

IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH

Case no: 1878/2017

Date heard: 14 June 2018
Date delivered: 26 June 2018

In the matter between:

ARNOLD ALBERT KOTZE

First Applicant

MARIA REGINA KOTZE

Second Applicant

vs

THE MEC OF CO-OPERATIVE GOVERNANCE AND
TRADITIONAL AFFAIRS (LAND USE MANAGEMENT
AND ADMINISTRATION, EASTERN CAPE)

First Respondent

THE KOUGA MUNICIPALITY

Second Respondent

THE ST FRANCIS FIELD HOME OWNERS
ASSOCIATION

Third Respondent

JUDGMENT

MSIZI AJ:

Introduction

[1] This is an application for the following relief:

- "1. Reviewing and setting aside the first respondent's decision dismissing the applicants' appeal in terms of section 44 of the Land Use Planning Ordinance No. 15 of 1985 against the decision by the second respondent to disallow the subdivision of Erf 802 Cape St Francis.
2. Substituting the decision made by the first respondent for dismissal of the applicants' appeal aforesaid, with an order permitting subdivision of Erf 802 Cape St Francis, in the manner sought by the applicants when applying for consent to do so to the second respondent.
3. Directing the first respondent to pay the costs of this application, as well as any other respondent who opposes this application, jointly and

severally (as the case may be), the one paying, the other/s to be absolved.

4. *Granting the applicants such further and/or alternative relief as this Honourable Court may deem fit."*

[2] Only the first respondent is opposing this application.

[3] The main ground of attack in support of the first prayer, was that the impugned decision was influenced by an error of law; was irrational and the first respondent failed to consider all the material facts.¹ Also that the first respondent did not follow due process. In support of the second prayer the applicants complained of real or at least perceived bias of the first respondent.²

[4] Most of the facts giving rise to this application are common cause or at least not countermanded. The summary of those facts follow.

[5] The applicants purchased erf 802 Cape St Francis in December 2006 ("the property"). The property is situated at St Francis Field, in an estate known as the Airpark. It has several owners. Airpark is governed in terms of a constitution which binds all the owners in that estate.

[6] On 11 September 2012 the applicants submitted an application to the second respondent in terms of section 25 of the Land Use Planning Ordinance No. 15 of 1985, ("LUPO") for the sub-division of their property. At that point, the third respondent had embarked on efforts to amend its constitution. On 30 March 2013 the third respondent

¹ They relied on section 6(2)(a)(iii) and section 6(2)(c)

² They relied on section 6(2)(e)(v)

amended its constitution. At that point the decision of the second respondent was still outstanding.

[7] On 2 April 2013, the third respondent filed an objection to the proposed sub-division with the second respondent. It explained its reasons thus: *“At the AGM of the St Francis Field Homeowners Association held on the 30th of March 2013, a motion was carried that the Association does not support Mr Kotze’s application to subdivide Erf 802. Besides the overwhelming majority of members of the Association voting against Mr Kotze’s application, the Association cannot support the application as sub-division of any erf on the Airpark is forbidden by the constitution of the St Francis Field Homeowners Association of which Kotze is a member by virtue of him being owner of Erf 802. The minimum size of a residential erf on the Airpark was set at 6 800m² per the letter HUM746/59 of the Algoa Regional Services Council dated 14 December 1993. In light of the above, the St Francis Field Homeowners Association opposes Mr Kotze’s application to subdivide Erf 802.”*

[8] This objection prompted the applicants to file a further submission to the second respondent. They prevailed upon the second respondent to keep in mind that their application was submitted before the amendment of the constitution of Airpark. The previous constitution did not prohibit sub-divisions like the new constitution. The second respondent was thus enjoined to determine their application on the basis of the now repealed constitution. Furthermore, no fewer than five residential stands in the estate had less than 6,800 square metres. The third respondent had been party to the sub-division of at least two of those. Their submission was that it was not accurate that there is a compulsory minimum size of the individual erven in Airpark.

[9] On 20 August 2013, the second respondent resolved, by council resolution 13/07/1PD4, not to approve the sub-division. It cited the new constitution of the third respondent and the size limits of erven in Airpark as the reasons for its decision. It referred to the approval of the Algoa Regional Services Council dated 14 December 1993, which stipulated a minimum size for the plots in Airpark.

[10] The applicants were aggrieved by this. Consequently, they lodged an appeal with the first respondent on 5 September 2013. On 30 September 2013 the first respondent solicited a comment on that appeal from the second respondent.

[11] On 6 January 2017, the applicants' attorneys received the outcome of the appeal. The first respondent resolved that the appeal against the second respondent's decision to refuse the granting of the application for the sub-division of the property be dismissed. The reasons advanced by the first respondent were the following:

- (i) the third respondent did not support the application;
- (ii) the second respondent had refused the application.

THE CONSTITUTION OF THE THIRD RESPONDENT

[12] *Mr Beyleveld* SC representing the applicants, argued that the reliance of the first respondent on the new constitution was an error of law. For support of this argument, he referred to an unreported decision of the Full Bench of the Western Cape Division in **Noel-Greve v Markus Mueller and Others**: case no A348/2013, dated 5 February 2014. In considering an appeal before him, the MEC: Environmental Affairs and Development Planning: Western Cape, relied on a by-law that had been repealed

in the period between the initial decision appealed against and the determination of that appeal. The applicant sought the review of the decision of the MEC on the basis that it had been informed by an error of law. The full bench, relying on section 12(2)(c), (d) and (e) of the Interpretation Act 33 of 1957 concluded that the MEC had been entitled to and obliged to have regard to the provisions of the repealed by-law notwithstanding its repeal as it was the law applicable at the time he made his decision.

[13] *Mr Beyleveld SC* thus contended that the amendment in the new constitution which now prohibited sub-divisions was a nullity.

[14] The case relied on by the applicants is clearly distinguishable from the present. The present case relates to the constitution of the third respondent. The constitution is not a law but rather a contract that governs the rights and obligations between the members of the third respondent. The binding nature of the constitution at the time of the second respondent's decision is entirely independent of any statutory consideration. Its interpretation is thus not subject to the Interpretation Act or any statute for that matter.

[15] The current constitution of the third respondent was in place at the time of the first decision by the second respondent and also at the time of the decision of the first respondent. The second respondent had relied on it and so did the first respondent. Both the first and second respondent were enjoined to adjudicate the matter on the basis of valid and applicable regulatory dispensation at the time they made their decisions.

[16] The applicants themselves accept the binding authority of the constitution of the third respondent on them, that the third respondent is a voluntary association whose members, are contractually bound to adhere to the respective obligations imposed on them when subscribing to it. They also accept that the constitution of a voluntary association constitutes a contract between its members provided that such rules accord with the dictates of natural justice and are implemented in a *bona fide* manner.

[17] Anyway it is incorrect that the applicants had a vested right to sub-division as at 30 March 2013 when the new constitution came about. The old constitution does not contain that right. It simply did not preclude sub-division. So an owner could apply for sub-division. That application which could be disapproved. That application would be considered in terms of section 23 (1) of LUPO. That section prohibits sub-division of any land except in accordance with an application granted under section 25 of LUPO by either an administrator or by scheme regulations, a council unless the administrator exempts such division from the provisions of Chapter 111 of LUPO governing sub-division. So, all that the applicants had at the time of the launch of their application, was an entitlement to apply for a sub-division in terms of section 25 (1) of LUPO. Nothing more, nothing less.

THE MINIMUM SIZE OF RESIDENTIAL ERVEN IN AIRPARK

[18] As already adverted to, the applicants also complained that it was incorrect that properties in the estate were limited to individual sites of 6.800 square metres in size. *Mr Rocke SC*, for the first respondent, argued that the fact that there had been

deviations from that standard previously did not translate to an obligation of the part of the respondents to consent to sub-divisions.

[19] In dealing with this submission, I have considered that LUPO itself prohibits sub-divisions except in certain circumstances. Also the Algoa Regional Services Council prescribed 6 800 square metres for the residential erven in Airpark. Therefore, the applicants cannot insist on the approval of the sub-division merely on the basis of previous approvals. Accordingly this ground must fail.

INADEQUANCY OF REASONS FOR THE DECISION OF THE FIRST RESPONDENT

[20] The issue that has arisen is whether because the reasons advanced by the first respondent are terse, they are inadequate.

[21] The applicants relied on section 6 (2) of PAJA which provides that a person is entitled to adequate reasons. They also referred to section 6 (3) of PAJA which further states that if an administrator fails to furnish adequate reasons it must be presumed that the administrative action taken was taken without good reason.

[22] The test applicable in determining an answer to this was articulated in ***Commissioner, South African Police Services and Others v Maimela and Another*** 2003 (5) SA 480 T at 487C-D as follows:

“The adequacy of reasons will depend on a variety of factors, such as the contextual context of the administrative action, the nature of and complexity

of the action, the nature of the proceedings leading up to the action and the nature of the functionary taking the action. Depending on the circumstances, the reasons need not always be 'full written reasons'; the briefest pro-forma reasons may suffice'. (See Hoexter (op cit) at 246; Rean International Supply CO (Pty) Ltd and Others v Mpumalanga Gambling Board 1999 (8) BCLR 918 (T) at 927A-B). Whether brief or lengthy, reasons must, if they are read in the factual context, be intelligible and informative. It must be informative in the sense that they convey why the decision-maker thinks (or collective think) that the administrative action is justified."

[23] In ***Koyabe and Others v Minister for Home Affairs and Others*** 2010 (4) SA 327 the Constitutional Court had this to say:

- "63. *Although the reasons must be sufficient, they need not be specified in minute detail, nor is it necessary to show how every relevant fact weighed in the ultimate finding. What constitutes adequate reasons will therefore vary, depending on the circumstances of the particular case. Ordinarily, reasons will be adequate if a complainant can make out a reasonably substantial case for a ministerial review or an appeal.*
- 64. *The purpose for which reasons are intended, the stage at which these reasons are given, and what further remedies are available to contest the administrative decision are also important factors. The list, which is not a closed one, will hinge on the facts and circumstances of each case and the test for the adequacy of reasons must be an objective one."*

[24] In ***Minister of Environmental Affairs and Tourism and Others v Phambili Fisheries (Pty) Ltd; Minister of Environmental Affairs and Tourism and Others v Bato Star Fishing (Pty) Ltd*** 2003 (6) SA 407 (SCA) at para [40] the Constitutional Court explained what constitutes adequate reason as follows:

"[40] What constitutes adequate reasons has been aptly described by Woodward J, sitting in the Federal Court of Australia, in the case of Ansett Transport Industries (Operations) Pty Ltd and Another v Wraith and Others [1983] FCA 179; (1983) 48 ALR 500 at 507 (23-41), as follows: 'The passages from judgments which are conveniently brought together in Re Palmer and Minister for the Capital Territory (1978) 23 ALR 196 at 206-7; 1 ALD 183 at 193-4, serve to confirm my view that s 13(1) of the Judicial Review Act requires the decision-maker to explain his decision in a way which will enable a person aggrieved to say, in effect:

"Even though I may not agree with it, I now understand why the decision went against me. I am now in a position to decide whether that decision has involved an unwarranted finding of fact, or an error of law, which is worth challenging.

"This requires that the decision-maker should set out his understanding of the relevant law, any findings of fact on which his conclusions depend (especially if those facts have been in dispute), and the reasoning processes which led him to those conclusions. He should do so in clear and unambiguous language, not in vague generalities or the formal language of legislation. The appropriate length of the statement covering such matters will depend upon considerations such as the nature and importance of the decision, its complexity and the time available to formulate the statement. Often those factors may suggest a brief statement of one or two pages only.' To the same effect, but more brief, is Hoexter The New Constitutional and Administrative Law Vol 2 244: '[I]t is apparent that reasons are not really reasons unless they are properly informative. They must explain why action was taken or not taken; otherwise they are better described as findings or other information."

[25] In **Coutsourides NO and Another v Nelson Mandela Bay Metropolitan Municipality and Others** an unreported judgment of Goosen J in case no 3565/2016 [2015] ZAECPHC 66 (8 December 2015), this Court followed the Constitutional Court decisions and held that considerations of adequacy of the reasons furnished involve

a determination of the sufficiency of the reasons and whether such reasons enable the person concerned to decide on further steps to remedy the administrative action³.

[26] Whilst readily conceding that the reasons advanced by the first respondent are terse, *Mr Rorke SC* argued that they were nevertheless adequate and met their purpose. They convey adequately why the first respondent refused the appeal, they enable the applicants to decide on whether or not to seek the review of the first respondent's decision and the basis upon which that review is made. He stressed that this Court should determine this issue wearing the glasses of an objective reader considering the context within which the decision was made, both the facts and legislative framework.

[27] Whilst the application for sub-division was still with the second respondent, before the decision was made, the applicants became aware of the objections of the third respondent and the grounds thereof. They also knew that the second respondent considered that objection, amongst other things before it, in arriving at its decision. Once it gave its decision, it also gave its reasons for it. So, when the first respondent explained that its decision was based on the objections of the third respondent and the refusal of the application by the second respondent, the applicants, knew exactly what that referred to. In those circumstances, it cannot be said that the reasons furnished by the first respondent were inadequate. The other way to look at it would be to ask the question, if the first respondent had added the explanation contended for, would the applicants have been placed in a different position? The answer must surely be in the negative.

³ At paragraph [11]

[28] Also, no purpose would be served by the first respondent repeating the objection of the third respondent and the refusal of the second respondent, in advancing its grounds/reasons of its decision. Therefore, I disagree that these reasons were objectively inadequate.

RATIONALITY

[29] The applicants contended that the decision of the first respondent to dismiss their appeal constituted an irrational decision, made without consideration of the information before it and a decision that was made arbitrarily and impulsively based on a material error of law, in a procedurally unfair and unbiased manner. For this contention they relied on section 6 (2)(d) read with section 6 (2)(e)(iii) and (iv) and section 6 (2)(f)(ii)(cc) of PAJA.

[30] They then contended further that special circumstances exist in terms of which this Court may consider the matter to be of exceptional nature and, therefore, make an order substituting or varying the administrative action of the first respondent in favour of the applicants application as per section 8 (1)(c)(ii)(aa) of PAJA.

[31] It is a requirement of the rule of law that the exercise of public power should not be arbitrary and should be rationally related to the purpose for which the power was given. In ***Pharmaceutical Manufacturers Association of South Africa and Another: in re Ex Parte President of the Republic of South Africa*** 2000 (2) SA 674 the Constitutional Court held:

[85] *It is a requirement of the rule of law that the exercise of public power by the executive and other functionaries should not be arbitrary. Decisions must be rationally related to the purpose for which the power was given, otherwise they are in effect arbitrary and inconsistent with this requirement. It follows that in order to pass constitutional scrutiny the exercise of public power by the executive and other functionaries must, at least, comply with this requirement."*

[32] In this Court in **Joubert Galpin Searle Inc and Others v Road Accident Fund and Others** 2014 (4) SA 148 Plasket J referring to various authorities, explained the exercise of judicial review of public power as follows:

*"Judicial review is concerned with whether the exercise of a public power is regular or irregular, not whether the decision of public functionaries are 'good' decisions or 'bad' decisions, 'wise' decisions or 'foolish' decisions."*⁴

[33] In **Trinity Broadcasting v ICASA** 2004 (3) SA 346 (SCA) at para 21 approved and relied on what was held in **Carephone (Pty) Ltd v Marcus NO and Others** 1999 (3) SA 304 (LAC) at para [37] regarding rationality as a ground for review in the context of PAJA: *"Is there a rational objective basis justifying the conclusion made by the administrative decision-maker between the material properly available to him and the conclusion he and she eventually arrived at."*

[34] To determine this issue I must consider what was before the first respondent.

⁴ Paragraph 58

[35] The third respondent is a homeowners association, an elected body representing all its members including the applicants. Its members chose to live together voluntarily as neighbours in a manner where the collective will of the majority prevails. The will of the majority determines what is appropriate and relevant concerning the rules relevant to living together as neighbours. That will may and sometimes does impact on a minority view of an individual member as to what is appropriate and relevant. The collective will of the third respondent is reflected in its constitution, which binds all the homeowners.

[36] At the time the second respondent took its decision, the applicable constitution of the third respondent prohibited the sub-division of the properties at Airpark.

[37] In addition to this the views of the majority of the owners in Airpark were also before the second respondent and later the first respondent when each considered the application. Those views were a material consideration and provided an objectively rational basis justifying the first respondent's decision and that of the second respondent.

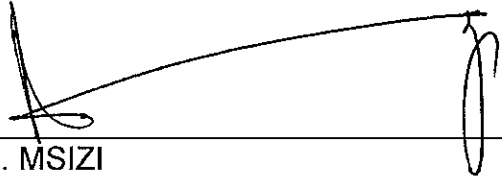
[38] Also serving before the first respondent was the Algoa Regional Services Council. The council had approved the sub-division of the parent property subject to certain conditions. One of those was that the erf size of the individual sub-divided properties was limited to a minimum of 6,800 square meters.

[39] The information before the first respondent also included the decision of the second respondent in rejecting the application. Those were contained in the latter's resolution 13/07/IPD4. The reasons for that decision were also set out.

[40] In the circumstances of this case I am thus not satisfied that the decision of the first respondent was not well made. For that reason I do not deal with the facts supporting the relief sought in the case of the review of the first respondent's decision.

[41] I therefore issue the following order:

Application is dismissed with costs.



N. MSIZI
ACTING JUDGE OF THE HIGH COURT

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