

In the High Court of South Africa
KwaZulu-Natal Local Division, Durban

Case No : 13896/2014

In the matter between :

PLG Schools (Ballito Academy)

Applicant

and

KwaDukuza Municipality

Respondent

Judgment

Lopes J

[1] This application came before me on the 18th December 2015 as an opposed urgent application. The applicant, PLG Schools (Ballito Academy) seeks an order from this court extending the time limits of an order granted on the 11th February 2015 by consent between the school and the respondent, the KwaDukuza Municipality ('the Municipality').

[2] The history of the matter may be briefly summarised as follows.

- (a) At the end of November 2014 the Municipality delivered an application for an order interdicting the school from using certain premises as a school, unless and until special consent had been granted by the Municipality.
- (b) The school counter-applied for an order directing the Municipality to consider its application for special consent within a period of two months from the 14th November 2014.
- (c) The application was eventually heard, and settled, during February of 2015 and a consent order was agreed upon by the parties and granted by the court.
- (d) The effect of the consent order was that an interdict was granted preventing the school from carrying on a school on the premises it occupied in Ballito, and to stop and not continue with building works on the premises until they had been approved in terms of the National Building Regulations and Building Standards Act, 1977. The school was also directed to give notice to all learners that it was unable to operate as a school until it obtained permission, both in terms of the National Building Regulations and Building Standards Act and the Ballito Town Planning Scheme.
- (e) In paragraph 6 of the consent order the interdictory provisions were suspended up until the 31st December 2015, or the end of the school's 2015 academic year, whichever occurred first. The order recorded that in the event that the special consent application was granted by the Municipality prior to the 31st December 2015, then the interdicts would fall away. An order that the school pay the Municipality's costs on the scale as between attorney and client, subject to a maximum of R320 000, was also agreed.

- (f) The present application by the school sets out in its founding affidavit correspondence which was conducted between the parties and their legal representatives. What emerges from the affidavit and the correspondence are the following :
- (i) The school requested, as early as the 23rd February 2015 that the Municipality provide it in writing with the criteria to be used by the Town Planning Tribunal in assessing the special consent application to be made.
 - (ii) The Municipality insisted that a meeting should be held, in order that proper clarification could be given to the school's representatives by persons employed by the Municipality who were qualified and equipped to do so.
 - (iii) Neither party changed its stance with the school's legal representative's still requesting the criteria in writing on the 26th June 2015. Eventually a meeting was held between the parties' representatives on the 28th July 2015. This meeting was held because the application for special consent which was eventually submitted by the school on the 15th July 2015, was considered by the Municipality's employees to be incomplete.
 - (iv) Pursuant to that meeting a further application for special consent was submitted by the school, this time represented by Sivest, apparently specialists in town planning applications. This subsequent application was only submitted on the 19th August 2015.

- (v) Matters then dragged on because the school was again notified by the Municipality's employees that the special consent application was incomplete.
- (vi) On the 15th October 2015 the Municipality requested the consent of the school to extend the time period within which the meeting was to be held by a further 30 days. This was because the parties were aware that the time period during which the interdicts were suspended was to come to an end on the 31st December 2015, or the end of the school's academic year (which it turns out was the 9th December 2015).
- (vii) The school's attorneys then complained on the 17th November 2015 about the fact that the time limits were to expire with no decision having been made by the Municipality. The attorneys requested an extension of the time periods during which the interdicts would be suspended. This was eventually refused by the Municipality on the 2nd December 2015. On the 3rd December 2015 the Municipality notified the school that the decision would be announced on the 11th December 2015.
- (g) The school then launched this application on the 3rd December 2015. On the 10th December 2015 the Municipality handed down its decision refusing the special consent sought by the school. On the 7th December 2015 this application was heard and an order made, inter alia, providing for the filing of affidavits, and a further order that the operation of paragraph 4 of the consent order granted on the 10th February 2015 was further suspended until the 18th December 2015. Paragraph 4 of the consent order dealt with the notices to be given by the school to prospective learners.

[3] The school's founding affidavit in this application is a somewhat self-serving document which evidences in my view an inadequate justification for the incompetence of the school in not proceeding timeously with its application before the Municipality for special consent. What is clear is that the school went ahead with establishing its premises without first obtaining the proper consent. There is an abundance of recent authority dealing with the need for persons wanting to develop properties, to do so in a proper and lawful manner, obtaining the requisite consent in advance. In the applicant's affidavit the deponent tries to blame the Municipality for all its woes. It does not explain why there are huge gaps in the process of applying for the special consent, and why, if the school felt that it was being unfairly treated by the Municipality, it did not seek the proper and timeous relief from the courts to assist it.

[4] The continual allegations of malice on the part of the Municipality's employees have no apparent foundation in fact. What appears to be a belligerent attitude on the part of the school in refusing to meet with the Municipality's staff who were to advise them, is inexplicable, save perhaps that it was done for the reason that the school feared it could not meet the requirements of the special consent application and did not wish to proceed with it. Had the school required information which was not available to its legal advisors, and it was entitled to have that information provided, its legal advisors could and should have brought an application to secure such knowledge. Their continual exchange of correspondence was most unhelpful in the circumstances.

[5] That, however, is not the end of the matter. The school wishes to pursue its legal remedies and appeal to the Municipal manager against the decision of the Town Planning Tribunal. Mr *Goddard*, who appeared for the Municipality, was unable to give me any indication whatsoever as to when the Appeal Board would be able to be constituted to hear the appeal, save to state that it would have to be re-constituted in the New Year. The clear impression I was given, was that this was not going to occur in the near future.

[6] Mr *Pillay*, who appeared for the school, submitted that in terms of the consent order concluded between the parties it was clearly envisaged that the special consent application process would be followed to its conclusion by way of an appeal, if necessary. He pointed out that this is evident from the Municipality's own correspondence, containing a summary prepared by the Municipality which states:

'The whole idea of initially agreeing to the suspension of the Court Order to the end of the year was, amongst other things, to give the applicant adequate time to submit their application and complete the entire process, inclusive of an appeal process, if need be.'

Mr *Pillay* submitted that the prima facie right of the school to a mandatory interdict was established by the clear intention of the parties in concluding the consent order.

[7] In addition to the foregoing, Mr *Pillay* pointed out that in terms of the decision made by the Municipality's Town Planning Tribunal, the authority of the decision only becomes effective upon the expiry of the 21 day period provided for an appeal, if no

appeal is lodged against the decision of the Municipality. In the event that an appeal is lodged the decision becomes final upon the finalisation of the appeal. Mr *Pillay* indicated that the appeal was all but lodged, and would be lodged timeously.

[8] Mr *Pillay* submitted that in terms of the bylaws passed on the 13th August 2015, the special consent procedure is dealt with on paper alone, whereas the appeal entails a more complete procedure. Thus the appeal process is the more important process of the two. What the school wants is for the interdicts to be suspended until the process takes its course. He submitted that it does not lie in the mouth of the Municipality to indicate that an appeal tribunal was not constituted, and would have to be constituted in the New Year, entailing further delays, when it wished to have the school's application for an extension of the suspension of the interdict dismissed because of delays on the part of the school. All that the school wants is for the special consent procedure to be carried out to its logical end.

[9] Mr *Goddard* submitted that the school was prohibited from being conducted on the premises concerned without the grant of special consent by the Municipality, and the Municipality did not agree to go to the end of the process, but merely the end of December 2015 or the end of the school's academic year, which had already occurred. He submitted that even with the interdicts in place, the appeal could still be heard, but the school would simply cease to operate. The school's prima face right was only to have the matter adjudicated, and not to have the interdicts continually suspended. He submitted that it was not the intention of the agreement

that the school would continue to operate until the appeal was decided. Had the school acted promptly the entire process would have been finalised within a year.

[10] I do not agree with the submissions of Mr *Goddard*. It is clear from the documentation before me that it was the intention of both the Municipality and the school that the special consent process would be followed through to the appeal stage. It was also envisaged by all parties that this would be finalised by December of 2015. We now know that that did not, and cannot, happen. The reasons why, and the apportionment of fault in that regard, are not the only factors which I have to consider.

[11] An important factor which falls to be considered is the balance of convenience. There are approximately 270 children attending the school, together with 17 academic staff, and in 2016 there are 180 new enrolments together with 14 new members of the academic staff together with five other employees. If the school were not to continue the prejudice to all these persons would be manifest. The children would have to enrol in other schools at great inconvenience to themselves and their parents, not to mention the expense of new uniforms, etc.

[12] I am accordingly of the view, for the reasons set forth above, that the interdicts which were granted should be extended for a further period to allow the appeal process to be finalised.

[13] In deciding this I do not wish to be understood, in any way, to be condoning what I consider to be the unacceptable conduct of the school in failing to ensure that all the administrative processes were finalised prior to conducting the operation of the school. It is difficult to understand on a reading of the papers why the proper professional staff were not hired by the school at the outset, and why they did not meet with, and discuss the matter with the Municipality's staff, when they were invited to do so.

[14] With regard to the question of costs, there can in my view be no debate about the fact that the school has been granted an indulgence, which I cannot envisage would easily be granted again. The belligerent attitude of the school authorities and their legal advisors is, in my view, in large measure responsible for the fact that the deadline of one year was not met. The excuses about the conduct of the Municipality and the fact that they did not timeously address matters are factors which could easily have been resolved by applications to court after suitable warnings were given. None of that was done. In these circumstances I am of the view that the school should pay for the indulgence which it seeks, and the costs should not come out of the public purse. In this regard I disagree with the submissions of Mr *Pillay*, that each party should pay its own costs.

[15] I also do not agree that the school should be given leave to apply on the same papers as those delivered on the 3rd December 2015, supplemented insofar as may be necessary, for a further order varying or extending the period of suspension

beyond that which is sought by the school presently. To do so would in my view only encourage further delays.

[16] In all the circumstances I make the following order :

- (a) The order of the 11th February 2015 under case number 13896/2014 is varied by the substitution of paragraph 6 thereof with the following paragraph 6 :

'6. The operation of the orders in paragraphs 1 to 5 above is suspended in their entirety up to and including the 31st December 2016, alternatively the end of the respondent's 2016 academic year, whichever should occur first. In the event that the special consent application is granted by the applicant prior to the 31st December 2016, alternatively the end of the respondent's academic year, whichever occurs first, the interdicts shall fall away.'
- (b) Nothing contained in this order, or the order of the 11th February 2015, shall in any way absolve the PLG School (Ballito Academy) from complying with any other legal requirements for the operation of the school, other than those contained in the application for special consent and covered by the suspended interdicts.
- (c) PLG Schools (Ballito Academy) is to pay the costs of the KwaDukuza Municipality in this application, such costs to be calculated on the scale as between attorney and client.

Date of Hearing : 18th December 2015

Date of judgment : 22nd December 2015

Counsel for the Applicant : I Pillay (instructed by MacGregor Erasmus Attorneys)

Counsel for the Respondent : G D Goddard (instructed by Shepstone & Wylie)