



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

Case no: 16920/2016

THE HABITAT COUNCIL

Applicant

v

THE CITY OF CAPE TOWN

1st Respondent

CORNELIS ANDRONIKUS AUGOUSTIDES N.O.

2nd Respondent

MICHAEL ANDRONIKUS AUGOUSTIDES N.O.

3rd Respondent

RAYMOND JAMES WILSON N.O.

4th Respondent

PANGIOTIS ZITIANELLIS N.O.

5th Respondent

(second to fifth respondents in their capacities as the trustees
for the time being of the Gera Investment Trust, IT 3449/2007)

HERITAGE WESTERN CAPE

6th Respondent

THE SOUTH AFRICAN HERITAGE RESOURCES AGENCY

7th Respondent

**THE PLANNING AND GENERAL APPEALS COMMITTEE
OF THE CITY OF CAPE TOWN**

8th Respondent

EXECUTIVE MAYOR OF THE CITY OF CAPE TOWN

9th Respondent

**THE MAYORAL COMMITTEE OF
THE CITY OF CAPE TOWN ("MAYCO")**

10th Respondent

Coram: Justice J Cloete

Heard: 8 February 2018

Delivered: 20 March 2018

JUDGMENT

CLOETE J:

Introduction and background

- [1] On 3 November 2015 the 10th respondent (“MAYCO”) approved an application by the 2nd to 5th respondents to develop erf 174009 Strand Street, Cape Town, on which a 249 year old historic building known as the Melck warehouse is situated.
- [2] The applicant had previously objected to the proposed development. On 12 November 2015 it was informed in writing by the 1st respondent’s Director: Planning and Building Development Management that it had a right to appeal the MAYCO decision to the 8th respondent (“PLANAP”). The applicant duly lodged an appeal and it was refused by PLANAP on 11 March 2016.
- [3] The applicant was subsequently made aware that it had no right to appeal the MAYCO decision; that PLANAP was not empowered in terms of the relevant statutory provisions to entertain and therefore refuse its appeal;¹ and that accordingly the PLANAP decision *‘is a nullity and / or falls to be set aside as irregular’*.
- [4] The applicant intends taking the MAYCO decision on review. Its case however is that before it can competently do so, it is necessary for a court to

¹ *City of Cape Town v Reader and Others* 2009 (1) SA 555 (SCA) at paras [30] – [32].

first review and set aside the PLANAP decision, hence the present application.

- [5] Only the 1st and 8th to 10th respondents filed a notice of opposition and an answering affidavit, and for convenience I will refer to them collectively as “the respondents”. They accept that PLANAP was not authorised in terms of the applicable empowering provision² to hear and determine the applicant’s appeal. However they contend that: (a) the applicant lacks *locus standi* to seek the present relief; and (b) PLANAP’s decision has no legal consequence and it is therefore irrelevant whether it is set aside by a court ‘*as being a nullity*’.
- [6] The applicant advanced two alternative grounds for the relief sought, namely systemic bias on the part of the Democratic Alliance and various individuals, and the failure to consider relevant information. These grounds are only relied upon in the event that it is found that PLANAP’s decision is not a nullity.
- [7] The allegations concerning bias run to 44 paragraphs in the founding affidavit and are serious and wide ranging, are unsupported by any objective evidence, and include accusations levelled at individuals who are not even party to these proceedings. Moreover, once the PLANAP record was made available in terms of uniform rule 53, the applicant was unable to substantiate them, although it is acknowledged that the bias allegations extend beyond the PLANAP decision itself.

² S 62 of the Local Government: Municipal Systems Act 32 of 2000.

- [8] This caused the 1st respondent to launch a striking out application. Undeterred, the applicant persisted with the allegations, even going so far as to suggest in its replying affidavit that the court '*can take judicial notice of the concerns in this regard which are in the public domain and have been reported in the media for some time*'.
- [9] On 8 December 2017 the respondents, through their attorney, made an open tender. While maintaining their stance that there was '*no legal necessity*' for the review and setting aside of the PLANAP decision, they tendered: (a) that the PLANAP decision be set aside by agreement; (b) the applicant's costs be paid on an unopposed basis up to the stage of filing of the answering affidavit and application to strike out;³ and (c) that each party otherwise pay their own costs. The applicant rejected the tender.
- [10] The issues for determination are thus: (a) the applicant's *locus standi*; (b) whether an order of court is required to review and set aside the PLANAP decision; (c) whether the offending allegations fall to be struck out; and (d) liability for costs.

Locus standi

- [11] The respondents argue that, because the applicant was not a party to the development application in respect of which its appeal served before

³ The reference to '*counterclaim*' instead of '*striking out application*' in the tender was a patent error as confirmed by counsel for the respondents during argument.

PLANAP,⁴ and thus had no *locus standi* to appeal to PLANAP, it therefore has no *locus standi* to take the PLANAP decision on review.

[12] To my mind this argument is flawed for the following reasons. First, there is no suggestion by the respondents that the applicant lacks *locus standi* to take the MAYCO decision (the genesis of the PLANAP decision) on review. Second, although not spelt out in the applicant's founding affidavit, it is clear that the impugned PLANAP decision is sought to be reviewed under s 6 of PAJA,⁵ and the principle of legality, as was confirmed in the applicant's replying affidavit. S 6(1) of PAJA provides that any person may institute proceedings in a court or tribunal for the judicial review of an administrative action, and there is no dispute that the PLANAP decision constitutes administrative action.

[13] Section 33(1) of the Bill of Rights in the Constitution provides that everyone has the right to administrative action that is lawful, reasonable and procedurally fair. Section 38 of the Constitution in turn confers *locus standi* on any one of the following persons to approach a court, alleging that a right in the Bill of Rights has been infringed or threatened:

13.1 Anyone acting in their own interest;

13.2 Anyone acting on behalf of another person who cannot act in their own name;

⁴ The only parties to that application were the prospective developers, i.e. the 2nd to 5th respondents.

⁵ Promotion of Administrative Justice Act 3 of 2000.

13.3 Anyone acting as a member of, or in the interest of, a group or class of persons;

13.4 Anyone acting in the public interest; and

13.5 An association acting in the interest of its members.

[14] The applicant is a voluntary association of persons and organisations not for gain, with such powers as may be necessary to give effect to its objectives, which are to promote matters pertaining to the environment, with a view to ensuring sustainable conservation, and the utilisation and management of the built and natural environments. It has also been formally recognised by the 6th respondent as a heritage conservation body. It avers that it has an intrinsic interest in lawful administrative action and, in particular, a direct and substantial interest in the lawful application of the planning laws applicable within the municipal jurisdiction of the 1st respondent. It further avers that it is also acting in the public interest to ensure that the conduct of administrators and, in this case, the 1st respondent and its delegated bodies, is lawful, reasonable and procedurally fair. These allegations are not denied by the respondents, who simply aver that they either have no knowledge thereof or note them.

[15] The preamble to PAJA states that its purposes include promoting an efficient administration and good governance, and creating a culture of accountability, openness and transparency in the public administration, or in the exercise of a

public power or the performance of a public function, by giving effect to the right to just administrative action.

- [16] In Hoexter: Administrative Law in South Africa 2nd Edition, the learned author considers the issue of *locus standi* under the Bill of Rights and its relationship to PAJA.⁶ She concludes with the following:

'In the context of administrative law the most pressing question is which requirements of standing apply in relation to cases brought under the PAJA. The version of the Act that was recommended by the South African Law Reform Commission replicated the wording of s 38 [of the Constitution], although without mentioning its provenance. Unfortunately the provision was deleted in the final stages of the parliamentary process, thus causing some uncertainty as to the position. However, in the light of the arguments made above, and in view of the fact that the PAJA aims to give effect to s 33 of the Constitution, it seems clear that the provisions of s 38 ought to be read into the statute.'

- [17] Moreover, given the findings in the next section of this judgment, I am persuaded that the applicant indeed has the necessary *locus standi* to have approached court for the relief sought.

Whether an order of court is required

- [18] Given that the PLANAP decision is clearly a nullity it is not necessary to consider the alternative review grounds.

⁶ At pp491-494.

[19] In their answering affidavit the respondents not only denied that the PLANAP decision was required to be set aside by a court, but also sought the dismissal of the application with costs.

[20] In heads of argument filed subsequently on their behalf, it was contended that there was no obligation on the 1st respondent to have approached court for the review and setting aside of the PLANAP decision because:

'...as the law presently stands, the City is entitled, in the appropriate circumstances, to raise a challenge reactively to a defective administrative decision of an organ of state, even if it was its own invalid decision... The City has in fact raised a reactive (or "collateral") challenge... in the City's answering affidavit wherein it declared, inter alia, that it regarded the [PLANAP decision] as null and void and stated that the applicant should have brought an application for the review and setting aside of the MAYCO decision.'

[21] However, as pointed out by counsel for the applicant, a collateral challenge is one raised to resist coercive compliance with an invalid or void decision:

*'The settled law is that the target of such compulsion is entitled to await events and resist only when the unlawful condition is invoked to coerce it into compliance...'*⁷

[22] In the present matter the applicant has not sought to compel PLANAP to implement the impugned decision – quite the opposite. All that it asks is that the bar to it instituting review proceedings in respect of the MAYCO decision

⁷ *City of Cape Town v Helderberg Park Development (Pty) Ltd* 2008 (6) SA 12 (SCA) at para [50] and the authorities cited therein.

be removed by setting aside the PLANAP decision. It follows that the respondents' reliance on a collateral challenge is misplaced.

[23] As *Merafong*⁸ makes clear, the respondents cannot ignore the PLANAP decision on the basis that it is a nullity. It nonetheless remains legally effective until it is set aside by a court, given that it is the exclusive role of the courts to determine legality. Cameron J explained this as follows:

*'Where Kirland above... says that a decision not properly set aside "remains valid", it means that it remains legally effective. Absence of challenge by the right litigant in the right forum at the right time doesn't magically heal the administrative-law flaws in the decision. It means that the decision continues to have effect in law until properly set aside.'*⁹

[24] By the same token *Merafong* recognises that it was not incumbent on the respondents to themselves have approached court to have the PLANAP decision set aside:

'Oudekraal and Kirland did not impose an absolute obligation on private citizens to take the initiative to strike down invalid administrative decisions affecting them. Both decisions recognised that there may be occasions where an administrative decision or ruling should be treated as invalid even though no action has been taken to strike it down. Neither decision expressly circumscribed the circumstances in which an administrative decision could be attacked reactively as invalid. As important, they did not imply or entail that, unless they bring court proceedings to challenge an administrative decision, public authorities are obliged to accept it as valid. And neither imposed an

⁸ *Merafong City v AngloGold Ashanti* 2017 (2) SA 211 (CC) at paras [41] to [43].

⁹ At fn 63.

*absolute duty of proactivity on public authorities. It all depends on the circumstances.*¹⁰

[25] Given the above, it seems clear that the legal effect of the PLANAP decision remains extant until set aside by the court. Having pursued a flawed appeal process the court must “undo” the decision that followed in order for the applicant to competently institute proceedings for a review of the MAYCO decision.

[26] I accordingly disagree with the respondents’ submission that the applicant, upon being made aware that they agreed the PLANAP decision was a nullity (i.e. when their answering affidavit was filed), ought to have amended its application to seek the review and setting aside of the MAYCO decision. Nor do I agree that it was alternatively incumbent on the applicant to have simultaneously launched proceedings for the review and setting aside of both the PLANAP and MAYCO decisions.

The striking out application

[27] In terms of rule 23(2) of the uniform rules, a court can only strike out offensive matter if satisfied that the complaining party will be prejudiced in the conduct of its claim or defence if it is not struck out.

[28] Counsel for the applicant argued that the question of prejudice cannot arise given the respondents’ concession (in its tender) that the PLANAP decision falls to be set aside. He also submitted that if the material is struck out, the

¹⁰ At para [44].

applicant will be placed in an invidious position, since in the contemplated review of the MAYCO decision, it will be open to the respondents to challenge the bias allegations on the ground that they have already been struck out in these proceedings.

[29] I have certain fundamental difficulties with this approach. First, and while I appreciate that the applicant needed to foreshadow alternative grounds for review of the PLANAP decision (since it was only in the answering affidavit that the respondents conceded that it is a nullity), this does not mean that the respondents were not, and will not in future be, prejudiced. This is because the bias allegations extend way beyond the PLANAP decision, and may have a material impact in the review of the MAYCO decision that will follow.

[30] Second, the allegations are, in the main, in such broad and sweeping terms that the respondents have been severely prejudiced in attempting to answer them.

[31] Third, courts determine issues, not crusades, and the applicant should have placed facts before the court which could have assisted it in determining whether there is any substance to these allegations. This the applicant failed to do, ultimately retreating to the position of an invitation to the court to take '*judicial notice*' of what has allegedly appeared in the media and the public domain. This approach to litigation cannot be countenanced.

[32] As was held by the Constitutional Court in *Helen Suzman Foundation v President of the Republic of South Africa and Others*; *Glenister v President of the Republic of South Africa and Others*:¹¹

'[29] The allegations in the struck-out material amount to reckless and odious political posturing or generalisations which should find no accommodation or space in a proper court process. The objective appears to be to scandalise and use the court to spread political propaganda that projects others as irredeemable crooks who will inevitably actualise... [the] alleged projection that South Africa may well become a failed state. This stereotyping and political narrative are an abuse of court process...

[30] These assertions or conclusions are scandalous, vexatious or irrelevant. Courts should not lightly allow vitriolic statements of this kind to form part of the record or as evidence. And courts should never be seen to be condoning this kind of inappropriate behaviour, embarked upon under the guise of robustness...'

[33] It is for these reasons that the offending paragraphs in the founding affidavit must be struck out. However, I make it clear that it is nevertheless open to the applicant, in the contemplated MAYCO review, to revive its allegations of bias on a proper basis, and the order that follows should not be construed as a finding by this court that such allegations are necessarily baseless.

Costs

[34] The applicant is correct that it had to approach court to have the PLANAP decision reviewed and set aside. It is also correct that the respondents only formally consented to such an order in their tender of 8 December 2017, almost 4 months after the applicant delivered its replying affidavit. The

¹¹ 2015 (2) SA 1 (CC) at paras [23] – [30] especially at paras [29] – [30].

respondents' tender to pay costs on an unopposed basis up to the filing of their answering affidavit and striking out application was thus inadequate.

[35] However, the applicant should have seriously considered the formal consent tendered by the respondents to have the PLANAP decision reviewed and set aside. This it failed to do, and unnecessary costs were incurred by the applicant persisting in having the merits ventilated thereafter, and in its refusal to withdraw the offending material that forms the substance of the striking out application.

[36] With this in mind, it is my view that an appropriate costs order is the one that follows.

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

1. The decision of the eighth respondent ("PLANAP") dated 11 March 2016 refusing the applicant's appeal is reviewed and set aside.
2. Paragraphs 97 to 141 of the applicant's founding affidavit are struck out, and the applicant shall pay the first respondent's costs attendant upon the striking out application.
3. The first, eighth, ninth and tenth respondents shall pay the costs of the main application up to and including 8 December 2017, jointly and severally, the one paying, the others to be absolved.
4. Save as aforesaid, there shall be no order as to costs.

J I CLOETE

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