

REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
(LIMPOPO DIVISION, POLOKWANE)

(1)	REPORTABLE: YES/NO
(2)	OF INTEREST TO THE
	JUDGES: YES/NO
(3)	REVISED.

1/9/22

Case no:2853/2020

In the matter between:

AGRI LETABA

APPLICANT

And

GREATER TZANEEN MUNICIPALITY

C/O THE MUNICIPAL MANAGER

RESPONDENT

JUDGMENT

MULLER J:

- [1] The applicant applied to the respondent for the rezoning of erf 2931 and 2932 in the township of Tzaneen, Extension 53, for purposes of erecting an agricultural college on the properties of which it is the registered owner.

[2] On 10 August 2017 the Mopani Municipal Planning Tribunal¹ as well as the respondent² approved the rezoning of erf 2931 to make provision of an agricultural college and ancillary uses. Approval was also granted for the removal of certain restrictive conditions contained in the title deeds of both erven, subject to the general provisions of the scheme, together with various conditions specifically recorded in the approval letter. Several of the conditions are relevant for purposes of the judgment. They are:

- “(i) That an entrance to the property be provided by the owner at own cost and addressed through a Site Development Plan.
- (ii) The applicant must submit Map 3 documents for proclamation of the rights prior to submission of Building Plans.
- (iii) A Site Development Plan shall be submitted and approved by the Local Authority prior to the approval of building plans and the development of the property.

....

- (ix) That a notice be published in the Provincial Gazette by Greater Tzaneen Municipality to confirm the removal of the following Title conditions:

Title Deed 98686/2002 – Condition D

Title Deed 98687/2002 – Condition A.1 to A.4

As contemplated in Section 58(7) of the SPLUMA By-Law of Greater Tzaneen Municipality.³

- (x) That the applicant shall at own cost submit the original Title Deeds of the relevant properties, the original approval letter of the Municipality and a copy of the notice

¹ Hereinafter called the “tribunal”. The tribunal is established in terms of section 37(4) of the Spatial Planning and Land Use Management Act, 16 of 2013. Hereinafter referred to as “SPLUMA”.

² Council resolution B78 dated 28 August 2014.

³ Hereinafter called “the By-Law.”

published in terms of paragraph (ix) above to the Registrar of Deeds of endorsement as contemplated in Section 59 of the SPLUMA By-Law of Greater Tzaneen Municipality.

- (xi) That the removal of restrictive conditions in Title Deeds T98686/2002 and T98687/2002 be finalized prior to promulgation of the rezoning.

....”

- [3] I turn to the defences raised by the respondent. It is important from the outset to note that the By-Law makes provision for an appeal against a decision of a tribunal to an Appeal Authority.⁴ It is common cause that after the tribunal approved the rezoning, no appeal was lodged by either the applicant or the respondent in terms of section 121 (Part B) of the By-Law. The decision is thus valid and enforceable.
- [4] The respondent, firstly raised the question whether the applicant has approached the court for review under the Promotion of Public Administrative Justice Act.⁵ The basis of the objection is that the applicant was aware that the respondent has failed to make a decision to publish in the Provincial Gazette confirmation of the removal of the suspensive conditions in the title deeds but has clothed the application under the guise of a mandatory interdict to circumvent falling foul of the 180 days period provided for in section 7(1) of PAJA.
- [5] Secondly, the respondent contended that relief claimed in prayer 1 and 2 is incompetent by virtue of the provisions of section 57(2) of the By-Law. No proclamation of the approval has occurred. As the approval has lapsed it is

⁴ Section 117 (Part A) read with Part B of Chapter 8.

⁵ Act 3 of 2000. Hereinafter referred to as “PAJA.”

therefore unenforceable. The applicant did not apply for an extension in terms of the By-Law.

- [6] The respondent also averred that the applicant should have exhausted the internal remedy provided for in Chapter 8 of the By-Law. The respondent in conclusion averred that the applicant has failed to submit a Site Development Plan to the respondent as required by section 50(3) of the By-Law. It is not the respondent that caused the approval to lapse due to non-compliance with the said By-Law.
- [7] Finally, albeit without much force, was the suggestion by the respondent that the transfer of ownership of the land in 2002 is questionable. Counsel for the respondent conceded, quite correctly, that the applicant is presently the lawful owner of the land in question. The only relevance that the statement presented is an underlying reason for the failure of the respondent to comply with its clear and simple obligation to publish the necessary information in the Gazette because the respondent failed to accept that the applicant is the owner of the land.
- [8] The evidence creates the impression that the respondent developed second thoughts about the rightness of the rezoning after it initially supported the application.
- [9] The application was submitted for consideration on 5 May 2016. On 10 April 2017, the respondent acknowledged receipt of the application. The respondent requested a copy of the legal notice to remove the restrictive conditions from the title deeds prior to publication for approval. On 20 April 2017 a draft legal notice was submitted to the respondent as requested in the

letter. The next day the respondent approved the contents of the notice but requested the addition of the words "(for amendment of the current land use from AGRICULTURAL SHOW TO AGRICULTURAL COLLEGE)".

- [10] On 14 May 2018 the applicant referred to its letter dated 22 March 2018 in terms whereof copies of the title deeds containing the endorsements of the Registrar of Deeds as required by condition (x) of the approval letter were forwarded to the respondent stating that the conditions of the approval have been met with the exception of the publication. The reply was:

"Hi hope you well, will get back to you about this matter, we have to submit additional report to Council before we final the matter. Once that report has been received by council will then get a proper action on the outstanding matter."

- [11] On 6 June 2018 the respondent was requested to respond. The answer was again that a council resolution has to be obtained before it can be finalised. The writer added that the respondent has not yet placed the notification in the newspaper.

- [12] The respondent was reminded in an email dated 27 June 2018 that in terms of condition (ix) a notice should be published by the respondent to confirm the removal of the restrictive conditions from the relevant title deeds. The applicant requested clarification from the respondent whether or not the notice had been published.

- [13] The parties have met to discuss the issues. In an email dated 12 July 2018 the meeting as well as the failure by the respondent to publish the notice were confirmed. It was recorded in the email that a proposal was made to refer the application to the council to conclude the decision regarding the publication of

the notice. The proposal was not accepted by the applicant. The following was noted:

"Both the GTM delegates further proposed that this issue be tabled before the council to clarify the ongoing and ill-informed perception by certain councillors and/or municipal employees that the relevant property was illegally donated to the current land owner, while the facts indicate that it was a mutual and fair agreement by both parties at the time of the transaction."

[14] On 1 April 2019 the respondent, when requested to respond, answered that they are still waiting for a legal opinion. With a letter dated 4 April 2019 the attorneys of the applicant requested information from the legal department of the respondent.

[15] A meeting was convened on 29 November 2019. At that meeting the representative of the respondent explained that the issue:

"In simple terms:

Issue at hand, it was an application for rezoning and removal of restrictions there are certain compelling issues prior to removal that must come from Agri-Letaba's side as commitment. Remember the Title Deed put it explicit, that if you are to move from what you are practicing now, because the land was offered to you on that basis. Now you need to come back to the Municipality to make that offering to say you are moving away from Agriculture into a different business, then that negotiation must happen at that level and once there is a council approval on that then the proclamation can go ahead. It is in that context that all of us are trying to re-direct. On the copy of the title deed it will show it explicitly, I think it's 4.1 that indicates that the land has been offered for this and it is a council resolution of that specific time.

Now if you want to move away from that activity (restriction) it means it is a whole process of renegotiation the terms of that land. That is our basic understanding and that is what you must deal with before ourselves before we can commit to proclamation."

- [16] At the end of the meeting the applicant was given the undertaking that the legal department of the respondent will communicate with the attorneys of the applicant by 13 December 2019. On 17 January 2020 the respondent was reminded of its undertaking and the respondent was requested to revert by 31 January 2020. Nothing came of the request or the undertaking and on 20 March 2020 the respondent was informed that suitable relief will be sought in court.
- [17] It is clear that the respondent laboured under a misguided apprehension that the restrictive conditions must be re-negotiated by the parties after the tribunal had made its decision. This objection was an afterthought. What is worse is that the applicant was left in the dark as to what the objection really was until the meeting of 27 November 2019. Ownership of the land was transferred to the applicant in 2002. In the letter dated 12 July 2018 the impression was created that the donation of the land to the applicant was tainted by impropriety. The respondent had at least 14 years to do something about it before the application to rezone was lodged if the land was donated to the applicant under dubious circumstances. At the meeting of 27 November 2019 a fresh objection was raised. The respondent was of the view that the applicant must re-negotiate the new land use prior to the rezoning. It was an issue that fell squarely within the jurisdiction of the tribunal. It is in essence an objection to the proposed rezoning of the land. The difficulty is that the respondent endorsed its support for the establishment of the agricultural college before the tribunal.
- [18] It is of concern that the respondent blows hot and cold with regard to the reason why it failed to comply with its obligation to publish the notice. The

failure to comply with condition (ix) of the approval letter was deliberate and calculated. The failure to publish the notice brings section 57 of the By-Law, into focus. It provides that:

- “(1) An applicant, who wishes to rezone land, must apply to the Municipality for rezoning of the land in the manner provided for in Chapter 6.
- (2) If the following requirements are not met, a rezoning approval may lapse after a period of 12 months, from the date of approval, or further period as may be determined by the Municipality:
 - (a) the zoning is not utilised in accordance with the approval thereof; or
 - (b) if the land use right as approved is not implemented and exercised.
- (3) The Municipality may grant extension to the periods contemplated in subsection (2), which period together with any extensions the Municipality grants, may not exceed ten (10) years.
- (4) If a rezoning approval lapses prior to proclamation, the zoning applicable to the land prior to the approval of the rezoning applies, or where no zoning existed prior to the approval of the rezoning, a zoning of “Undetermined” be applicable.
- (5) If the provisions of subsection 2 is not adhered to and the rezoning has been proclaimed the municipality shall have the sole right to de-proclaim the land use right which was approved, at the cost of the applicant and the applicant will have no claim against the Municipality for any costs incurred as a result of the rezoning application.
- (6) If land is to be used for a Quarry, an application for rezoning should be submitted for consideration.”

[19] The respondent avers, with reference to section 57 of the By-Law, that the approval has lapsed since twelve months have expired, after the approval letter was issued without the notice being published.

- [20] Reliance on the provisions of section 57 is misplaced. Section 57, in my view, is not applicable. Approval of the land use right was suspended pending fulfilment of all the conditions referred to in the approval letter. It is a consequence of the suspension of the land use right, that the zoning cannot be utilised until fulfilment of all the conditions. Nor can the land use right be implemented or exercised by the applicant until fulfilment of the conditions.
- [21] Section 43(1) and (2) of SPLUMA provides that an application may be approved subject to conditions. Such a conditional approval lapses, if a condition is not met within a period of five years from the date of approval, if no period for compliance has been stipulated. There is no period stipulated for compliance in the letter of approval. It follows, in my judgment, that a period of five years is applicable.
- [22] Section 43 of SPLUMA is less onerous than section 57 of the By-Law and should therefore be followed should there be a conflict between the two provisions. The twelve months period starts to run only after an applicant has complied with the conditions of approval referred to in section 43(1).
- [23] I am convinced that the defences raised by the respondent are without any merit. The relief claimed is to enforce an obligation placed on the respondent by the decision of the tribunal. Counsel for the applicant has intimated that the relief in prayer 3 is unnecessary. The whole case of the applicant is centred at the failure to publish the notice which the respondent was obliged to publish.
- [24] The applicant is successful and entitled to its costs. Both parties employed two counsel. The conduct of the respondent with regard to the manner it dealt

with the rezoning application leaves much to be desired. The respondent approved the rezoning until the tribunal granted the application. It was then that the respondent conjured up the excuse that council must make a decision after the approval. The council never made a decision. It is doubtful that whatever reason which caused the respondent to have an objection to the rezoning, was ever placed before the council for consideration. It took the respondent until November 2020 to inform the applicant of the real reason for the objection. The obvious course to have taken was to note an appeal, if the respondent was aggrieved with the approval. The respondent has failed to do so.

[25] The respondent endeavoured to use its dilatoriness to comply with its obligation in terms of the approval to oppose the application by relying on non-compliance of section 57 of the By-Law. This is not what is expected by an organ of state. The respondent must pay the cost of this application, on the scale as between attorney and client as a mark of disapproval of the manner in which the rezoning application was dealt with by the respondent.

ORDER

1. It is declared that the land use approval dated 10 August 2017 is valid.
2. The respondent is directed to take all administrative steps as required by the approval letter dated 10 August 2017 to publish a Notice of Proclamation as required by the said letter of approval in respect of the land known as Erf 2931 and Erf 2932 Tzaneen Extension 53 within 15 days from the date of this order.

3. The respondent is ordered to pay the costs on the scale as between attorney and client such costs shall include the costs consequent upon the employment of two counsel.

A black rectangular box redacting the signature of the judge.

GC MUYLER

JUDGE OF THE HIGH COURT LIMPOPO

DIVISION: POLOKWANE

APPEARANCES

- | | |
|----------------------------|----------------------|
| 1. For the Applicant | : Adv C Erasmus SC |
| | : Adv J Van Heerden |
| 2. For the Respondent | : Adv T Ncongwane SC |
| | : Adv F Zulu |
| 3. Date judgment reserved | : 11 August 2022 |
| 4. Date judgment delivered | : <u>1/9/22</u> |