IN THE HIGH COURT OF SOUTH AFRICA,

FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	**NO**
Of Interest to other Judges:	**YES**
Circulate to Magistrates:	**NO**

Case number: 5481/2016

In the matter between:

LIFE HEALTHCARE GROUP (PTY) LTD Applicant

and

ACTING MUNICIPAL MANAGER: MANGAUNG METROPOLITAN MUNICIPALITY 1st Respondent

MANGAUNG METROPOLITAN MUNICIPALITY 2nd Respondent

THE CHAIRPERSON: LAND USE ADVISORY BOARD, FREE STATE PROVINCE 3rd Respondent

MEC: CO-OPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS, FREE STATE PROVINCE 4th Respondent

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JUDGMENT BY: DAFFUE, J

HEARD ON: 23 FEBRUARY 2017

DELIVERED ON: 16 MARCH 2017

I INTRODUCTION

[1] This case is a typical example of the inability of an organ of State, acting through recalcitrant senior employees, to deal with pressing issues swiftly and effectively. In *casu* we have an entity that is prepared to invest millions of rands in Bloemfontein. If the project comes to fruition it will not only benefit the community, but the Mangaung Metropolitan Municipality will earn much needed income in the form of property taxes. Notwithstanding the expiry of four years no progress has been made to obtain authority for the intended development.

II THE PARTIES

[2] Applicant is Life Healthcare Group (Pty) Ltd. Adv J S Rautenbach appeared before me on behalf of applicant. Applicant conducts the business of an accredited acute physical and neuro rehabilitation hospital, being the only such hospital in the Free State and Northern Cape provinces.

[3] The Acting Municipal Manager of Mangaung Metropolitan Municipality has been cited as the first respondent and the said municipality (herein later referred to as “the Municipality”) as the second respondent. These two parties were represented by Adv T L Manye.

[4] The Chairperson of the Land Use Advisory Board for the Free State Province and the MEC: Co-operative Governance and Traditional Affairs, Free State Province have been cited as third and fourth respondents respectively. Third and fourth respondents were not represented at the hearing before me, probably as no relief is claimed against them at this stage of the proceedings.

III THE RELIEF SOUGHT

[5] The notice of motion reads as follows:

> "1. That the Second Respondent is declared to be in contempt of the Court order under case number 1668/2016 granted on 6th Augusts 2015 by not complying with the terms of prayer 2 thereof.
>
> 2. That the First Respondent is ordered to appear before the Honourable Court on a date to be determined by the Court to provide reasons, if any, why the following order should not be made:
>
> 2.1 That the Second Respondent is guilty of contempt of Court;
>
> 2.2 That the First Respondent, as the Acting Municipal Manager of the Second Respondent be sentenced to direct imprisonment of such fine as the Court may determine and/or suspension of the sentence to be determined by the Honourable Court subject thereto:
>
> 2.2.1 That the First and Second Respondents are not found guilty of contempt of a Court order again within the period of suspension; and

2.2.2 That the Second Respondent provide a new special use zoning number, the objections, representations or proposed amendments as well as whether they support and approve or disapprove of the Applicant's application for rezoning to the Third and Fourth Respondents within seven (7) days of date of this order and to inform the Applicant immediately of the decision and the special use number.

3.2 That the Second Respondent pay the cost of the application on the scale as between attorney and own client.

3. …

4. …" (emphasis added)

(The relief claimed in paragraphs 3 and 4 are not relevant at this stage in so far as no order is sought against third and fourth respondents now, save in so far as I have been requested to postpone the matter in respect of this part of the application to the 15th of June 2017.)

IV BACKGROUND

[6] The applicant's ten year lease agreement in respect of the premises rented at all material times expired at the end of May 2016, although it had an option to renew the lease for a further period of ten years. I have no knowledge of the present status of this lease agreement, but it is apparent from the aforesaid application that the facilities at the leased premises have become inadequate, that no other building in Bloemfontein could

accommodate the hospital and that it was deemed necessary to build a specialised facility on the immovable property obtained for that purpose.

[7] Applicant purchased the immovable property known as Plot 13, Spitskop Smallholdings in the district of Bloemfontein ("the property") which is situated to the west of the city centre for the purpose of constructing its intended new hospital. The zoning of the property must be changed which *inter alia* necessitated a composite application, including *inter alia* a township establishment application. Due to the delay that has been caused, notwithstanding the issue of application 1668/2015 on 8 April 2015, the grant of a detailed order by agreement on 6 August 2015 and a contempt of court application issued under application 5481/2016, i.e. the application presently pending before me, nothing further has transpired and consequently applicant could not start with the construction of the new hospital which it anticipated to be in operation during the first half of 2016.

[8] The following orders were issued on 6 August 2015 in application 1668/2015 by agreement between the parties:

> "1. The respondents are directed, subject to paragraph 2 and 3, to proceed with the proceedings prescribed in paragraph 10 of the founding affidavit relating to Plot [...], S. S. H., district Bloemfontein, Province of the Free State in extent 4,5749 hectares in terms of Deed of Transfer no. T9034/2013 ("the property") including:

1.1 the amendment of the detail development plan for portions of Spitskop and Kwaggafontein (May 1999) to incorporate a proposed new Special Use Zoning (“Parking” and “Street”).

1.2 In terms of section 2 of the Removal of Restrictions Act, 87 of 1967 for the removal of certain restrictive title deed conditions, in the Deed of Transfer of the property.

1.3 In terms of section 20 of the Ordinance for the subdivision of the property into five portions.

1.4 In terms of section 30 of the Ordinance for the amendment of the Bainsvlei Town Planning Scheme no. 1 of 1984 by the insertion of the proposed new Special Use Zoning (“the number of the new Special Use Zoning to be determined by the third respondent).

1.5 In terms of section 8 of the Ordinance for Land Development (township establishment) on the property with the zoning as indicated on Layout Plan 40646 MD52 and Rezoning Schedule appended to the application on the property.

1.6 In terms of section 2 of the Removal of Restrictions Act, 84 of 1967 for the rezoning of the township establishment area of the property from “Holdings” to the new proposed Special Use zoning (private hospital (Proposed Remainder): Parking (Proposed Subdivision 1 and Proposed Subdivision 3) and “Street” (Proposed Subdivision 2 and Proposed Subdivision 4)).

2. The third respondent is directed to lodge objections to or representations concerning the application in writing with the second respondent within 60 days from date hereof as well as

whether they approve of the amendment in terms of section 30 of the Ordinance and the number of the new special use (zoning).

3. The first and second respondents is and are hereby directed to do everything necessary and prescribed by law, as far as it is within their control, as soon as possible but not later than within 180 days from of receipt of the inputs by the third respondent referred to in paragraph 2 of this order.

4. The parties agree to an unrestricted open communication channel between the parties represented as follows:

   4.1 The applicant by Mr WJJ Spangenberg, attorney of the applicant, Spangenberg Zietsman & Bloem Attorneys, landline [...], cell no. [...].

   4.2 The first and second respondents by Dr S Motingoe, Director Legal Services, Department of Cooperative Governance.

   4.3 The third respondent by Mr Sejane Sempe, Litigation Manager Mangaung Metropolitan Council, landline [...] and cell number [...] email [...]

5. The application is postponed sine die.

6. The applicant is granted the right to at any stage amplify this application by filing supplementary affidavits (if necessary) and to enrol the matter in accordance with the rules of this court.

7. The costs of this matter to stand over." (emphasis added)

V CONFUSING ORDER

[9] The orders of 6 August 2015 are confusing in several instances. For a reason unknown to me the Mangaung Metropolitan Municipality ("the Municipality") was not cited as a respondent in application 1668/2015 in the heading of the papers, although it is apparent from paragraph 5 of the founding affidavit that the applicant intended to refer to the Municipality as the third respondent. Unfortunately this error was repeated in the court order issued by agreement. In terms of the order as it reads at this stage, the council of the Municipality was required to act in accordance with paragraph 2 thereof.

[10] Municipal councils are dealt with in the Local Government: Municipal Structures Act, 117 of 1998. Each municipality must have a municipal council consisting of a number of councillors. A municipal manager as head of administration of a municipality is responsible and accountable for various matters as set out in s 55 of the Local Government: Municipal Systems Act, 32 of 2000 ('the Systems Act"), but subject to the policy directions of the municipal council. Applicant never applied for the amendment of the court order and although one should be wary of being too technical, there can be no doubt that neither the Municipality, nor its Municipal Manager was ordered to do anything in terms of this order.

[11] Another aspect that struck my attention from the very first moment when I received the file in this matter is the reference to the Removal of Restrictions Act, 87 of 1967 as it appears on more than one occasion in paragraph 1 of the order. By the time the order was made, this Act had been repealed by the Spatial

Planning and Land Use Management Act, 16 of 2003, i.e on 1 July 2015. I shall deal with Mr Rautenbach's arguments *infra*, but merely wish to state at this stage that I find it inappropriate that litigants can be ordered to comply with provisions of a repealed Act in the absence of relevant transitional arrangements.

[12] The pertinent problem facing applicant at this stage of the proceedings is the vagueness of paragraph 2 of the court order. In terms thereof third respondent, i.e. the council of the Municipality which is not even a party in the contempt of court application, was directed to do certain things. Furthermore the phrase at the end of the paragraph to wit: "and a number of a special use (zoning)" does not contain a verb and appears to be meaningless. In terms of this paragraph objections or representations must be lodged and the amendment in terms of section 30 of the Ordinance must be approved (or not), but nothing further is said in respect of the number of the new special use (zoning).

[13] Mr Rautenbach argued that the process in these kind of applications had been fully explained in the papers and the Municipality knew that it had to present a number for a new special use (zoning) to enable the officials of the Land Use Advisory Board to advertise the application and to prepare same for consideration by the particular Board. The order is not clear for two reasons, i.e. the council of the Municipality is directed to do something and not the Municipality or anyone of its employees, and secondly, the paragraph is quiet as to what has to be done with the "number of the special use (zoning)".

VI VAGUE AND CONFUSING NOTICE OF MOTION

[14] The applicant seeks an order in terms whereof the second respondent in this application, the Municipality is declared to be in contempt of court for failing to comply with the court order in application 1668/2015. No declaratory order is sought against the first respondent, i.e. the Acting Municipal Manager. As indicated, the Municipality was not ordered to comply with paragraph 2 of the order in application 1668/2015, but its council.

[15] In paragraph 2 of the notice of motion I am requested to order the Acting Municipal Manager to appear before me on a date to be determined to provide reasons why second respondent (the Municipality) is not guilty of contempt of court and why he as Acting Municipal Manager should not "be sentenced to direct imprisonment or such fine as the Court may determine and/or suspension of the sentence to be determined by the Honourable Court …". It does not make sense that a further opportunity again be given to provide reasons why second respondent should not be convicted of contempt of court, bearing in mind paragraph 1 of the notice of motion where such declaratory order is already sought. Mr Rautenbach agreed that such order should not be made.

[16] I am also requested to sentence the Acting Municipal Manager to direct imprisonment or to payment of a fine without convicting him of contempt of court. Clearly this does not make sense. Mr Rautenbach apparently had in mind that the Acting Municipal

Manager should be sentenced in his official capacity as the head of the Municipality.

[17] It is apposite to consider the situation in criminal law. Section 332 of the Criminal Procedure Act, 51 of 1977, deals with the prosecution of corporations and members of associations. The relevant part of s 332(2) reads as follows:

> "(2) In any prosecution against a corporate body, a director or servant of that corporate body shall be cited, as representative of that corporate body, as the offender, and thereupon the person so cited may, as such representative, be dealt with as if he were the person accused of having committed the offence in question:
> Provided that-
> (a) …
> (b) …
> (c) if the said person, as representing the corporate body, is convicted, the court convicting him shall not impose upon him in his representative capacity any punishment, whether direct or as an alternative, other than a fine, even if the relevant law makes no provision for the imposition of a fine in respect of the offence in question, and such fine shall be payable by the corporate body and may be recovered by attachment and sale of property of the corporate body in terms of section 288;
> (d) ..."

[18] Section 332(5) reads as follows:

> "When an offence has been committed, whether by the performance of any act or by the failure to perform any act, for which any corporate body is or was liable to prosecution, any person who was, at the time of the commission of the offence, a director or servant of the corporate

> body shall be deemed to be guilty of the said offence, unless it is proved that he did not take part in the commission of the offence and that he could not have prevented it, and shall be liable to prosecution therefor, either jointly with the corporate body or apart therefrom, and shall on conviction be personally liable to punishment therefor."

[19] What is apparent from the notice of motion, read with s 332 of the Criminal Procedure Act, is that applicant does not seek the conviction of the Acting Municipal Manager in his representative capacity as the accounting officer of the Municipality. Contrary to the provisions of the Criminal Procedure Act, the conviction of the Municipality as an entity, not being represented by a person such as the Acting Municipal Manager, is sought. Furthermore applicant seeks an order in terms whereof the Acting Municipal Manager personally be sentenced (without having been convicted) to direct imprisonment which is clearly uncalled for in the absence of a finding in respect of his personal guilt based on the provisions of s 332(5) of the Criminal Procedure Act.

VII <u>THE CONTEMPT OF COURT APPLICATION</u>

[20] The leading authority is *Fakie NO v CCII Systems (Pty) Ltd 2006 (4) SA 326 (SCA)* which was quoted with approval in *Pheko v* Ekurhuleni *City 2015 (5) SA 600 (CC)* at paras [28] to [37]. I quote paragraphs [9] and [10] of *Fakie:*

> "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."

[21] At paragraph [23] of *Fakie supra* Cameron JA made it clear that the common law had been developed and that a change pertaining to the burden of proof had taken place. I quote:

> "What is changed is that the accused no longer bears a legal burden to disprove wilfulness and mala fides on a balance of probabilities, but to avoid conviction need only lead evidence that establishes a reasonable doubt."

[22] I am respectfully in agreement with Nkabinde J in *Pheko supra* at paragraph [25] where the learned judge referred to *"the difficulties*

inherent in compelling compliance from recalcitrant state parties in a manner that displays the courts' discontent with disregard for the rule of law." Courts are too often confronted with certain State parties displaying a total disregard for court orders. In *Meadow Glen Home Owners Association and Others v Tshwane City Metropolitan Municipality* 2015 (2) SA 413 (SCA) the Supreme Court of Appeal stated in paragraph [22] that:

> "…We do not hesitate to endorse what Nugent JA said in this court in Kate, that 'there ought to be no doubt that a public official who is ordered by a court to do or to refrain from doing a particular act, and fails to do so, is liable to be committed for contempt, in accordance with ordinary principles'. However, it must be clear beyond reasonable doubt that the official in question is the person who has wilfully and with knowledge of the court order failed to comply with its terms."

[23] No doubt a Municipal Manager is the accounting officer of the Municipality and his/her responsibilities are clearly set out in s 55 of the Systems Act *supra*.

[24] The Supreme Court of Appeal reiterated in *Meadow Glen Home Owners* Association *supra* at paragraph [24] the following:

> "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. It is unacceptable that a person is 'selected' by the municipality

> to be liable for imprisonment, when that person is clearly not the one who has control over all the facets and terms of the order and it is clear that they are being made the scapegoat. The municipal manager is the official who is responsible for the overall administration of the municipality and the logical person to be held responsible. Even if, as must necessarily be the case, the municipal manager delegates tasks flowing from a court order to others it remains his or her responsibility to secure compliance therewith. It may be that certain of the political office bearers may also be liable for a contempt but it is unnecessary to traverse the possible ambit of such responsibility here."

[25] It is thus 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. Notwithstanding the comments of the Supreme Court of Appeal in *Meadow Glen Home Owners* Association *supra* and the finding that the particular official, Mr Fenyani, was the incorrect person to be held liable notwithstanding the fact that the order sought was directed at him personally, the court did not specifically state that the court *a quo* should have convicted the municipal manager of contempt of court. Mr Rautenbach argued, based on this judgment, that there was sufficient reason to convict the Acting Municipal Manager of contempt of court notwithstanding the fact that the order of 6 August 2015 was not served on him personally and he was not even involved in the negotiations leading to the order obtained by consent as a different municipal manager occupied the position at that stage.

[26] In my view the court did not go as far in *Meadow Glen Home Owners* Association *supra*, as suggested by Mr Rautenbach, to

give courts *carte blanche* to convict municipal managers based on non-compliance by municipal officials of court orders in a situation where the municipal manager was not specifically called upon to advance reasons why he/she should not be convicted of contempt of court.

[27] In *casu* there is, as indicated *supra*, no prayer in the notice of motion seeking the conviction of the Acting Municipal Manager for contempt of court. This is fatal for the applicant's case in this regard. Secondly, the second respondent, the Mangaung Municipality was never called upon in paragraph 2 of the court order of 6 August 2015 to do anything, for as stated *supra*, the council of the Municipality was directed to do certain things. Thirdly, paragraph 2 of the order in particular is drafted in such vague and confusing terms pertaining to the numbering of the special use zoning that no court could convict any person for failing to comply with these confusing terms. Fourthly, the Acting Municipal Manager confirmed under oath that he had acted on legal advice to the effect that applicant's application had to be dealt with in terms of the provisions of the Spatial Planning and Land Use Management Act, 16 of 2013 ("the Spatial Planning Act") which Act repealed the Removal of Restrictions Act, 87 of 1967 *in toto*. I am not convinced of the truth of his version, but he managed to establish reasonable doubt.

[28] Although the Acting Municipal Manager failed to attach a confirmatory affidavit from the Municipality's General Manager: Town and Regional Planning who is directly involved with applications for township establishment in support of his version, I

am satisfied that he created reasonable doubt and am prepared to accept that he believed, based on legal advice, that non-compliance with the court order of 6 August 2015 was justified. In the light of doubt created I am unable to find that there was a wilful and *mala fide* disregard of the court order.

[29] Applicant has therefore failed to show beyond reasonable doubt that either first or second respondent is in contempt of court and should be convicted as such.

VIII RELEVANT ASPECTS *in re* SPATIAL PLANNING AND LAND USE MANAGEMENT

[30] There is some merit in Mr Manye's argument that the Free State Townships Ordinance, 9 of 1969 ("the Townships Ordinance") is clearly out-dated and must be regarded as repealed in so far as it is inconsistent with the Spatial Planning Act. However, it is apparent from the evidence that the procedures laid down in the Townships Ordinance are applied to this day as will be shown *infra*.

[31] Applicant attached to its replying affidavit three letters from the Municipality's General Manager: Town and Regional Planning addressed to the Department of Co-operative Governance, Traditional Affairs and Human Settlement in respect of three unrelated applications, confirming that it was resolved to

recommend approval of the particular applicants' applications. It was placed on record on behalf of the applicant that these three applications were lodged before the 1st of July 2015 and that this served as proof that the Municipality accepted that all such applications had to be dealt with in terms of the old regime, i.e. in terms of the Townships Ordinance, and not in terms of the Spatial Planning Act. This may indicate that the Municipality and its Acting Municipal Manager in particular acted grossly unreasonable *in casu*, *mala fide* and in wilful disregard of the court order. However, the application papers and the particular letters referred to indicate that a Municipal Planning Tribunal was indeed established as provided for in the Spatial Planning Act. This tends to support the Acting Municipal Manager's version in so far as action was taken to comply with the Spatial Planning Act.

[32] A significant difference between the two regimes, the old regime in terms of the Townships Ordinance and the new regime, is that the Spatial Planning Act gives effect to the autonomy of municipalities in terms of s 156 of the Constitution in so far as Municipal Planning Tribunals now have authority in terms of ss 41 and 42 thereof to consider applications for township establishment, the subdivision of land, the consolidation of different pieces of land, the amendment of a land use or town planning scheme with certain exceptions, and the removal, amendment or suspension of restrictive conditions. In terms of the Townships Ordinance such applications had to be considered by the Townships Board, now called the Land Use Advisory Board. Bearing in mind the applicant's version and the three

letters referred to *supra,* this is factually still the situation, particularly in respect of applications lodged before 1 July 2015.

[33] Mr Rautenbach referred to two judgments of the Constitutional Court which he submitted to be authority that all similar applications as *in casu*, made before 1 July 2015 must be proceeded with and adjudicated based on the provisions of the old regime, i.e. *in casu* in accordance with the Townships Ordinance. The two judgments are *Pieterse NO and Another v Lephalale Local Municipality and Others [2016] ZACC 40* and *Tronox KZN Sands (Pty) Ltd v KwaZulu Natal Planning and Development Appeal Tribunal 2016 (3) SA 160 (CC).* Mr Manye argued that the decisions are distinguishable on the basis that no actual application had been placed before the Land Use Advisory Board *in casu* and therefore it could not be argued that the matter was a pending application before the particular Board. According to him the application was merely presented to the Municipality, but because of differences of opinion, the secretariat of the Land Use Advisory Board could not publish the application for objections and comments and eventual adjudication. This submission is not correct. The applicant has shown convincingly that it complied with the procedure prescribed in s 9 of the Townships Ordinance and the parties accepted this to be the case when they consented to the order of 6 August 2015.

[34] Before I deal with the two judgments it is apposite to say something about the Spatial Planning Act. It is apparent from the preamble thereof that the legislature *inter alia* intended to provide a framework for spatial planning and land use management in the

Republic, to provide for the inclusive, developmental, equitable and efficient spatial planning at the different spheres of government, to promote greater consistency and uniformity in the application procedures and decision-making by authorities responsible for land use decisions and development applications and to provide for the establishment, functions and operations of Municipal Planning Tribunals. The objects of the Act are clearly recorded in s 3, *inter alia* to provide for a uniform, effective and comprehensive system of spatial planning and land use management for the Republic. Further objects are not relevant for purposes hereof. It is pertinently stated in s 10 of the Spatial Planning Act that "(P)rovincial legislation not inconsistent with the provisions of this Act may provide for structures and procedures different from those provided for in this Act in respect of a province." Provincial legislation consistent with the Act may be provided for as set out in Schedule 1 of the Act. In terms of s 35 a municipality must establish a Municipal Planning Tribunal that must consider and decide applications received by it as set out in ss 40 to 43 of the Act. Section 47 provides for the removal, amendment or suspension of restrictive conditions with the approval of a Municipal Planning Tribunal and an internal appeal process is provided for in s 51. Notwithstanding the implementation of the Spatial Planning Act, the Townships Ordinance has not been repealed, either expressly or by necessary implication. The factual position is that the Townships Board (as it was known previously) still consider applications lodged before 1 July 2015.

[35] Section 60 deals with transitional provisions. Mr Rautenbach relied on s 60(1) which I do not find applicable. He also argued

that s 60(2) is not applicable *in casu.* In terms of this sub-section all applications, appeals or other matters pending before a tribunal established in terms of s 15 of the Development Facilitation Act, 67 of 1995 must be continued and disposed of in terms of the Spatial Planning Act. According to him the Free State Province did not apply the Development Facilitation Act pertaining to procedures and no tribunals in terms of this Act had been established. He submitted that the Municipality could not rely on s 60(2) for the viewpoint that the applicant's application could not be dealt with in terms of the Townships Ordinance. The Municipality's legal advisors adopted a different approach and accepted the legal position to be different from that relied upon by applicant's legal representatives.

[36] The judgment in *Tronox supra* was delivered on 29 January 2016 and the *Lephalale* judgment as recently as 10 November 2016. These two cases followed upon the judgments in *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and Others 2010 (6) SA 182 (CC)* and *Minister of Local Government, Environmental Affairs and Development Planning, Western Cape v Habitat Council and Others 2014 (4) SA 437 (CC).* In the *Gauteng Development Tribunal* judgment the Constitutional Court struck down chapters V and VI of the Development Facilitation Act which authorised provincial development tribunals established in terms of that Act to determine applications for the rezoning of land and the establishment of townships, suspended the declaration of invalidity for 24 months on certain conditions and allowed these tribunals to finalise all pending applications. Jafta J emphasised in paragraph [53] that "the Constitution confers different

planning responsibilities on each of the three spheres of government in accordance with what is appropriate to each sphere" In *Habitat Council supra* the Constitutional Court confirmed that s 44 of the Land Use Planning Ordinance, 15 of 1985 was constitutionally invalid. It found that the provincial appellate capacity usurped local government's power in respect of municipal planning. However, the court ordered the declaration of invalidity not to be retrospective and all pending appeals were exempted from the declaration of invalidity.

[37] In *Tronox supra* s 45 of the KwaZulu-Natal Planning and Development Act, 6 of 2008 was declared constitutionally invalid, but the Constitutional Court held in paragraph [58] that appeals already pending in terms of s 45 should be allowed to proceed. The court followed its own judgments in *Habitat Council* and *Gauteng Development Tribunal*.

[38] In *Lephalale* the Constitutional Court found s 139 of the Town Planning and Townships Ordinance, 15 of 1986 constitutionally invalid. The court stated as follows in paragraph [5]:

> "The Ordinance is old-order legislation that continues to apply under the Constitution. The pre-democracy Transvaal Provincial Legislature enacted it to determine the powers and capacities of local municipalities in its jurisdiction. It reflects a typical planning law regime. This was at a time when municipalities were subordinate arms of government. They "owed their existence to and derived their powers from provincial ordinances". The Ordinance does what the Constitution itself now does. It assigns the authority to introduce, exercise executive authority over and administer municipal planning to

authorised municipalities. Since the advent of democracy, the Constitution reserves to municipalities executive power over, and administration of, the functional areas listed in Part B of Schedule 4. Their powers are now constitutionally recognised and protected."

[39] At paragraph [8] the court in *Lephalale* proceeded as follows:

"Municipal land use planning schemes are executive and administrative in nature. They are exclusively for the municipality to determine. Beyond their constitutionally allocated powers of oversight and assistance, neither national nor provincial government may, by legislation or otherwise, interfere with a municipality's executive powers to administer municipal affairs. Yet section 139 of the Ordinance continues to allow an appeal from a municipal planning decision to a provincially appointed and administered appellate body."

[40] The court proceeded in paragraphs [12] and [13] as follows:

"[12] This Court has found provisions of this kind, both old-order and Constitution era, invalid. …

[13] Local authorities have a constitutionally entrenched power to manage municipal planning. "This power is autonomous and under no circumstances can it be intruded upon." … So any mechanism that subjects municipalities' planning decisions to a provincial appeal process intrudes into constitutionally prohibited terrain."

[41] Finally the court concluded in paragraphs [17] and [18] as follows:

"[17] … To avoid disruption and prejudice to third parties, whose appeals were disposed of by the Limpopo Townships Board, as

well as those whose appeals are still pending; it would not be just and equitable for the order to operate retrospectively.

[18] However to attenuate any possibility of prejudice in conserving an unconstitutional mechanism, it would be apt, as we did in Tronox, to enjoin the Limpopo Townships Board, when it disposes of pending appeals, to take into account the Municipality's norms and standards, and policies."

[42] In *casu* the applicant initially launched a typical rezoning application during 2013, but amended it to a more comprehensive township establishment application during June 2014. This amended township establishment application requires the incorporation of a new proposed amended spatial use zoning to replace the present zoning of "holdings". The application was simultaneously submitted to second, third and fourth respondents which required the second respondent to provide a specific number for the new spatial use zoning applied for. The provision of such a number would not mean that the Municipality necessarily approved the rezoning of the applicant's property or that it acquiesced thereto. In the answering affidavit the Acting Municipal Manager does not deny that such a process was followed and he furthermore does not deny that the Municipality's delegated officials refused to provide such a special use zoning number to allow applicant's application to proceed before third respondent. He merely made the following remark in paragraph [14] in respect of the allegations contained in paragraphs 5 to 15:

"I aver that the allegations in these paragraph (sic) and the more especially the events mentioned and the court order were overtaken by

adoption and coming into operation of SPLUMA (the Spatial Planning Act) and the second respondent's establishment of Municipal Planning Tribunal.

In paragraph [18] the following allegation is made:

"I aver once again that after the adoption and coming into operation of SPLUMA the second respondent's was legally bound to act in terms of relevant Act in operation notwithstanding the court order."

In paragraph [21] the following is stated:

"I reiterate that the second respondent can only act in terms of the prescripts of the law in place at the time when considering the applicant's application."

[43] The respondents never approached the court to set aside the court order because it had been overtaken by the Spatial Planning Act as alleged by the Acting Municipal Manager and no application has been brought to declare the Townships Ordinance or any provisions thereof unconstitutional.

IX FURTHER ISSUES, INCLUDING RELIEF TO BE GRANTED

[44] Further issues arise. During argument the issue of a revised structure plan came to the fore and this was one of the aspects relied upon by the Municipality for not giving proper attention to applicant's application. In this regard the Municipality stated in its letter dated 7 July 2014 that a revised structure plan needed to be implemented for the particular area in which the applicant's

property is situated before the application could be processed. Mr Kumalo, the General Manager: Town and Regional Planning at the time made the following promise in the aforesaid letter: "The Mangaung Metropolitan Municipality will contact you as soon as your application has been considered within the context of the revised structure Plans." Numerous enquiries have been made on behalf of applicant pertaining to the compilation of a revised structure plan and the time frames needed for the Municipality to complete this plan. A period of nearly three years has lapsed and nothing has been done. In the letter of Ms Ramaema, the HOD of Corporate Services dated 20 January 2016 the following is stated: "That the applicant will be notified to consider re-submitting his application after February 2016 once Council has revised all the current structure plans." This is the Municipality's attitude notwithstanding the agreement entered into which was made an order of court the previous year. Mr Manye advised me that he had instructions from the Municipality to place on record that it would ensure that a revised structure plan be compiled within 90 days. Argument was presented on 23 February 2017. Although applicant's notice of motion does not provide for a *mandamus* in this regard, I am satisfied that the parties have given proper attention to this aspect which is clearly relevant to applicant's application and that the offer made by Mr Manye on behalf of the Municipality may be incorporated in the order to be issued.

[45] Another issue to be considered is the relief sought in paragraph 2.2.2 of the notice of motion which I quote again for the sake of convenience:

> "That the Second Respondent provide a new special use zoning number, the objections, representations or proposed amendments as well as whether they support and approve or disapprove of the Applicant's application for re-zoning to the Third and Fourth Respondents within seven (7) days of date of this order and to inform the Applicant immediately of their decision and the special use number."

[46] As mentioned, the Municipality does not deny that the relief sought is in line with the application procedure set out in the Townships Ordinance, the so-called old regime. There is no doubt that the applicant's application was filed with second, third and fourth respondents more than a year before the repeal of the Removal of Restrictions Act and the commencement of the Spatial Planning Act on 1 July 2015. Applications in the Free State Province lodged prior to 1 July 2015 are still considered in terms of the old regime according to the accepted evidence. There is no substance in Mr Manye's argument that the newly established Municipal Planning Tribunal should receive and finally adjudicate the application. Therefore and based on the practice in the Free State and judgments of the Constitutional Court referred to *supra,* it is fair, just and equitable that applicant's application be dealt with without further delay and therefore an order as set out in paragraph 2.2.2 of the notice of motion, more carefully worded, should be granted.

X **COSTS**

[47] The relief that I intend to grant coincides with the relief granted by the court in application 1668/2015 on 6 August 2015 which order was made by agreement.

[48] It is an absolute shame that this matter has been dragged out for so long. I have already found that the Acting Municipal Manager should not be convicted of contempt of court, but I have serious doubts about the *bona fides* of the Municipality's officials in the Town and Regional Planning Division of the Directorate: Corporate Services. This judgment should be brought to the knowledge of Ms M J Ramaema, the HOD of Corporate Services who on 20 January 2016 decided not to recommend approval of applicant's application due to alleged non-compliance with the current structure plan, as well as Mr Kumalo, the General Manager: Town and Regional Planning and Mr Mahao, the Acting General Manager: Town and Regional Planning. It must also be served on the Acting Municipal Manager forthwith. Should this matter not be resolved in accordance with my order, the court hearing the matter eventually may well decide to call upon the particular persons to give reasons why punitive costs orders *de bonis propriis* should not be made against them in their personal capacities. I wish to reiterate the remarks in this regard of Nkabinde J in *Pheko supra* as well as the comments of the Supreme Court of Appeal in *Meadow Glen Home Owners* Association *supra*.

[49] The applicant is not successful in respect of the contempt of court application. In these applications an applicant is regarded as a

nuntius who merely supplies information to the court pertaining to the non-compliance with court orders by particular persons. Unfortunately for the applicant the court order of 6 August 2015 which was made by agreement does not adhere to the standard required of court orders. In *Eke v Parsons 2016 (3) SA 37 (CC)* Madlanga J pointed out in paragraph 25 that "a court must not be mechanical in its adoption of the terms of a settlement agreement." See also paragraphs [29] and [30]. Although the parties have settled the matter, it does not mean that anything agreed to by them should be accepted by a court and made an order of court. I indicated my difficulty with the court order *supra.* The starting point in interpreting a court order is to determine the manifest purpose of the order and in this regard the intention of the parties is to be ascertained from the language used, read in its contextual setting and in the light of admissible evidence.

[50] I referred in my introduction to the Municipality's apparent reluctance to ensure that an entity that wants to invest millions in Bloemfontein and simultaneously offer a high class and much needed medical service to the community is able to achieve its goals. Such action is unacceptable.

[51] If the Municipality was advised that the court order was vague and confusing and/or had been overtaken by national legislation, it should have come to court to apply for the rescission, amendment or even setting aside of the court order. It should not have waited for the contempt of court application to be lodged. If it was the Municipality's case that the Townships Ordinance had been repealed or is unconstitutional, it should have approached

the court for a declaratory order which it failed to do. Instead it, acting through its senior officials, played a waiting game. If one considers the manner in which the Municipality has been dealing with similar applications filed before 1 July 2015 as recently as during September last year, it is incomprehensible why applicant's application could not be afforded similar attention. A punitive costs order is warranted.

XI FREE STATE SPATIAL PLANNING AND LAND USE BILL

[52] On 10 March 2010 and after having finalised this judgment, I was presented by counsel with the Free State Province's draft Bill on Spatial Planning and Land Use. Notices calling for comments on the draft Bill were apparently published in local newspapers on 3 February 2017. Counsel and the court were unaware hereof and the matter was not addressed in the written heads of argument or during oral argument. I perused the Bill, but deliberately refrain from making any comments, save in respect of the following. It is apparent that the Free State Province still regards the Townships Board, also known as the Land Use Advisory Board, established in terms of the Townships Ordinance as a valid entity which "…continues to exist and may finalise recommendations that are pending or in progress immediately before the commencement of this Act." See: s 47(3) and s 47 of the Bill in general relating to transitional arrangements. It is intended that the MEC shall ultimately disestablish the aforesaid Board by notice in the Provincial

Gazette, but only upon conclusion of all matters contemplated in subsection 47(3). The judgment and orders to be issued are in harmony with the apparent intention of the Free State Provincial Legislature.

XII ORDERS

[53] Therefore I make the following orders:

1. Second respondent shall provide to third and fourth respondents within seven (7) days of this order a new special use zoning number as well as its objections, representations or proposed amendments and indicate whether it supports and approves or disapproves applicant's application for rezoning and it shall simultaneously inform applicant of its decision and/or recommendations as well as the special use zoning number provided.
2. Second respondent must compile a revised structure plan, particularly in respect of the area in which the applicant's property is situated, to wit Plot [...] S. S. , district Bloemfontein, by not later than 23 May 2017.
3. The Acting Municipal Manager is directed to oversee the above process and ensure that second respondent's

Department of Corporate Services and in particular its Town and Regional Planning Directorate comply with this order.

4. The application is postponed to 15 June 2017 and leave is granted to applicant to supplement its papers on or before 26 May 2017 and to first, second, third and fourth respondents to do so on or before 2 June 2017.
5. Second respondent is ordered to pay the costs of this application on the scale as between attorney and client.

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J.P. DAFFUE, J

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