, at para [95]:

'The general rule is that the reasonable use of property by an owner is not subject to restrictions, even if such user causes prejudice to others.'

(Own underlining)

[14] In commenting on the question of whose rights are adversely affected, Cora Hoexter[3] remarks the following:

'A final question is whose rights must be adversely affected. On a narrow and technical approach a successful applicant, say, would not be able to challenge beneficial administrative conduct such as being granted a license or being awarded a tender. It would not amount to administrative action vis-à-vis the successful applicant, and only the person disadvantaged by such an award would be able to challenge it. On a broader approach, administrative conduct nearly always affects someone's (broadly construed) rights adversely, and so any conduct complying with the other requirements of s 1 would nearly always qualify on this score as well. Although it has been suggested, with reference to 'direct, external legal effect', that the impact should fall on the person seeking to challenge the decision, the broader approach is indicated by the wording of s 1 of the PAJA itself: 'which adversely affects the rights of any person'. As already noted, too, the Supreme Court of Appeal has apparently been content with a decision whose impact was on the rights not of the applicant but of the lessee – and whose impact was moreover beneficial, not adverse.'[4]

[15] It is undeniable that the Applicant Trust is the current registered owner of the property. A development has been approved in respect of the adjacent property. This clearly affects the rights of the current owner. At the very least, the Applicant Trust has established a prima facie right, though open to some doubt, which will entitle them to the relief in due course.

[16] The Seventh Respondent has also raised the issue of Section 7(2)(a) and (c) of PAJA dealing with internal remedies. The Seventh Respondent submits that alternative remedies are available to the Applicant as they have yet to exhaust the internal remedies, thus preventing them from succeeding on appeal.

[17] The Constitutional Court dealt with the issue in the decision of Eskom Holdings SOC Ltd v Vaal River Development Association (Pty) Ltd and Others[5] where it was held:

'The substance of the first judgment's point is that the residents ought not to have approached the High Court for the relief sought without first exhausting what the first judgment suggests are internal remedies under the ERA. The first judgment is mistaken in this regard. The operative word in s 7(2)(a) is 'review'. What was before the High Court, the Supreme Court of Appeal and now this court is not a review. It is interim relief for an interdict sought by way of urgency pending a review. So, in the proceedings for interim relief, s 7(2)(a) cannot feature because these proceedings are not a PAJA review.'

- [18] The Constitutional Court ventured further to conclude that the requirement of showing that no other remedy is available is wider to the extent that it must be shown that the alternative remedy is 'satisfactory'. Internal remedies may not be 'satisfactory'. Section 7(2)(a) of PAJA, properly interpreted, does not apply to interim interdicts sought pending PAJA reviews. To interpret it differently will have a negative impact on the fundamental right to access to courts contemplated in section 34 of the Constitution, 1996. It must also be borne in mind that in exceptional circumstances, non-compliance with the provisions of Section 7(2) may be condoned – this aspect is however for the reviewing court to decide and does not feature in a determination of the pendente lite relief.
- [19] This Court is satisfied that there is no 'alternative' remedy that would yield 'satisfactory' results.
- [20] It is trite law that the right set up by the Applicant need not be shown on a balance of probabilities. If it is prima facie established, although open to some doubt, it is sufficient. It is furthermore trite law that the determination of a prima facie right must be considered against the backdrop of irreparable harm being caused should the relief not be granted.
- [21] Prest, The Law and Practice of Interdicts[6] states the following:
- The court has to decide, in its discretion, whether or not to grant a temporary interdict. In the exercise of this discretion, it must be satisfied that the applicant has proved an actual or well grounded apprehension of irreparable loss if no interdict is granted and it must have regard to the balance of convenience
- [22] As to the irreparable harm, this Court is of the view that the harm lies in the development of the Seventh Respondent having an adverse economic effect on the proposed development of the Applicant Trust. This rings true especially in lieu of the fact that both developments purport to be of a similar nature providing for similar facilities including but not limited to the filling stations. The Seventh Respondent argued that approval of the petroleum site and retail licenses can take up to two years, thus negating any potential irreparable harm. This Court is however not privy to those procedures and must assume, for purposes hereof, that such site and retail licenses may be approved prior to the review being finalised. It is after all not actual irreparable harm that is envisioned but rather 'immers eene gegronde vrees dat 'er zoodanige feitelijkeid ... gepleegd zal worden'.[7]
- [23] An applicant must therefore only have a reasonable apprehension of injury – one which a reasonable man might entertain on being faced with certain facts.[8] This constituted an objective test.[9]
- [24] This Court is likewise satisfied that irreparable harm might result should the relief not be granted on an interim basis.
- [25] Prest supra further states on page 79:

‘In every case of an application for an interdict pendente lite the court has a discretion whether or not to grant the application. It exercises this discretion upon consideration of all circumstances and particularly upon a consideration of the probabilities of success of the applicant in the action. It considers the nature of the injury which the respondent, on the one hand, will suffer if the application is granted and he should ultimately turn out to be right, and that which the applicant, on the other hand, might sustain if the application is refused and he should ultimately turn out to be right. For though there may be no balance of probability that the applicant will succeed in the action, it may be proper to grant an interdict where the balance of convenience is strongly in favour of doing so, just as it may be proper to refuse the application where the probabilities favour the applicant, if the balance of convenience is against the grant of interim relief.’

[26] Both parties referred to the matter of *Economic Freedom Fighters v Gordhan*[10] where the following was stated at [42]:

‘[42] In addition, before a court may grant an interim interdict, it must be satisfied that the applicant for an interdict has good prospects of success in the main review. The claim for review must be based on strong grounds which are likely to succeed. This requires the court adjudicating the interdict application to peek into the grounds of review raised in the main review application and assess their strength. It is only if a court is convinced that the review is likely to succeed that it may appropriately grant the interdict. The rationale is that an interdict which prevents a functionary from exercising public power conferred on it impacts on the separation of powers and should therefore only be granted in exceptional circumstances.’

[27] In the case of *Eskom Holdings* referenced supra, the learned Madlanga J (Mathopo J, Mhlantla J, Theron J and Tshiqi J concurring) furthermore remarked:[11]

‘There are legal questions that are capable of easy resolution to any judge worth their salt. Those must be decided definitively. If, as a matter of law, the right asserted by the applicant for interim relief is held not to exist at all, that will be the end of the matter. And that will result in a saving in costs as there will be no subsequent litigation. On the other hand, the legal right may definitively be held to exist as a matter of law and all that may remain for determination at the later proceedings may be whether, on the facts, the applicant has made out a case. There may also be those circumstances where — either because of a combination of factors that include the complexity of the legal question, its novelty, little or no assistance from the litigants' argument, the speed with which the outcome is required and lack of sufficient time for the judge to consider the matter as best they can — the judge may not be in a position to reach a definitive decision on a legal question. In *Johannesburg Municipal Pension Fund* Malan J held:

‘Impressive and erudite arguments were addressed to me on all these grounds. I cannot do justice to all the considerations referred to. All the issues referred to involve difficult questions of law and none of them can be described as ordinary. Nor is it desirable to rule at this interim stage that there is no prospect of success on any of these bases of review. The issues are simply too involved (a serious question to be tried) and of such gravity that they cannot be, and should not

be, disposed of in these interim proceedings. The city has disavowed reliance on the notices purporting to amend Notice 6766 and I do not intend dealing with their validity, but accept for the purposes of this judgment the applicants' contentions.'

[28] This court is specifically concerned with the fact that the objection in liminé presented at the Appeal hearing was heard in the absence of the Applicant Trust (or its predecessor). I do not have access to the record of these proceedings to ascertain precisely what transpired save for the version presented by the parties. As was aptly stated in *Joseph v City of Johannesburg*[12] with reference to the commentary of Cora Hoexter:

'Procedural fairness ... is concerned with giving people an opportunity to participate in the decisions that will affect them, and – crucially – a chance of influencing the outcome of those decisions. Such participation is a safeguard that not only signals respect for the dignity and worth of the participants, but it is also likely to improve the quality and rationality of administrative decision-making and to enhance its legitimacy.'

[29] The Seventh Respondent referred to the matter of *Rainbow Junction Development and Another v City of Tshwane Metropolitan Municipality and Others*[13] in justification of its view that the review will not succeed as the Applicant Trust was not the same party that lodged the complaint and initially participated in the proceedings.

[30] This Court respectfully does not agree with the findings and reasoning of the Honourable Justice Phahlane for the following

reasons:

33.1 Section 51(1) of SPLUMA provides that a person whose rights are affected by a decision taken by a Municipal Planning Tribunal may appeal against that decision by giving written notice of the appeal and reasons to the Municipal Manager within 21 (twenty-one) days of the date of notification of the decision.

33.2 This must be read with the provisions of Section 51(4)(c) that provides that 'any interested person who may be reasonably be expected to be affected by the land development application proceedings' has the required locus standi to lodge appeal procedures in the prescribed manner.

33.3 Section 51(5) further elaborates to state that an interested person for the purpose of subsection (4)(c) must be a person having a pecuniary or proprietary interest who is adversely affected or able to demonstrate that she or he will be adversely affected by the decision of the planning tribunal or an appeal in respect of such decision.

33.4 Nowhere in SPLUMA is it state that the status of an 'interested person' is limited to the extent that it has participated in the proceedings to date. In fact, quite the opposite is intended in as far as interested person are given the pertinent right to intervene.

33.5 Furthermore, Section 45(4) of SPLUMA provides that, in the event that the question arises as to whether a person is an interested person in a land development application or an appeal, the Municipal Planning Tribunal or appeal authority concerned may make a determination as to whether such person qualifies as an interested person.

33.6 Regulation 31(4) of the Regulations promulgated in terms of SPLUMA, stipulates that for the Municipal Planning Tribunal, appeal authority or authorised official to determine whether a petitioner qualifies as an interested person as contemplated in subsection

(4) *supra* it may consider:

33.6.1 his / her rights have been affected by the decision of the Municipal Planning Tribunal or that his / her rights may be adversely affected by the decision of the Municipal Planning Tribunal or authorised official and might therefore be adversely affected by the decision of the appeal authority;

33.6.2 the petitioner represents a group of people who have a direct concern in the proceedings;

33.6.3 the ability of the petitioner to protect his / her interest would be impeded by the decision of the Municipal Planning Tribunal, authorised official or appeal authority and his / her interest is not adequately represented by the current parties to the proceedings;

33.6.4 the petitioner will provide a different perspective on the issues before the Municipal Planning Tribunal, authorised official or appeal authority, without expanding those issues.

33.7 This case was therefore clearly incorrectly decided to the extent that it failed to have regard to the right of any third party to effectively intervene in the appeal procedures. It furthermore failed to highlight the discretion of the Municipal Planning Tribunal, authorised official or appeal authority to allow the intervention purely on the basis that the petitioner will have for instance, a different perspective on the issues before them.

[31] Applying the *stare decisis* principle, this Court is not bound to follow the reasoning of a court of equal stature if this Court is of the view that the judgment and reasoning is incorrect or misguided. For the reasons expounded upon herein before, this Court consequently do not follow the judgment and reasoning set forth in the case of *Rainbow Junction Development and Another supra*.

[32] Having regard to the matter before court, the Municipal Appeals Tribunal simply dismissed the appeal on the premise that the Applicant Trust was not the objector in the Municipal Planning application.[14] This decision is fatally flawed as no consideration was given to the fact that the petitioner might have a pecuniary or proprietary

interest that might be adversely affected. It must again be noted that the Applicant Trust did not have an opportunity to argue the matter as the postponement was refused.

- [33] This court is prima facie of the view that these two grounds for review has a reasonable prospect of success. This will however conclusively be decided at the hearing of the review. Having said that, this Court is of the view that justice demands that interim relief be granted.
- [34] As matters of this nature customarily entails a possible economic risk should it be unreasonably delayed, the parties will be well advised to approach the Office of the Judge President for approval of a preferential hearing date in respect of the review.
- [35] Much of what this Court has found, is premised upon a prima facie view and is dependant upon a final determination in the main case. It would therefore be just under the circumstances if the costs of Part A of the application is left for determination in the main application under Part B.

Order:

[36] In the result the following order is made:

36.1 The Application is heard as an Urgent Application in accordance with the provisions of Uniform Rule 6(12) and the requirements pertaining to forms and service are dispensed with.

36.2 Pending the outcome of the relief sought in PART B of the Application, the First to Seventh Respondents are interdicted and restrained from directly or indirectly giving effect to or causing and / or allowing the execution of the Decisions attached as ANNEXURES 'A' and 'B' to the Notice of Motion (the 'Impugned decisions'), in respect of the property described at Portion 162 (A Portion of Portion 150) of the Farm Sterkloop 688, Registration Division L.S., Limpopo Province (the 'Subject property'), on which the Township Lion Hill (the 'Township') is intended to be developed, by virtue of any Proclamation, Promulgation, Approval, Consent, Authorisation and / or Licence to be granted or issued by the First to Fifth Respondents, in favour of the Sixth and / or the Seventh Respondent, the Subject property or the Township or any of their Agents, Representatives, Consultants or affiliated Companies, in terms of any applicable and prevailing legislation, and which Proclamation, Promulgation, Approval, Consent, Authorisation and / or Licence constitutes or ultimately may form the subject of PART B of the Application.

36.3 The costs pertaining to PART A are reserved for determination in PART B of the Application.

M BRESLER

ACTING JUDGE OF THE HIGH COURT,

APPEARANCES:

FOR THE APPLICANTS : Adv. MC Erasmus SC Adv. DJ van Heerden INSTRUCTED BY : Adriaan Venter Attorneys & Associates info@avatt.co.za c.oberholzer@dbolaw.co.za FOR THE SEVENTH RESPONDENT : Adv. LG Putter SC : Adv. M Majozi INSTRUCTED BY : Ivan Pauw & Partners Attorneys pierre@ippartners.co.za solly@mmakolamatsimela.co.za DATE OF HEARING : 30 July 2024 DATE OF JUDGMENT : 12 August 2024

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- [1] 2005 (6) SA 313 (SCA)
- [2] At [30]
- [3] Hoexter, *Administrative Law in South Africa*, Second Edition, Juta on page 227
- [4] The learned writer made the remark with reference to the finding in the Grey's Marine case *supra*.
- [5] 2023 (4) SA 325 (CC) at [215] to [229]
- [6] Page 57
- [7] Joannes Van der Linden, *Verhandeling over de Judicieele Practijcq* (Leiden 1794)
- [8] See *Free State Gold Areas Ltd v Merriespruit (Orange Free-State) GM Co Ltd* 1961 (2) SA 505 (W) at 518
- [9] See *Pickles v Pickles* 1947
- (3) SA 175 (W) at 179 – 180
- [10] 2020 (6) SA 325 (CC)
- [11] At [251]
- [12] 2010 (4) SA 55 (CC) at 71C-D
- [13] 2022 JDR 0260 (GP)
- [14] See page 162 in Volume 2 of the paginated papers.
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