IN THE HIGH COURT OF SOUTH AFRICA
(BOPHUTHATSWANA PROVINCIAL DIVISION)

CASE NO: 1004/05

In the matter between:

ELLIOT LETLALE KGANAKGA 1st Applicant

ITSOSENG RESIDENTS ASSOCIATION 2nd Applicant

and

THE CHAIRPERSON OF THE NORTH WEST DEVELOPMENT TRIBUNAL 1st Respondent

THE DEPARTMENT OF DEVELOPMENT LOCAL GOVERNMENT AND HOUSING NORTH WEST 2nd Respondent

THE CITY OF TSHWANE METROPOLITAN COUNCIL 3rd Respondent

ROB TAYLOR AND ASSOCIATES CC 4th Respondent

HOMES 2000 PROPRIETARY LIMITED 5th Respondent

CIVIL MATTER

DATE OF HEARING : 18 NOVEMBER 2005
DATE OF JUDGMENT: 19 JANUARY 2006

COUNSEL FOR THE APPLICANTS : ADV C R JANSEN
COUNSEL FOR THE RESPONDENTS : ADV A T NCONGWANE

JUDGMENT

HENDRICKS J:

A. Introduction:

[1] The Applicants apply as urgent interim relief in Part A of the Notice of Motion for an order in the following terms:-

> "2. The Respondents be ordered to:-
>
> 2.1 immediately suspend any developmental activities that are being undertaken on an area known as Kopanong Proper, which is part of the Remaining extent of the farm Mabopane 702 JR and which is also known as part of Itsoseng Phase 6 and 8, in the North West Province;
>
> alternatively;
>
> 2.2 immediately suspend the development of the area known as Kopanong Proper in so far as the said development will affect the size of the stands, will result in the demolition of houses, and/or the eviction of residents who would not qualify for subsidies;
>
> 3. that prayer 2, operates as an interim interdict

pending the finalisation of the review application in Part B of the Notice of Motion;

4. that the costs of this urgent interim relief are to be paid by:-

4.1 second and third respondents jointly and severally, the one paying the other to be absolved;

4.2 any of the other respondents, or any other person who elects to oppose this urgent relief, and such costs to be paid jointly and severally together with the first and second respondents by such other respondents or any person so opposing;

5. any such further and/or interim relief the court might deem necessary."

[2] In Part B of the Notice of Motion, the review application, the Applicants apply for an order in the following terms:-

"The decision by first respondent approving the development on an area called Kopanong Proper [part of phase 6 and 8 of Itsoseng] taken on or recorded on 05 October 2000 [attached herein as annexure IRA 4] is hereby received and set aside in so far as it entails the reduction of residential stand sizes from 900 m to 450m and the exclusion the present residents who do not qualify for Government subsidies, alternatively, setting it aside in its entirety."

[3] The Applicants further applied for a declarator, also in connection with the development on the area called Kopanong Proper. The Notice of Motion reads:-

> "2. Declaring that;
>
> 2.1 the residents of the informal settlement known as Kopanong Proper [*part of phase 6 and 8 of Itsoseng*], district Mabopane, hold informal rights to land, or at least at the time that the decision sought to be set aside was made, they held informal rights as defined by the Interim Protection of Informal Rights Act, No 31 of 1996, in respect of informally demarcated residential stands which they occupy;
>
> 2.2 the development of the area known as Kopanong [*part of phase 6 and 8 of Itsoseng*], in the district of Mabopane in so far as it entails the reduction of the affected residents stands from 900m to 450m, is lunlawful;
>
> 2.3 the Housing Development Project at Kopanong Proper [*part of phase 6 and 8 of Itsoseng*] in the district of Mabopane in so far as it does not accommodate present residents who do not qualify for Government Housing subsidies, is unlawful;
>
> 2.4 the Housing Development Project at Kopanong Proper [*part of phase 6 and 8 of*

Itsoseng] in the district of Mabopane in so far as it fails to make provision for compensation for the property of the residents who will lose part of their stands, is unlawful;

2.5 the Housing Development Project at Kopnaong Proper [*part of phase 6 and 8 of Itsoseng*] in so far as it will result in the demolition of houses of some of the affected members of the residential community, is unlawful;

2.6 the Housing Development Project at Kopanong [*part of phase 6 and 8 of Itsoseng*] in so far as will result in the eviction of those residents who would not qualify for Government subsidies, is unlawful;

2.7 the Housing Development Project at Kopanong [*part of phase 6 and 8 of Itsoseng*] in so far as it will result in:

2.7.1 the demolition of houses of some of the affected residents.

2.7.2 the eviction of those resident who do not qualify for Government subsidies,

2.7.3 the reduction of the sizes of the stands of the residents;

2.7.4 failure to provide for compensation for the loses of stands and houses of the residents is unconstitutional;

3. Directing the Respondents to;

3.1 take all the necessary steps to amend the present Project approval and project agreements relating to Kopanong Proper [*part of phase 6 and 8 of Itsoseng*] to retain the stands sizes at 900m;

3.2 make provision for the present residents who do not qualify for Government Housing subsidies to be included in the Kopanong Proper [*part of phase 6 and 8 of Itsoseng*] housing project;

3.3 investigate and advise the applicants of the other Government Housing subsidies option suitable for their conditions and desires, and to immediately provide for the same;

4. In the alternative to prayer 3 above, ordering that the matter be referred back to the first respondent with such conditions the court might deem just, or as agreed between the parties;

5. directing the first, second, third and fourth

respondents to pay the costs of this application, jointly and/or severally; or any other person who elects to oppose this application;

6. any further and/or alternative relief the court might deem necessary."

B. <u>The Parties</u>:

[a] <u>The Applicant</u>:

[4] The First Applicant is <u>Elliot Letlale Kganakga</u>, an adult male resident at Stand No 261, Itsoseng, situated at the remaining extent of the farm Mabopane, 702 JR in the North West Province, which is known as Itsoseng phase 6 and 8, who instituted this action in his personal capacity as well as in his representative capacity as the Chairman of Itsoseng Resident Association, (the Second Applicant).

[5] The Second Applicant is the Itsoseng Resident Association (IRA), a voluntary association with legal personality and the capacity to sue or to be sued. The aims and objectives of the IRA include; among others, to assist the members of the Association and any of their housing problems or any other

matter which relate to their residence in the area. Membership of the IRA is open to those people residing in phase 6 and 8 of Itsoseng.

[b] Respondents:

[6] The First Respondent is the Development Tribunal of the North West Province appointed in terms of Section 15 of the Development Facilitation Act, No 67 of 1995.

[7] The Second Respondent is the Member of the Executive Council (MEC) for Local Government and Housing in the North West Province.

[8] The Third Respondent is the City of Tshwane Metropolitan Municipality.

[9] The Fourth Respondent is Rob Taylor and Associates CC, a close corporation.

[10] The Fifth Respondent is Homes 2000 Propriety Limited.

C. Background:

[11] Itsoseng is a rural settlement that came into existence in approximately 1991 when the people from the neighbouring areas moved in and informally settled therein. It is situated on the remaining extent of the farm Mabopane 702 JR (formerly known as Boekenhoutfontein 236 JR) in the North West Province. This area is in the south of Mabopane.

[12] The area consists of over a thousand residential stands which are presently part of the City of Tshwane Metropolitan Municipality. In terms of the envisaged development for the area, Itsoseng will in future become known as Kopanong.

[13] Itsoseng was established in the early 1990's by a Civic Organisation which called itself Eraville Civic Association, which was affiliated to the National Civic Association called SANCO.

[14] The area was under the former Bophuthatswana Government which was an independent home land. The Local Government Administration (of the said Bophuthatswana Government) in the area was in the state of disarray, and inadequate housing was available for the people. The families that moved into Itsoseng were allocated stands by the Eraville Civic Association.

[15] Although there were no formal lands surveying of the residential stands and the roads, they were informally demarcated and residential stands, all of which approximately were 900 square metres i.e. (30 metres X 30 metres) were allocated to family units within the settling community.

[16] There are now about 3 600 families living in Itsoseng phase 6 and phase 8. Their homes range from informal shacks to large bricks and mortar houses. Most of the members of the group on whose behalf this application is brought have built permanent homes of bricks and mortar to house their families.

[17] They have consistently been asking for assistance from the Government to have the area developed. They have also contacted other stakeholders like Eskom to assist in

electrifying their area. But they were repeatedly told that development could only come about through the actions or structures of the State.

[18] They are therefore not opposed to development. In this particular case, so it is submitted, the rights that are being affected are the reduction of their stands sizes, the demolition of some of their houses and the removal of security of tenure for those that would not qualify for subsidies.

[19] The Second Respondent is in the process of developing Itsoseng into a township in terms of the procedures provided for in the Development Facilitation Act, 1967 of 1995 [DFA].

[20] Such development was approved by the First Respondent on 05 October 2000. In principle they welcome the improvement of their living conditions and the constructions of houses of those people who are living in temporary structures and the provisions of infrastructures.

[21] It is submitted by the Applicants that the problem with this development is that there was no proper consultations and their objections and fears have not been addressed and they are still not being addressed. The developers are busy and their activities will unavoidably result in the demolition of some of their houses and the reduction of their stands which

effectively means that they will be evicted from those portions of their stands that are being taken from them.

[22] In terms of the proposed development their stands sizes are to be reduced from 900 square metres to 450 square metres.

[23] There is talk of compensation for the demolished houses.

[24] At the hearing of this application, certain points were raised ***in limine*** by the Respondents. I will deal ***in seratium*** with these points.

D. ***Res judicata***:

[25] It is common cause that on 05 October 2000 the First Respondent approved the development on the area called Kopanong Proper. On the 07th August 2001, the Applicants launched an application under case number 413/2001, ***inter alia***, for the reviewing and setting aside of the said decision of the First Respondent.

[26] The Notice of Motion read:-

> "PLEASE TAKE NOTE that the above Applicants will apply to the above Honourable Court on a date and time when the matter has been set down in accordance with the Rules for an order in the

following terms:-

1. Declaring that the residents of the informal settlement known as Itsoseng Phase 6, district Mabopane, hold informal rights to land as defined by the Interim Protection of Informal Land Rights Act, No 31 of 1996, in respect of the informally demarcated residential stands which they occupy;

2. declaring that the Housing Development Project at Itsoseng Phase 6, district Mabopane, insofar as it intends reducing the affected residents' stand sizes from 900 m to 450 m , is unlawful;

3. declaring that the Housing Development Project at Itsoseng Phase 6, district Mabopane, insofar as it does not accommodate present residents who do not qualify for Government housing subsidies, is unlawful;

4. that the decision of the Second Respondent dated 9 September 1999 under reference number B99090025, approving the Housing Development Project at Itsoseng Phase 6, district Mabopane, be set aside insofar as it entails the reduction of residential stand sizes from 900 m to 450 m and the exclusion of present residents who do not qualify for Government subsidies, **alternatively**,

setting it aside in its entirety;

5. ordering the Respondents to take all necessary steps to amend the present Project Approval and Project Agreement relating to the Itsoseng Phase 6 Housing Development to retain the stand sizes to 900 m and to reduce the project funding accordingly;

6. ordering the Respondents to make reasonable provision for present residents who do not qualify for Government Housing subsidies to be included in the Itsoseng Phase 6 Housing Development;

7. costs of suit against those Respondents opposing the application;

8. Further and/or alternative relief."

[27] On 12 November 2002 Mogoeng JP ordered the dismissal of the said application. The order reads as follows:-

"HAVING HEARD ADV JANSEN on behalf of the Applicants and ADV MAREE SC with him ADV MAIBELO for the 1st, 2nd and 5th Respondents and ADV FOURIE SC with him ADV VERMEULEN on behalf of the 3rd Respondent and having read the Notice of Motion and other documents filed of record;

IT IS ORDERED

THAT: The application be and is hereby dismissed with costs including costs occasioned by the employment of two counsel in respect of 1st, 2nd and 3rd Respondents.

THAT: These costs are to be paid by 1st and 2nd Applicants jointly and severally, to one paying the other to be absolved.

[28] Mr Jansen submitted that the merits of the application was not argued before Mogoeng JP seeing that he was only briefed to argue a postponement. When his application for a postponement failed, he withdrew because his mandate was terminated. The Applicant's were not present at Court on that date. This being so despite the fact that it was the Applicants who sat the matter down. Mr Jansen submits that the application was dismissed on a technicality and not on the merits.

[29] When this matter initially came before me on 21 September 2005, I postponed it until 18 November 2005. The record of the proceedings of the 12 November 2002 was transcribed in order to determine whether the merits of the application was considered by Mogoeng JP.

[30] Upon scrutiny of the record of proceedings it is apparent that in his argument, Mr Jansen did refer to the merits of the case when he applied for a postponement on 12 November 2002 before Mogoeng JP.

[31] After the withdrawal of Mr Jansen, abovementioned order was granted by Mogoeng JP.

[32] It is clear that the merits were indeed considered in the granting of the order. No application for rescission of that order was made at any given time. The ***de facto*** situation is that the order stands unchallenged.

[33] The Applicants now launched this application as a fresh application, raising virtually the same issues that were raised in the application that was dismissed by Mogoeng JP.

[34] I am of the view that the matter was dealt with by Mogoeng JP and dismissed.

E. Urgency:

[35] The second point raised ***in limine*** by the Respondents is the lack of urgency. It is common cause that the decision sought to be challenged by the Applicants were taken by the First Respondent on 05 October 2000.

[36] The Applicants launched a review application coupled with a declarator as far back as 07 August 2001, which application was dismissed by Mogoeng JP on 12 November 2002.

[37] It is clear from the founding affidavit of the Applicants in this matter that since 05 October 2000 alternatively the dismissal of their application on 12 November 2002, nothing new has happened to render this application urgent.

[37] The Applicants knew as early as the year 2000 that the approved development would have the effect of reducing their stands from 900m to 450 m . They also knew that some of their houses might be demolished.

[38] No steps were taken by the Applicants from 12 November 2002 until the launching of this application on the 17 August 2005.

[39] In my view, the Applicants fail to establish urgency and this application stands to be dismissed because of the lack of urgency.

F. The delay in bringing this application:

[40] Applicants in their founding affidavit state that the long delay is mainly as a result of the confusion that has been created by the demarcation of the land in issue, the lack of finances

for lawyers and as a result of the interaction with the Respondents.

[41] Applicants submitted that there would be no prejudice suffered by the Respondents if this review application is heard now after such a long delay.

[42] Nugent JA in the as yet unreported judgment of **Ntombomzi Gqwetha v Transkei Development Corporations Ltd and Others** case no 242/04 (Supreme Court of Appeal) states as follows:

> "[22] It is important for the efficient functioning of public bodies (I include the first respondent) that a challenge to the validity of their decisions by proceedings for judicial review should be initiated without undue delay. The rationale for that longstanding rule – reiterated most recently by Brand JA in *Associated Institutions Pension Fund v Van Zyl* 2005(2) SA 302 (SCA) at 321 – is twofold: First, the failure to bring a review within a reasonable time may cause prejudice to the respondent. Secondly, and in my view more important, there is a public interest element in the finality of administrative decisions and the exercise of administrative functions. As pointed out by Miller JA in *Wolgroeiers Afslaers (Edms) Bpk v Munisipaliteit van Kaapstad* 1978(1) SA 13 (A) at 41 E-F (my translation):

> 'It is desirable and important that finality should be arrived at within a reasonable time in relation to judicial and administrative decisions or acts. It can be contrary to the administration of justice and the public interest to allow such decisions or acts to be set aside after an unreasonably long period of time has elapsed – *interest reipublicae ut sit finis litium* … Considerations of this kind undoubtedly constitute part of the underlying reasons for the existence of this rule.'
>
> [23] Underlying that latter aspect of the rationale is the inherent potential for prejudice, both to the efficient functioning of the public body, and to those who rely upon its decisions, if the validity of its decisions remains uncertain. It is for that reason in particular that proof of actual prejudice to the respondent is not a precondition for refusing to entertain review proceedings by reason of undue delay, although the extent to which prejudice has been shown is a relevant consideration that might even be decisive where the delay has been relatively slight (*Wolgroeiers Afslaers*, above, at 42C).

[43] The delay in this case is inordinate and certainly unreasonable. The decision by the First Respondent was taken as far back as 05 October 2000. Although an application was launched on 07 August 2001, which was dismissed on 12 November 2002, nothing has happened ever since.

[44] Applicants fail to adequately explain the long delay that occurred in this matter.

G. **Appeal in terms of Section 23 of the Development Facilitation Act, Act 67 of 1995**:

[45] Respondents also raised as a point ***in limine*** the fact that the Applicants did not exhaust its available remedies before approaching this Court. Section 23 of the Development Facilitation Act, Act 67 of 1995 states:-

> "(1) Any decision or determination by a tribunal is final: Provided that any party to a dispute relating to a matter referred to in Section 16(a) or (b)(ii) may within the period and in the manner prescribed by the rules made under Section 26, appeal against the decision of a tribunal in regard to that dispute or any related order as to costs, to the development appeal tribunal for a province established or recognised under Section 24."

[46] It is common cause that no appeal was lodged against the decision by the First Respondent with the Development Appeal Tribunal. This remedy available to the Applicants was never persued.

[47] It is contended on behalf of the Respondents that the Promotion of Administrative Justice Act, Act 3 of 2000 (PAJA) is applicable. It is common cause that the decision

was taken by the First Respondent on 05 October 2000.

[48] PAJA came into operation on 30 November 2000, and it does not operate retrospectively. I am of the view that PAJA is therefore not applicable in this case.

[49] However, even under common law, an application for a review must still be brought within a reasonable time and without unreasonable delay.
See: **Ntombomzi Gqwetha** case, ***supra***.

H. Merits:

[50] The present application is an application for an interlocutory interdict. The onus is on the Applicants to prove that the requirements for the granting of an interim interdict are met. The requirements are:-

[i] a ***prima facie*** right;

[ii] a well-granted apprehension of irreparable harm if the interim relief is not granted and the ultimate relief is eventually granted

[iii] a balance of convenience in favour of the granting of the interim relief;

[iv] the absence of any other satisfactory remedy

See: **Ferreira v Levin NO And Others**

Vryenhock And Others v Powell NO And Others

1995(2) SA 813 (W).

[i] A *prima facie* right:

[51] As far as the ***prima facie*** right is concerned, it is trite law that the Applicant must prove the existence thereof before an interlocutory interdict can be granted.

[52] The application wherein the Applicants sought the relief similar to the relief sought in this application was dismissed by Mogoeng JP on 12 November 2002.

[53] Furthermore, in case 229/05 an order by agreement between the parties was granted by my Brother Landman J. Paragraph 2 thereof reads:-

> "2. That: The Applicants, including the Applicants who have joined in the proceedings, untertake:-
>
> a) not to interfere with the development of Kopanong Proper, and
>
> b) not to erect any new structures whatsoever in Kopanong, Extention 1

(one); pending the review application."

[54] The First Applicant in this case was also the First Applicant in case no 229/05, ***supra***. The order in case no 229/05 is an interdict restraining ***inter alia*** the First Applicant from interfering with the development of Kopanong Proper (including phases 6 and 8).

[55] Despite the existence of this Court order, the Applicants launched this application. I am of the view that as long as the order interdicting the First Applicant exists, he is not in a position to prove the existence of a ***prima facie*** right to bring an application such as this one.

[56] The development of phase 6 and 8 for purposes of establishing the township Kopanong involves the use of land including land held under "informal right to land" and proceeds to develop such land as the Respondents have implemented regarding the present development.

<u>See</u>: **The Interim Protection of Informal Land Rights Act 31 of 1996.**

[57] The Applicants are not opposed to the development which has started as far back as 2001.

[58] The Applicants have been in consultation with the Respondents about issues regarding the development of the

area in question.

[59] It is to be noted that, from all of the aforegoing, the Applicant does not have a ***prima facie*** right to bring the application as the Third Respondent together with the other Respondents are entitled to proceed further with the development that was commenced with at the area known as Kopanong Proper (also known as Itsoseng Phase 6 and 8).

[ii] <u>A well-grounded apprehension of irreparable harm if the interim relief is not granted and the ultimate relief is eventually granted</u>:

[60] This requisite is clearly not present in this application. The Applicants will definitely not suffer irreparable harm if the development proceeds further. The Applicants are aware of that. For any houses that may be demolished, compensation will be paid to the owners of those houses.

[61] In this regard the Applicants state the following:-

> "If even though there is talk of compensation for the demolished houses such criteria for compensation is not yet clear and has not been properly negotiated or a committee has been properly consulted in terms thereof."

[62] The Third Respondent contends that it is only houses that are built on road reserves, sewerage lines or on borders where no alternative arrangements can be made, that negotiations will be entered into with the owners in view of compensation if the house is to be demolished.

[63] At the launching of the application, the issue of the demolishing of any of the houses had not arisen, to justify the granting of the interim interdict.

[iii] <u>The balance of convenience</u>:

[64] When considering this requisite the Court must weigh the prejudice to the Applicant if the interim interdict is refused against the prejudice to the Respondent if it is granted. This requisite frequently involves a consideration of the prospects of success in the main action or application.

[65] It could also be a valid consideration in dealing with this requisite to consider as to what extent the prejudice that the Third Respondent may suffer as a result of the interim interdict being granted.

[66] It is averred by the Third Respondent that the balance of convenience does not favour the granting of the interim interdict sought by the Applicants.

[67] The responsibility of the Third Respondent extends far beyond the Applicants. There are hundreds of thousands of communities eagerly awaiting RDP houses. The Third Respondent and indeed the National and Provincial Government, cannot satisfy the housing needs of all the communities if communities like the Applicants will selfishly insist on bigger stands.

[68] An involved consultation process with the community on the issue of low cost housing was started as early as 2000. The Applicants were consulted regarding the development.

[69] The Third Respondent has already concluded contracts with other parties regarding the services to be rendered for purposes of a development. An interim interdict would expose the Third Respondent to inundated civil claims from these contractors.

[70] In any event, the majority of the families from the community have applied for subsidies for the houses in the proposed development.

[71] There can be no doubt that the First Respondent made a proper decision on 05 October 2000 to develop the area.

[72] The delay by the Applicants in lodging this application enabled the Third Respondent to proceed with the

development to an extent that any act intended at stopping

the development would cause huge financial loss to the Third Respondent.

[73] I am of the view that the balance of convenience does not favour the granting of the interim relief.

[iv] <u>No other satisfactory remedy</u>:

[74] I am of the view that apart from the review proceedings, the Applicants do have other remedies available for them. The Applicants do indeed have a remedy for an action for damages for whatever damage the Applicants may have suffered.

[75] It is submitted furthermore that in addition to such a claim for damages being available to the Applicants, the Applicants would in the circumstances of the present case, be able to claim compensation in the event of any loss of property that they might have suffered due to the development.

<u>Conclusion</u>:

[76] I am of the view that the Applicants failed to make out a case for the relief sought and their application must be dismissed. I am further of the view that costs should follow the result.

[77] Consequently, I make the following order:-

The application is dismissed with costs.

R D HENDRICKS

JUDGE OF THE HIGH COURT

ATTORNEYS FOR THE APPLICANTS: LEGAL RESOURCES CENTRE c/o HLAHLA MOTLHAMME ATTORNEYS