

**IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN**

Case No: **5073/2017**

Reportable: YES/NO

Of Interest to other Judges: YES/NO

Circulate to Magistrates: YES/NO

In the matter between:

EJALK CC

Applicant

and

MANGAUNG METROPOLITAN MUNICIPALITY

Respondent

CORAM: C REINDERS, ADJP et MATHEBULA, J

JUDGMENT BY: C REINDERS, ADJP

HEARD ON: 14 FEBRUARY 2022

DELIVERED ON: 3 AUGUST 2022

This judgment was handed down electronically by circulation to the parties' representatives by email, and release to SAFLII. The date and time for hand-down is deemed to be 15:00 on 3 August 2022.

[1] The Mangaung Intermodal Transport Facility (hereafter interchangeably referred to as the “building” or “facility”) in the Bloemfontein Central Business District (the “CBD”) was built to serve as a hub for public transport vehicles for the purpose of parking, loading and unloading passengers. It was meant to replace the old and existing taxi rank in the CBD. After completion of the building and on 31 October 2011 the respondent (at the time known as Mangaung Municipality) issued an occupancy certificate (the “certificate”) in respect of the building situated at Erf 26753, Bloemfontein. The certificate was issued in terms of the provisions of s14 of the National Building Standards Act 103 of 1977 (the “Act”) read with the National Building Regulations and Directives (the “regulations”) made in terms of the Act.

[2] The application was originally issued in September 2017 and the applicant (a close corporation operating in the industry of financial intermediation, insurance, real estate and business services) at the time sought relief to extend the period for applying to review and set aside the decision to issue an occupancy certificate for the facility and that the decision to issue the certificate, be reviewed (dated 31 October 2011) and set aside. In August 2021 the applicant amended its notice of motion by seeking the aforementioned relief only in the alternative. As main relief it sought that an agreement between the parties (entered into ostensibly afterwards and which I will deal here within later) be made an order of court in terms of rule 41(4), alternatively a declarator that the dispute was compromised.

[3] I deem it appropriate to deal at this stage with the relief sought in respect of the alleged agreement and/or compromise entered into between the parties. I at the same time consider it to be appropriate and for purposes of following my reasoning to repeat verbatim the relief in this respect as sought in the amended notice:

“the main relief is sought in the following terms:

A1.1 The applicant funds the costs of tests in the Mangaung Intermodal Transport Facility to measure and determine whether the volume of noxious gases and fumes that build up exceeds a safe limit and whether the ventilation in the building is sufficient.

A1.2 If the tests confirm that volume of noxious gases and fumes that build up exceeds a safe limit and the ventilation in the building is insufficient, the costs of the test's forms part of the costs of the application.

A1.3 If the applicant is proved wrong, it will withdraw the application and pay the respondent's costs

A1.4 If the tests confirm that the volume of noxious gases and fumes that build up exceeds a safe limit and the ventilation in the building is insufficient the application succeeds, be made an order of Court in terms of the provisions of Rule 41(4) and granting an order in terms of prayer 1 and 3, the costs to include the costs occasioned by the tests conducted by Dr. DJ (Dawid) van den Heever and to the extent necessary the qualifying expenses and preparation fees of the expert witnesses Dr. DJ (Dawid) van den Heever;

A2. In the alternative to prayer A1 that it be declared that the parties compromised the dispute in terms set out in paragraph A1 and granting an order in terms of prayer 1 and 3, the costs to include the costs occasioned by the tests conducted by Dr. DJ (Dawid) van den Heever and to the extent necessary the qualifying expenses and preparation fees of the expert witnesses Dr. DJ (Dawid) van den Heever."

[4] The core reason for the relief sought is based on a tender that applicant made and which the applicant avers the respondent through its attorney accepted in writing. The tender as contained in the replying affidavit reads:

"TENDER

The applicant is prepared to fund the costs of a test in the building to measure and determine whether the volume of noxious gases and fumes that build up exceeds a safe limit and naturally whether the ventilation in the building is sufficient. If the applicant is correct then the costs of the test forms part of the costs of the application. If the applicant is proved wrong it will withdraw the application and pay the respondent's costs."

The replying affidavit was attested to on 19 February 2018.

4.1 In applicant's further affidavit dated 2 October 2020 it is explained that on the 29th June 2018 a letter was addressed (by applicant's attorneys) to the attorneys acting on behalf of respondent at the time. The letter reads:

"We refer to previous correspondence regarding the conduct of tests to confirm / refute the allegations contained in the papers regarding dangerous gasses in the building.

As far as we could ascertain, the only local expert who can conduct the necessary tests is Dr DJ Van den Heever of VDH Industrial Hygiene CC. We approached him to determine if such tests are possible and if he would be able to carry out same. Dr Van den Heever wanted to inspect the building first to determine the feasibility of carrying out the tests which are usually required when faced with similar problems.

We attach Dr Van den Heever's response hereto from which you will note the type of testing he suggests and the methodology to carry out these tests. It would be appreciated to receive your comments regarding the contents of Dr Van den Heever's proposal.

We suggest that to curtail costs, Dr Van den Heever act as an independent expert and should you be in agreement in this regards, you are welcome to contact him to discuss any concerns or questions you may have regarding the tests to be carried out."

4.2 As no response came forth, the attorney of the applicant wrote follow-up letters on 27 July and 15 August 2018. This prompted a reply on 27 August 2018 by respondent's then attorney:

"Ons het instruksies ontvang dat daar voortgegaan kan word met 'n toets soos vervat in u skrywe van 29 Junie 2018. Ons wens om te bevestig dat u

kliënt verantoordelik sal wees vir die kostes van die toets sowel as enige gepaardgaande kostes.

Ons wens om te bevestig dat ons kliënt van oordeel is dat enige een van die twee toetse in orde sal wees vir die kostes van die toets sowel as enige gepaardgaande kostes.

Ons wens om te bevestig dat ons kliënt van oordeel is dat enige een van die twee toetse in order sal wees en is hulle van mening dat die aangeleentheid so spoedig moontlik afgehandel moet word, derhalwe verneem ons graag op welke datums die toets kan geskied”

Loosely translated the letter conveys that the aforementioned attorneys have received instructions to the effect that the test referred to in the letter of 29 June 2018 may be proceeded with. Respondent confirmed that applicant would be liable for the costs of the afore mentioned tests as well as any related costs. At the same time, it was confirmed that respondent is of the view that any one of the two tests would be acceptable and that they were of the view that the issue should be disposed of as speedily as possible wherefore they enquired on which dates the test could be done.

4.3 The applicant contends that the afore mentioned letter dated the 27th August 2018 constituted an acceptance of the applicant's proposals, compromising all disputes between the parties and entitling it to the verbatim relief referred to above.

[5] In the respondent's duplication/rejoinder Mr T Maine (at the time the duly appointed Acting City Manager of the respondent) stated that the respondent did not at any stage through any of its officials nor its legal representatives enter into any settlement agreement or compromise with the applicant. According to him the letter cannot be interpreted as constituting a settlement of the dispute. It was at the same time averred that the attorney had no authority to bind the municipality to settle the dispute in the aforementioned manner.

[6] It is not necessary to adjudicate the question whether respondent's attorney had the authority to settle the matter – had it been necessary I would have in all probability have concluded that he had the necessary authority.

See: ***Hlobo v Multilateral Motor Vehicles Accident Fund*** 2001 (2) SA 59 (SCA) at para [11]

[7] I have to agree with the respondent that on no interpretation of the correspondence I can find that the respondent compromised the dispute which at the time (and still) exists between the parties. On no reasonable interpretation can I find how the matter was settled in the event that the tests supported the applicant's version – in other words I do not find that in such circumstances the respondent agreed that its occupancy certificate by agreement was to be set aside. The letter dated 27 August 2018 refers in particular to the attorney's letter dated the 29th of June 2018 and the aforementioned letter did not suggest the cancellation or withdrawal of the occupancy certificate in the event of any findings made by an expert. I therefore have to conclude that the main relief is to be dismissed.

[8] The nub of the basis to set aside the certificate as contended by the applicant is that the Act read with the regulations do not authorise the issuing of an occupancy certificate by the local authority where the general safety, health and convenience of the general public are put in jeopardy and occupancy will probably or in fact be dangerous. According to the applicant, based on the evidence of its experts' reports (hereafter the reports), such health hazard lies therein that due to a lack of proper ventilation in the building, the volume of noxious gases and fumes (more specifically carbon monoxide) emitted by vehicles in the building will exceed the prescribed safety limits set by the applicable legislation. The certificate could thus never have been issued.

[9] The deponent to the founding affidavit, the managing member of the applicant, states that it has a direct and substantial interest in the issuing of the certificate as it is a tenant (subleasing portions of the premises to a doctor, dentist, pharmacy and optometrist) in terms of a lease agreement it concluded with the respondent on 28

November 2008 (the lease agreement). The building poses a health threat to the public and should not be operated or occupied.

[10] The respondent opposes the application. It is the respondent's case that the application constitutes an abuse of the court's process. It avers that the true motive for the application is to attack the issuing of the certificate as it plays a vital role in the determination of a pending dispute between the parties relating to the termination/cancellation of the lease agreement. Furthermore, the relief in as far as it relates to a health hazard is moot, or at best an academic exercise, as the facility had not been operating for the purpose it was intended for since 2011 (bar a "test run" in 2012) and the setting aside of the certificate would have no practical effect. Respondent submits that there exist substantial factual disputes in the matter which should have been foreseeable and anticipated by applicant. It complains that it is severely prejudiced by the proceedings on application.

[11] According to the respondent there was indeed compliance with the relevant statutory provisions and the certificate was properly issued. The building does not pose any health risk or hazard to the public. Relying on confirmatory affidavits of the professional team and technicians who were involved in the design, development and structure of the facility, respondent avers that applicant's issue with these aspects is misplaced. Amongst others the designer of the building and ventilation systems, Mr MC Heunis (a senior mechanical engineer employed at the time by IX Engineers) and Mr L Delport, the director of Incline Architects who was responsible for the preparation of the architectural drawings for the development of the facility, confirmed that the parking and transportation areas were specifically designed for natural ventilation by incorporating openings in the building for this purpose. The said openings complied with the South African National Standard (SANS)'s prescripts for proper ventilation at the time (SANS 10400-1990). The respondent accordingly avers that the openings not only comply with the said requirements but there was no necessity for the provision of mechanical ventilation as the extract fans in the building were installed for purposes of removing smoke from areas during a fire situation at the instance of the Mangaung Fire Department.

[12] The respondent in its opposing affidavit disputes the findings and conclusions in the reports of applicant's expert witnesses Mr BJP Rossouw (a registered mechanical engineer practising as a consulting engineer) and Dr Y Swart (a medical doctor with qualifications in Community and Public Health). The nub of the conclusion by Mr Rossouw, after having studied the existing building plans, engineering drawings as well as a physical investigation on site, is that the ventilation of the facility is not adequate as prescribed by SANS and poses a health threat to the public. Respondent attacks the conclusions of Mr Rossouw on the basis that it was done on the wrong principles and requirements as there is no need for mechanical ventilation in the building due to natural ventilation. More important, the respondent complains that it is deprived of the opportunity to cross-examine Mr Rossouw to test the veracity of his report and opinion. The report of Dr Swart is criticized on the basis that she did not physically visit the facility nor conducted any tests regarding the noxious omission of gases. Dr Swartz relied on the report of Mr Rossouw in dealing with the severe health risks of exposure to carbon dioxide (including danger to the unborn babies of pregnant women) and concluded that the certificate should be withdrawn. In respect of the report and conclusions of the independent expert Dr van den Heever (supporting the conclusions reached by the applicant's experts) the respondent complains that the tests performed by Dr van Den Heever (a registered practising Occupational Hygienist) were not in accordance with the agreed upon methods.

[13] In reply the applicant contends that it is patently clear that the facility is not merely a parking garage and respondent's comparison with the closed parking garage at the Loch Logan Waterfront basement parking (nor for that matter the Mimosa Mall complex) does not find application. The respondent's admission of the purpose for building the facility, namely to serve as a hub for public transport vehicles for parking, loading and unloading passengers includes applicant's averment that the facility is an enclosed area where vehicles are switched on and off and idle whilst dropping and loading passengers. Accordingly, the vehicles using the facility will emit gases, amongst others carbon monoxide. Respondent however persists that the aforementioned is of no relevance as the facility is not being used for the purpose as intended due to a deadlock in negotiations between several role

players. Bar a few tenants in the building, no taxis are operating at the facilities and there are no commuters.

[14] It is not contested by respondent that the relief sought constitutes the review of an administrative action and the Promotion of Administrative Justice Act 3 of 2000 ("PAJA") is applicable. It rather avers that the application for a review is brought outside the prescribed time limits set by PAJA and applicant tendered no convincing explanation for the delay, taking into account that it had occupation of the premises since 2011 when the certificate was issued. Respondent states that the applicant is vague as to when he would have become aware of the fact that the certificate was allegedly unlawful.

[15] The applicant avers that it could not bring the review within 180 days from the date of issuing of the certificate as prescribed by the Act. It is stated that the applicant originally had no knowledge of the facts and the respondent did not take tenants into its confidence and breached its duty towards the general public. Applicant avers that numerous incidents occurred where people fainted in the building and more in particular the area where passengers are to be on and off loaded. The garage area is alleged to be uncomfortably warm and smelling of exhaust fumes whilst the air is thick. In general it is simply an uncomfortable experience to be in the garage area. Affidavits of four members of public confirming the aforementioned is annexed to the papers. Applicant describe itself as very vocal regarding the conditions to such an extent that the applicant was victimised and even spoliated. Applicant identified qualified persons and eventually consulted with Dr Swart who is properly qualified and who expressed an opinion on the matter. The applicant at no stage before having been advised by the experts were aware that the occupancy certificate was issued contrary to the provisions of the enabling act.

[16] In this respect the conduct (and delay) of applicant is to be adjudicated along the lines stated in ***Joubert Galpin Searle v Road Accident Fund 2014 (40 SA 148 (ECP)*** where Plasket J stated:

"[52] It cannot be expected of an applicant that he or she rush to court to review and set aside administrative action without investigating and attempting

to determine whether he or she has a case. It is no answer to say that rule 53 enables an applicant to launch a review on the thinnest of bases and then supplement his or her case when reasons are provided, if they are, and the record is furnished in due course.

[53] In ***Scott and Others v Hanekom and Others 1980 (3) SA 1182 (C) at 192H*** Marais AJ, although dealing with a different context, stated:

‘The scope of review proceedings is limitless. The antecedent investigations and preparation of process may be simple or complex. The time required for this purpose may be short or it may be long. The parties may have spent many fruitless months in attempting to negotiate an acceptable compromise or settlement before resorting to litigation’”

[17] In ***South African National Roads Agency Ltd v Cape Town City*** 2017 (1) SA 468 (SCA) at para [108] the Supreme Court condoned a delay, based on the interest of justice.

[18] I align myself with what was stated by Laws J in ***R v Somerset Country Council, ex parte Fewings and Others*** [1995] 1 All ER 513 (QB) at 524 e-g:

“Public bodies and private persons are both subject to the rule of law; nothing could be more elementary. But the principles which govern their relationships with the law are wholly different. For private persons, the rule is that you may do anything you choose which the law does not prohibit. It means that the freedoms of the private citizen are not conditional upon some distinct and affirmative justification for which he must burrow in the law book. But for public bodies the rule is opposite, and so of another character altogether. It is that any action to be taken must be justified by positive law. A public body has no heritage of legal rights which it enjoys for its own sake; at every turn, all of its dealings constitute the fulfilment of duties which it owes to others; indeed, it exists for no other purpose.”

[19] In *casu* the respondent is a public body very much responsible for the safety of the public making use of the amenities which the respondent avers is safe and

complies with the necessary legislation and by laws. There is a real concern in my mind in this respect and declining to extend the time limit or simply dismissing the application due to the time lapse in my view could not be solving the real and potential prejudice to the public at large. It will create the impression that whatever the shortcomings in the building, same is water underneath the bridge and condoned by court. This perception would be wrong as the true facts need to be adjudicated in the interest of the public making use (or who will be making use) of the facilities and who are in fact are invited by the respondent to make use of the amenities on the premises. In the circumstances I am prepared to grant the relief in respect of the requested extension of time sought in paragraph 2.1 of the Amended Notice of Motion.

[20] This leaves me with the final dispute, to wit the review and setting aside of the occupancy certificate. The relief sought is final in nature. It is well established that such relief may be granted if the facts averred by the applicant which had been admitted by the respondent together with the facts alleged by the respondent justify such an order, unless the allegations and denials by the respondents are so far-fetched or untenable that the court is entitled to reject the respondent's version merely on the papers.

See: ***Plascon-Evans Paints (Pty) Ltd v Van Riebeeck Paints (Pty) Ltd***
1984 (3) at 634 H-I

[21] Recently in ***Mamadi and Another v Premier of Limpopo Province and Others*** [2022] ZACC 26 (delivered on 6 July 2022) the Constitutional Court in dealing with Rule 53 proceedings directed it to be inappropriate to dismiss a review application simply on the basis of ***Plascon-Evans*** where a court finds it difficult to resolve the matter simply on the basis of a dispute of facts which cannot easily be resolved on the papers. It was held that a court can refuse to render a final decision in a matter and thus on the right in terms of section 34 of the Constitution to have

“any dispute that can be resolved by the application of law decided in a fair public hearing before a court”.

[22] In my view this case and the disputes fall squarely within the ambit of the directions issued by the Constitutional Court. Whilst I find myself unable on the papers to resolve the disputes and find in favour of the applicant, I most definitely cannot simply, based on the Plascon-Evans Rule, dismiss the application. On the contrary, I am of the view that a referral to trial in respect of the only question remaining, namely the validity of the issuing of the occupancy certificate, is very much what is called for. This will and/or might hopefully lead thereto that the experts, through the working of the court rules, can inspect and investigate what they deem appropriate for the final adjudication of this matter, come to joint conclusions and narrow down the real expert disputes which a trial court on hearing evidence can finally adjudicate.

[23] Costs are always in the discretion of the court. In my view it is appropriate for costs to stand over for later adjudication at the main trial.

[24] Consequently I make the following orders:

24.1 Prayers A1 and A2 of the notice of motion is dismissed.

24.2 The period for applying to review and set aside the decision to issue an occupancy certificate for the Mangaung Intermodal Transport Facility is extended to the date on which service of the application was effected.

24.3 The decision to issue the occupancy certificate for the Mangaung Intermodal Transport Facility, which certificate is dated the 31st of October 2011, is referred for trial.

24.4 The applicant's founding affidavit shall stand as combined summons.

24.5 The respondent's answering affidavit shall stand as the plea.

24.6 The rules as set out in the Uniform Rules of Court for the filing of further pleadings will thereafter apply.

24.7 Costs to stand over for later adjudication.

C. REINDERS, ADJP

I agree

M.A. MATHEBULA, J

On behalf of the applicant: Adv N Snellenburg SC
Instructed by: Hendre Conradie Inc
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On behalf of the respondent: Adv LA Roux
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