

**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN**

CASE NO: D4967/2019

In the matter between:

ALICANTE INVESTMENTS (PTY) LTD

APPLICANT

and

ETHEKWINI MUNICIPALITY

RESPONDENT

JUDGMENT

Delivered on.

CHILI. J

[1] The applicant (Alicante Investments (Pty) Ltd) is a company whose registered office is situated at 8 Sinembe Crescent, La Lucia Ridge in Durban. The deponent to both the founding and replying affidavits, Mr Rajan Naidoo, is the applicant's sole director. At all material times the applicant was the registered owner of the immovable property described as erf 10107 Durban, Province of KwaZulu-Natal in the total extent of 2023 square meters, situated at 326/330 Mahatma Ghandi Road in Durban. The said property was leased to a church in terms of a lease agreement between the church and the applicant, concluded in March of 2013. Section 3 of the Local Government Municipality

Property Rates Act¹ empowers Ethekwini Municipality (the respondent) to levy a rate on property within its area of jurisdiction, and this includes the immovable property described hereinbefore ("the property").

[2] The current dispute between the applicant and the respondent occurred as a result of the church's occupation of the applicant's property. Prior to occupation, the property was categorized by the respondent as commercial/business. During September of 2016, the respondent received a complaint from members of the community (represented by a DA official) to the effect that the property was being used for large church gatherings resulting in noise and traffic disturbances. A follow up inspection by the respondent's employee revealed that the property was indeed being used as a place of worship in contravention of regulation A25 (1) of the National Building Regulations promulgated under the National Building Regulations and Building Standards Act no.103 of 1977 (hereinafter "the Act"). The inspection further revealed that an alteration had been effected to the property without prior approval of the local authority in contravention of s4 (1) of the Act.

[3] As a result of the above contraventions, in particular the usage of the property as a place of worship, the respondent took a decision that the property be re-categorised from business/commercial to unauthorized/illegal use. The respondent further resolved that the rates charged on the property be increased owing to the fact that the property was being used for the purpose it was not intended for. It is this decision together with the subsequent rate amount charged on the property with effect from September 2017 thorough to July 2018, that are a subject of dispute in the present application. Following on representations made by Zimanga Urban and Rural Design Consultants [hereinafter

¹ Section 3 of the Local Government: Municipality Property Rates Act No.6 of 2004 provides:

"(3) A municipality must exercise its powers to ley a rate on property subject to –

(a) section 229 and any other applicable provisions of the constitution;

(b) the provisions of this Act; and

(c) the rates policy it must adopt in terms of section 3."

"Zimanga Consultants"] in August of 2017 (on behalf of the applicant) the respondent resolved to reverse its earlier decision and subsequently changed the category of the property back to business/commercial usage, effective November 2018. It is common cause that when this decision was made, the church that operated the property as a place of worship, had since vacated the property.

The Notices

[4] An issue was made regarding the notices that the respondent was obliged by law to serve on the applicant when deciding to re-categorise the premises from business/commercial use to unauthorized/illegal use and to charge rates accordingly. Following on investigation into a complaint referred to herenabove, the respondent issued two notices dated the 22nd of September 2016. The first notice was issued in terms of s79 of the KwaZulu-Natal Planning and Development Act no.6 of 2008 (hereinafter "Act 6 of 2008"). This section obliges the respondent to serve a contravention notice on a person suspected on reasonable grounds, to be guilty of an offence contemplated in s75 (1) (a) to (h) of Act 6 of 2008 [unless the Municipality has elected to serve an urgent prevention order on that person]. The contravention charged in this regard related to an alteration to the building described by the respondent as 'an opening on the side of the building'.

[5] The second notice related to usage of the property for the purpose other than that shown on approved plans, in contravention of regulation A25 (1) of the Act. Regulations A25(1) and (2) provide:

"(1) No person shall use any building or cause or permit any building to be used for a purpose other than the purpose shown on the approved plans of such building, or for a purpose which causes a change in the class of occupancy as contemplated in these regulations, whether such plans were approved in terms of the act or in terms of any law inforce at any time before the date of the commencement of the act, unless

such building is suitable, having regards to the requirements of these regulations, for such first mentioned purpose or for such class of occupancy.

(2) Any person who contravenes a provision of subregulation (1) shall be guilty of an offence, and the local authority may serve a notice on such person calling upon him forthwith to seize such contravention." My underlining.

[6] On 17 November 2016 the respondent issued a contravention notice in terms of s79 (1) of Act 6 of 2008, on the basis that the applicant allowed the property to be used as a place of worship in contravention of s75 (1) (6) of Act 6 of 2008. I deal first with the question whether it was sufficiently established, that the property was used as a place of worship in contravention of regulation A25(1) of the Act. In my view, that question should be answered in the affirmative for the following reasons. In paragraph 6.3 of the applicant's founding affidavit, the deponent (Mr Naidoo) stated:

"6.3 Unbeknown to the applicant, the church's occupation constituted an unlawful usage of the property which led to the respondent re-categorising the applicant's property usage from business/commercial to unauthorized/illegal development use"

When responding to the contravention notice dated the 17th of November 2016 together with the notice for change of category from business/commercial to unauthorized/illegal use, the applicant's attorneys, acting on behalf of the applicant, stated in their letter:

"5. We are instructed that our client's tenant, a church, has vacated the property. As such there is no basis for continuing to debit our client with rates calculated in accordance with the unauthorized/illegal development tariff, and for the property category to remain as illegal development/use. My underlining.

6. In the circumstances, this letter serves to notify you that the property is not being used as a place of worship, and is a request for your senior Technical Planner, Thandiwe Mchunu, to immediately:-

6.1 Inspect the property and confirm that it is not being used as a place of worship,

6.2 Change the property category from illegal development/use back to business/commercial alternatively immediately instruct the department responsible for effecting change to the property category.”

From the above one thing is clear, that the applicant posed no challenge to the correctness of a decision to re-categorise the property from business/commercial to unauthorized/illegal use and to charge rates on the property accordingly. It is undoubtedly clear, that the applicant accepted that the respondent's decision was correct, hence a request to reverse same based on the church's vacation of the property.

[7] The issue that remains therefore, is whether the respondent complied with the second part of the proviso (subregulation (2)), namely, service of contravention notice on the respondent. Ms Olsen argued on behalf of the applicant that the respondent failed to serve a notice on the applicant as required by regulation A25(2) of the Act. I do not agree. There are two contravention notices that were issued by the respondent dated the 17th November 2016 and 27 December 2017, respectively. When the applicant responded to the respondent's second contravention notice (dated the 27th December 2017), it acknowledged being in receipt of the first contravention notice (dated the 17th November 2016). In particular, it stated in paragraph 1:

“1. Following receipt of contravention notice dated 17th November 2016, a response was forwarded requesting an extension of time for an application to be made. The request referred to in this paragraph relates to the special consent application which was received by the respondent on 18 August 2017.”

Common sense dictates that the special consent request referred to in the letter, would only have been made if the applicant was in possession of the notices. It is the respondent's case that these notices were hand-delivered at 247 Cowey road Morningside, Durban. That, according to the respondent, was the applicant's last known address at the time. In reply the applicant sought to suggest that it would not have received notices that were served at Cowey Road because it was no longer operating from that address. That cannot be correct given the fact in the special consent application

dated August 2017, the applicant's address is cited as '247 Cowey road Morningside'². How the applicant would have given an address that was no longer in use is beyond comprehension. Further on in its reply, the applicant conceded having received the notices that were served at Cowey road but was unable to specify how and when these notices ultimately landed in its possession.

[8] It was submitted on behalf of the respondent, both in argument and in the answering affidavit, that at some stage a company search was conducted which revealed that, the applicant had (without the knowledge of the respondent) changed its postal address to 8 Sinembe Park La Lucia in Durban. From then on, all contravention notices and utility bills were forwarded to the said address by ordinary mail. It is worthy to be noted that it is not disputed that all utility bills that were forwarded to the La Lucia address were received by the applicant. It is only the contested notices that appear to have not found their way to the applicant, through that address. That I find to be convenient. In light of the above, I am satisfied that it was sufficiently established that notices informing the applicant of the contravention of Regulations 25 (1) of the Act and the respondent's intention to re-categorise usage of the property, were delivered to applicant. All that was expected of the respondent was to establish that the contravention notices were forwarded to the applicant by ordinary mail and that it did.

The applicability of PAJA

[9] This application was brought in terms of s6 (1) of the Promotion of Administrative Justice Act 3 of 2000 ["PAJA"]. In the founding affidavit the applicant submitted, that the decision taken by the respondent to unilaterally change the category of the applicant's property from business/commercial to unauthorized/illegal development use, is administrative and that it should be reviewed and set aside in terms of PAJA. I seriously doubt the correctness of that submission. When dealing with the legislature's power to

² See annexure RN 8 (a) at page 56 of applicant's founding affidavit.

raise taxes or rates, whether nationally or locally, the Constitutional Court in *Fedsure Life Assurance*³ had the following to say:

“... It does not seem to us that such action of the municipal legislatures, in resolving to set the rates, to levy the contribution and to pay a subsidy out of public funds, can be classified as administrative action as contemplated by s24 of the Interim Constitution. In the past, of course, the action of a municipal council in setting rates was considered to be an action that was subject to judicial review on the principles of administrative law, but the principles upon which that jurisprudence was based are no longer applicable as we have outlined above. It follows that the imposition of the rates and the levies and the payment of the subsidies did not constitute ‘administrative action’ under s24 of the interim constitution.”

The Constitutional Court concluded that the municipality’s power to charge rates is constitutionally vested in the legislature and that the exercise thereof is not administrative action⁴.

[10] The averment made by the applicant in paragraph 48 of its founding affidavit is somewhat confusing. It is stated;

“This application is brought in terms of s6 of the Promotion of Administrative Justice Act 3 of 2000 *but the decision taken by the respondent in any event does not comply with the general principle of legality.*” My emphasis.

Immediately thereafter a submission is again made that the respondent’s decision to re-categorise the rates category of the applicant’s property to illegal use, constitutes unlawful administrative action in that it was procedurally unfair, irrational, arbitrary and in bad faith⁵.

³ *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* 1999 (1) SA 374 at 396 para 45.

⁴ See also *City of Cape Town and Another v Robertson and Another* 2005 (2) SA 323 (CC) (2005) 3 BCLR 199 para 62; *Kungwini Local Municipality v Silver Lakes Home Owners Association* 2008 (6) 187 at 194 para 14.

⁵ See para 49 pages 32 and 33 of the index bundle.

This averment is re-iterated in the applicant's supplementary affidavit.⁶ The applicant further alleged that the respondent failed to comply with the provisions of s6 (e) (iii) of PAJA when considering the impugned decision. As already pointed out hereinbefore, charging rates constitutes legislative, not administrative action. The applicant's reliance on PAJA is therefore misplaced. Even if it were not, the application should be dismissed solely on the basis of the applicant's failure to comply with the provisions of s7 (1) of PAJA, a peremptory provision requiring s6(1) judiciary review to be instituted without unreasonable delay and within a period of 180 days from the date during which an affected person was alerted to the impugned decision.

[11] The present application was, without doubt, brought way out of time. The applicant had been receiving tax invoices reflecting re-categorisation of the property from business/commercial to illegal/unauthorized use, together with inflated rate charges, with effect from 15 September 2017 thorough to July of 2018⁷. On this alone, it can safely be concluded that the applicant became aware of the impugned decision as at September 2017. In paragraph 13.1 of the applicant's founding affidavit the deponent stated: 'upon receipt of its July 2018 utility invoice, the applicant instructed its attorneys to make enquires with the respondent in respect of unknown charge and substantial increase in monthly rates'. It is clear, on this version, that the applicant waited for 10 months (from September 2017 to July 2018) to enquire about the respondent's decision to change the category of the property from business/commercial to illegal/unauthorized use. When Zimanga made representations on behalf of the applicant in August of 2018 (as aforesaid), the applicant had already been alerted to the respondent's decision. By that time a period of 180 days had already lapsed. It is common cause that the application papers were only lodged on the 10th of September 2020. There is no explanation on the papers for such a lengthy delay in bringing the application. There is no request either for condonation for late filing. On that alone, the applicant's application falls to be dismissed.

⁶ See para 11 of the applicant's supplementary affidavit at page 90 of the indexed bundle.

⁷ See annexures RN4, RN5 and RN6 at pages at pages 42 through 50 of the indexed papers.

[12] In one line and without more, the applicant sought to suggest in its founding affidavit, that if the application fails for failure to comply with PAJA, then it should be considered as a legality review. It seems to me that this approach was founded on the remarks made by the Supreme Court of Appeal in *National Director of Public Prosecutions and Others v Freedom Under Law*⁸ where the court stated:

“The legality principle has now become well established in our law as an alternative path way to judicial review where PAJA finds no application”.

But, as it was held in *SITA v Gijima Holdings*,⁹ even if legality review proceedings were instituted, it remained for the applicant to show, that proceedings were instituted within a reasonable time, failing which, that there were nevertheless good reasons for the court to entertain the application and overlook the fact of the unreasonable delay in bringing the application, given the circumstances of the present case. As already pointed out, the *dies* for challenging the impugned decision lapsed in March of 2018. The applicant advanced no reason whatsoever, why it had to wait till the 10th of September 2021 to set the matter down. In *Buffalo City v Asla Construction*¹⁰ the Constitutional Court (per Theron J writing for the majority) remarked:

“The approach to undue delay within the context of a legality challenge necessarily involves the exercise of a broader discretion than that traditionally applied to s7 of PAJA. 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 interest of justice require an overlooking of that unreasonable delay.*” (Emphasis added).

I have little or no doubt, that a delay for a period in excess of 2 years is unreasonable in the prevailing circumstances. I am not at all persuaded that the interest of justice demand

⁸ *National Director of Public Prosecutions and Others v Freedom Under Law* 2014 (4) SA 298 (SCA) para 28.

⁹ *State Information Technology Agency SOC Ltd v Gijima Holdings (Pty) Ltd* 2017 (2) SA 63 at 72 para 40.

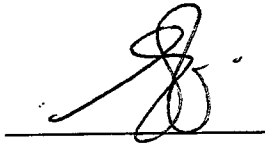
¹⁰ *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd* 2019 (4) SA 331 at 345 para 50.

that such delay be overlooked. In any event, no such case is made out in the application papers.

[13] I therefore make the following order.

Order

The application is dismissed with costs.

A handwritten signature in black ink, consisting of a stylized 'C' and 'J' with a horizontal line extending to the left, positioned above a solid horizontal line.

Chili J

Appearances

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Date of hearing: 21 May 2021

Date of judgment: 23 August 2021