IN THE HIGH COURT OF SOUTH AFRICA

MPUMALANGA DIVISION (MAIN SEAT)

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

15/11/19
DATE

SIGNATURE

CASE NUMBER 1054/2016

FRANK FISHER — APPLICANT

And

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| THE MBOMBELA LOCAL MUNICIPALITY | 1ST RESPONDENT |
| MATAFFIN MACADAMIA DEVCO PROPRIETARY LTD | 2ND RESPONDENT |
| THE MATAFFIN MACADAMIA HOME OWNERS ASSOCIATION | 3RD RESPONDENT |
| GOODMAN MOKOENA | 4TH RESPONDENT |
| THE REGISTRAR OF DEEDS, MBOMBELA | 5TH RESPONDENT |
| THE SURVEYOR GENERAL FOR THE PROVINCE OF MPUMALANGA, MBOMBELA | 6TH RESPONDENT |

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**JUDGMENT**

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**LEGODI JP**

[1] In this matter, the applicant, Mr Frank Fisher in its amended notice of motion seeks for relief *inter alia* framed as follows:

*"8. That the following administrative actions of the first and fourth respondents resulting in:*

*8.1 their granting of authority to the second respondent in terms of section 7(6) of the National Building Regulations and Building Standards Act, 103 of 1977 to commence or proceed with the erection of certain buildings on Portion 305 (a portion of Portion 294) of Erf 2, Mataffin Township prior to the approval of the building plans in respect of such buildings in terms of section 7(1) of the said Act; and*

*8.2 their approval of the aforementioned plans in terms of section 7(1) of the aforesaid Act; be reviewed and set aside".*

*9. That the administrative action of the sixth respondent resulting in its approval of Subdivision Diagram SG No 768 of 2014, Consolidation Diagram SG No 789 of 2014 be reviewed and set aside.*

*10. That the fifth respondent be interdicted from registering any transactions in relation to Portion 305 (a portion of Portion 294) of Erf 2, Mataffin Township or the improvements erected thereon, including but not limited to, the opening of a sectional title register in respect of the land and buildings erected thereon as contemplated in section 11 of the Sectional Titles Act, 95 of 1986 and, in the event of it being found that such sectional title register has already been opened by the time the order as sought herein is granted, the registration of transfer of any unit as contemplated in section 15B of the said Act.*

*11. That the second respondent be ordered to demolish the improvements constructed on Portion 305 (a portion of Portion 294) of Erf 2, Mataffin Township."*

[2] To this relief, the second respondent, Mataffin Devco Propriety Ltd (hereinafter referred to as the Developer) raised the issue of unreasonable delay disentitling the applicant to obtain the relief sought. On the other hand, a swipe was taken at what was said to be un-pleaded case of the applicant for the relief sought. This was prompted by the applicant's oral submission that once the impugned decisions or approvals are set aside, the matter will be referred back to the Municipality (first respondent) for reconsideration and approvals with conditions. I deal later with the conditions contemplated. The other opposition to the relief sought by the applicant is that the application ought to be dismissed for failure to join all affected home-owners.

[3] Before I deal with the challenges to the applicant's case, the background to the dispute is necessary. On 23 January 2015 the applicant and his wife, elderly people of 74 and 79 years of age at the time entered into an agreement of sale in terms of which they purchased a property described as portion 151 of the Mataffin Macadamia Village Mbombela (thereinafter referred to as th property). They relocated to Mbombela from Dullstroom for health reasons as they wanted to be closer to a medical care and frail care facilities. The property was purchased from the developer, the second respondent.

[4] The property appealed to them by reason of its location across the road from a park, situated on the corner of a street overlooking a low density residential areas compromising relatively stands averaging approximately 450 square metres in extent of which only five would have been in the line of sight of their planned dwelling on Portion 151. It abutted on two large stands of similar portions which the applicant and his wife anticipated would be developed to much the same standard of which they had in mind to construct on their property.

[5] According to the applicant at the time of the conclusion of the sale agreement there was no mention by the second respondent in its capacity as the Developer that diagonally across the road from their property, blocks of flats would be constructed. Having taken occupation of their property during January 2015, earthworks commenced on the property diagonally across the road from their new house in direct line of sight thereof of sight of their property.

[6] The nature of the construction was to introduce double storey block of apartments (flats) on that land each comprising of 24 Units. In other words, the developer sought to consolidate fifteen small residential stands shown on the general plan to substantially increase the density of the dwelling units, according to the applicant increase by 320%. This is what had prompted the present litigation.

Unreasonable delay

[7] Even if unreasonableness of the delay has been established, it cannot be evaluated in a vacuum and the next leg of the test is whether the delay ought to be overlooked. This is the third principle applicable to accessing the delay under legality. Courts have the power to refuse - application where there is an undue delay in initiating proceedings or discretion to overlook the delay. There must however be a basis for a court to exercise its discretion to overlook the delay. The basis must be gleaned from the facts made available or objectively available facts[1] .

[8] The reasonableness of the delay must be assessed on amongst others, the explanation offered for the delay. Where the delay can be explained and justified, then it reasonable and the merits of the review can be considered. If there is an explanation for the delay, the explanation must cover the entirety of the delay. Where there is no explanation for the delay, the delay will necessarily be unreasonable[2].

[9] The 180-day bar in PAJA does not play a pronounced role in the context of legality. Rather, the question is first one of reasonableness, and then if the delay is found to be unreasonable whether the interests of justice require an overlooking of that unreasonable delay[3].

[10] Before the effluxion of 180 days the first enquiry in applying section 7(1) is still whether the delay, if any, was unreasonable. But after the 180-day period the issue of unreasonableness is pre-determined by the legislation. It is unreasonable per se.

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[1] Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd 2019(4) SA 331 (CC) (16 April 2019) at para 53

[2] See Buffalo City at para 52

[3] See further Buffalo City para [14]

It follows that the court only empowered to entertain the review application if the interest of justice dictates an extension in terms of section 9...[4]

[11] The conclusion that it is impermissible for the court to have entered into and decided the merits of the review application without having decided the merits of the condonation application, as it was held in Urban Tolling Alliance, case was found by the Constitutional Court in Buffalo City case[5], not in accordance with the jurisprudence.

[12] At the start of the hearing of this matter and upon engagement with the parties' legal representatives it was agreed that it would be in the best interest of justice to deal with the issue of delay together with the merits of the case. I therefore do so hereunder.

[13] The applicant's counsel, Advocate HF Jacobs SC contended that the reasons for the decision having been furnished on 16 May 2016 and the present proceedings having been instituted on 1 September 2016, there can be no basis for the delay point raised by the respondents. Counsel for the state respondents, that is the Municipality and fourth respondent, Mr Mokoena sought to challenge the version that the reasons for the decisions or approvals were only furnished on 16 May 2016. However, there was no facts to the contrary.

[14] Section 7(1) (b) of PAJA provides that any proceedings for judicial review in terms of section 6(1) must be instituted without unreasonable delay and not later than 180 days after the date where no remedy exist on which the person concerned was informed of the administrative action and reasons for it or might reasonably have been expected to have become aware of the action and the reasons. (My emphasis).

[15] For the state respondents to suggest that in all probability the applicant must have known of the reasons much earlier than 16 May 2016 without providing facts,

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[4] Opposition to Urban Tolling Alliance v South African National Road Agency Ltd 2013 ZASCA 148. 2013 4 ALL SA 639 (SCA) at para [26]
[5] Para [55]

does not take the argument further. It is supposed to be within their knowledge as the decision makers to know better when such reasons were furnished. It does not matter whether the reasons were sufficient or not. I therefore find that the applicant did not unreasonably delay in the institution of the review proceedings. This brings me to the other aspect of the delay.

Delay in prosecution of the review application

[16] The pleadings in these proceedings having closed on 3 August 2017, only on 6 December 2018 did the applicant deliver the practice note and written heads of argument. For this, it is said *'there is period of some 14 months that had passed by without prosecution and thus resulting in a highly prejudicial failure to prosecute the review proceedings'*.

[17] This brings me back to the principle articulated in Buffalo City case. As can be gleaned from the undisputed facts, the applicant unduly delayed in prosecuting the review. Having abandoned the relief for demolition of the block of flats constructed, the second enquiry in these proceedings is whether the interests of justice require whether the delay should be overlooked. Put differently, what would be the basis for a court to exercise its discretion to overlook the delay. That basis must be gleaned from the facts made available or objectively available facts[6].

[18] The applicant effectively seems to contend that on objective available facts, none of the parties can claim to have been prejudicial or to be prejudiced by the setting aside of the approvals or decisions. To come to any conclusion to the issue of prejudice caused by the delay in the prosecution of the review application or what is in the best interest of justice, merits of the application has a bearing. I find that the delay in the prosecution of the review application was unreasonable and prejudicial as it will appear hereunder.

Applicant perceived right of view and space

[6] State Information Technology Agency SOC Limited v Giijima Holdings (Pty) Ltd 2018(2) SA CC at para [52]

[19] The state respondents in their written heads of argument move from the premise that the applicant cannot succeed. They start by asking the question 'which right or rights of the applicant has/have allegedly been affected? To succeed the right must first exist and administrative action complained of must adversely affect materially and adversely the right or legitimate expectations of any person, in this case, the applicant and must procedurally be unfair.

[20] In paragraphs [3] and [4] of this judgment I alluded to what the applicant says prompted him to buy the property and what his expectations were. The essence of the complaint speaks to his alleged interference with his space and view being trampled upon by the erection of block of flats. This must be seen in this context:

'*...An own-interest litigant does not acquired standing from invalidity of the challenged decision or law, but what effect it will have on his or her interests or potential interests. He or she has standing. to bring the challenge even if the decision or law is in fact valid. But the interests that confer standing to the challenge and the impact the decision or law has on them, must be demonstrated*[7].

[21] The applicant as '*an own-interest litigant*' wants every approval and or authorisation to be undone to allow him to ask the municipality to reconsider approval of the plans with conditions. That is, to put a caveat for erection of what he refers to as natural resources like trees and or shrubs. This was said during oral argument.

[22] I am at a lost with this contention. One, it is not pleaded. Two, the applicant is actually asking for what he already has. Lastly, he contradicts the source of his complaint. Starting with the latter, the source of his complaint is that by reason of the location of their property across the road from a park situated on the corner of a street, there is an overlooking view of a low density of residential area comprising relatively stands averaging approximately 450 square metres in extent of which only five would have been in the line of sight of their planned dwelling on Portion 151.

[7] Giant Concerts CC v Rinaldo Investments (Pty) Ltd 2012 2298JDR CC at 33

[23] I say contradiction because the applicant now wants the municipality in its reconsideration of the plans at his request to plant the trees and shrubs between his property and the erected block of flats. His alleged *'in line of sight of his property on Portion 151'* across the block of flats or before block of flats, would in my view, be more obscured by what he wants to see happening.

[24] Any of his concerns for the love of natural resources and his want to see plants and or shrubs should be seen in the context of what is already there. At his own yard and or besides his fence there are already big trees and shrubs. Already between his home and across the road before block of flats; *natural resources* have been provided.

[25] For example, between his property and in between or alongside the block of flats or the fence thereof as clearly appears on picture JA9 at page 374 of the paginated papers, there are already big trees and the shrubs that are still coming up as in 2017. By now, the shrubs should be big to take care of applicant's alleged sight or view of his love for nature.

[26] The interests that confer standing to his challenge of the impugned approvals or decisions and the impact thereof, must be demonstrated. The applicant did not plead what he now wants the municipality to put as a caveat to his request for reconsideration. In any event, if he did, he was still bound to fail because substantially he already has what he is looking for.

Prejudice

[27] Another aspect to consider is that, assuming that the approvals and or decisions were invalid, he would not necessarily have acquired standing thereby or right protectable in law. He allowed block of flats to be completed. Eventually he abandoned his relief for demolition of block of flats. Therefore, his interests must in the circumstances of the case, be seen in the light of the interests of the several owners of block of flats and how adversely they could be affected

[28] The prejudice to the owners of block of flats is described as follows by the developer in paragraph 37.1 of its written heads:

*"The apartments which were constructed were completed by September 2016 and an occupational certificate in respect thereof was issued on 25 October 2016. Before the applicant's supplementary affidavit was filed on 8 February 2017, a sectional title register was opened in respect of the apartments and they were transferred to new owners. Those apartments are now held in terms of another register in the office of the fifth respondent and that cannot now be undone by setting aside the consolidation diagram of Portion 305. To allow this would cause grave prejudice to 48 owners of apartments".*

[29] This fits into the delay aspect and prejudice or potential prejudice to other parties who are home owners on the subject property around that of the applicant. The applicant launched interim interdict in March 2016. It was not brought on an urgent basis. When the founding affidavit in the present review proceedings was deposed to on 29 August 2016, the pleadings in the interim interdict application were long closed. In the answering affidavit to the interim interdict, the developer pointed out that the apartments were due to be completed by September 2016. The interim interdict application was never set down and therefore, it has long been rendered moot.

[30] The applicant in a way now wants to act on that moot application. What I said earlier in this judgment regarding the delay in the institution of the present application should not be confused with the delay to prosecute the interim interdict on an urgent basis. If that was done, and the applicant was successful, it would have halted what the applicant now wants to do in the main review application. The construction of block of flats could have been halted.

[31] Double delay jeopardy. That is, delay to institute and failure to prosecute interim interdict on an urgent basis and delay in prosecuting the present review proceedings. Since September 2016 various owners of the subject flats or units could have come and go. Prejudice to the current owners caused by undoing of everything will be enormous. The competing interests of the owners, in my view, far outweighs that of the applicant. His limited right of space and view alluded to earlier in this judgment is minimal as compared to those of the 48 owners of the flats.

Non-Joinder Point

[32] That issue of non-jointer in my view, is deflated by the citation of the third respondent in these proceedings namely, Mataffin Macadamia Home Owners Association. Citation of the Home Owners Association and bringing to its attention the present proceedings should be sufficient. It would therefore not have been necessary to site each and every owner. The court should be entitled to assume that the Association represents all the affected owners by the nature and scheme of the Home Owners Associations in general.

[33] The applicant's application is destined to fail for the reasons already stated in the preceding paragraphs. I therefore do not find it necessary to deal with the essence of the challenge and the merits of the review application. It suffices to mention that I do not think there is any merit to the challenges levelled against the approvals and or decisions forming the subject of the application. Even if I was to be wrong in this regard, the application would still fail by virtue of what has already been stated in this judgment.

Costs

[34] Coming to the costs issue, the first, second and fourth respondents who actively participated in these proceedings should be entitled to an order of costs. As regards, the sixth respondent, that is the Surveyor General for the Province of Mpumlanga, Mbombela, it should only be entitled to costs up to when the applicant indicated that it intends not to pursue costs order against it.

[35] Consequently, an order is hereby made as follows:

35.1 The application is hereby dismissed with costs for the first, second and fourth respondents.

35.2 The sixth respondent only entitled to costs up to the date on which it was informed that the applicant intends not to pursue a costs order against it.

**LEGODI JP**

DATE OF HEARING: : 29 OCTOBER 2019
DATE OF JUDGMENT : 15 NOVEMBER 2019

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