

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 47686/19

- (1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: YES

[11 February 2021]


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SIGNATURE

In the matter between:

Q4 COMMERCIAL PROPERTIES (PTY) LTD

Applicant

and

**THE MUNICIPAL MANAGER:
MADIBENG LOCAL MUNICIPALITY**

First Respondent

**THE CHAIRPERSON / REGISTRAR:
THE EXECUTIVE / APPEAL AUTHORITY
MADIBENG LOCAL MUNICIPALITY**

Second Respondent

**THE CHAIRPERSON OF THE PORTFOLIO COMMITTEE
(PC4) OF THE MADIBENG LOCAL MUNICIPALITY**

Third Respondent

**THE CHAIRPERSON OF THE MUNICIPAL PLANNING
TRIBUNAL OF THE MADIBENG LOCAL MUNICIPALITY**

Fourth Respondent

ENGEN PETROLEUM LIMITED

Fifth Respondent

LIZALOR INVESTMENTS (PTY) LTD

Sixth Respondent

JOLLIFY TRADING (PTY) LTD

Seventh Respondent

FUELARAMA (PTY) LTD

Eighth Respondent

TOTAL SOUTH AFRICA (PTY) LTD

Ninth Respondent

DE WILDT HELPMENKAAR MAATSKAPPY (NPC)

Tenth Respondent

MADIBENG LOCAL MUNICIPALITY

Eleventh Respondent

J U D G M E N T

MUDAU, J:

[1] The applicant, Q4 Commercial Properties (Pty) Ltd, a fuel retailing company, seeks an order declaring the internal appeal lodged on behalf of the fifth, seventh and eighth respondents on 28 February 2018, against the ruling of the third respondent dated 12 December 2017, to be invalid. In the alternative, the applicant asks that the Court dismiss the aforementioned appeal in terms of Section 8(1) (c) (ii) of the Promotion of Administrative Justice Act 3 of 2000 ("PAJA").

[2] In addition, the applicants seek an order in terms whereof this Court approve the applications for township establishment subject to the conditions attached to the applicant's founding affidavit. The relief for the review and setting aside of the failures to take decisions is sought in terms of Section 6(2)(g) of PAJA and the substituting decisions as indicated, are sought in terms of Section 8(1)(c)(ii) of PAJA. The first, second, third and fourth respondents issued a notice to oppose, but failed to file answering affidavits. Accordingly, only the fifth, seventh and eighth respondents oppose the application.

IN LIMINE ISSUES

[3] The fifth, seventh and eighth respondents (the respondents), have filed a condonation application for the late filing of their answering affidavit, which is not opposed by the applicant; however, the applicant has indicated that it intends to rely on the paragraphs of the answering affidavit dealing with the condonation application for the purpose of argument on the question of delay and costs. The fifth, seventh and eighth respondents have, in written heads of argument, raised a point *in limine* regarding the non-joinder of the Madibeng Local Municipality. The Madibeng Local Municipality ("the Municipality") has, in the interim, formally been joined to the proceedings as the eleventh respondent.

[4] It is common cause that the applicant served a copy of the township establishment applications on the offices of the fifth, seventh and eighth respondents' attorneys on 17 March 2020. The fifth, seventh and eighth respondents opposed any reliance or reference by the applicant to the copies of the township establishment applications served upon them. In this regard, the fifth, seventh and eighth respondents have proceeded with a Rule 30(2) notice and thereafter, an application in terms of Rule 30(2) (b) to be heard simultaneously with this application. The applicant did not file answering papers in respect of the Rule 30 application.

BACKGROUND

[5] On 29 June 2015, the applicant lodged two township establishment applications in terms of section 96(1) of the Town-Planning and Townships Ordinance 15 of 1986 ("the Ordinance") Townships to be known as the "Township Q4 City" and "Q4 City Extension 1" respectively. The applicant wishes to develop two filling

stations on the N4 highway, catering for traffic on both sides of the highway. The opposing respondents are owners of filling stations on the N4 highway between Pretoria, Gauteng Province and Rustenburg, North West Province with a direct interest in the matter.

- [6] On 28 July 2015, the applicant's town planner gave notice as required in terms of section 69(6)(a) and Regulation 21 of the ordinance regarding the applicant's township establishment applications. Subsequently on 25 August 2015, the opposing respondents submitted their objections. Pursuant thereto, the first respondent ("the municipal manager") forwarded a copy of the objections received to the applicant and requested additional documentation as well as the applicant's response to the objections.
- [7] On 19 August 2016, the respondents' attorney sent a letter to the municipal manager, inquiring whether a reply to the objection had been received from the applicant and whether a hearing date regarding the matter had been scheduled. A follow-up letter was sent to the applicant's town planner seeking confirmation whether the applicant had submitted a reply to the respondent's objection, in which event, a copy thereof was requested. It was on 20 January 2017 that the applicant filed its response to the municipal manager's request as envisaged in terms of section 69(9) of the Ordinance.
- [8] Significantly, on 21 March 2017, the eleventh respondent, the Municipality, promulgated its Spatial Planning and Land Use Management By-Law 2016, under local authority notice 25 of 2017 per Gazette No. 7745 ("the By-law"). On 13 April 2017, the respondents' attorneys addressed a letter to the municipal

manager confirming that no response had been received regarding previous requests. The letter advised that, should a response not be received within a reasonable time to allow the respondents time to prepare, a postponement would be sought should a hearing be convened.

[9] On 2 May 2017, the municipal manager forwarded a notice advising the parties that a hearing before the portfolio committee had been scheduled for 18 May 2017. In response thereto, the respondents' attorney afforded a letter to the municipal manager requesting documentation preparations with a chronology dating back 19 August 2016 to 13 April 2017. On 8 May 2017, the municipality issued an email advising that the hearing was postponed.

[10] On 16 May 2017, the respondents' attorneys address a letter to the applicant's attorneys confirming postponement of the hearing and also proposing a meeting to discuss settlement as well as the possible nomination of a hearing date. Subsequently, on 27 November 2017, the municipal manager issued a notice advising the parties of the hearing scheduled for 12 December 2017. On 1 December 2017, the respondents' attorneys advised the municipal manager in writing of their unavailability on 12 December 2017 and suggested 25 or 26 January 2018 instead. On 7 December 2017, the municipality advised that the scheduled hearing for 12 December 2017 would not be postponed.

[11] On 8 December 2017, the respondents' attorneys advised the municipal manager and the applicant in writing that they intended to raise points *in limine*. The basis was that the township applications were allegedly unauthorised; and that certain public participation requirements had not been complied with, in that adjacent local authorities had not been notified. The hearing was proceeded

with on 12 December 2017. On that occasion, an additional point *in limine* was raised - the applicant should also have notified the Controller of Petroleum Products ("the Controller") of the township applications. However, the respondent's points *in limine* were dismissed.

[12] On 18 January 2018, the respondents' attorneys forwarded a letter to the third respondent requesting reasons for the dismissal of the points *in limine* and again on 1 February 2018. It was not until 14 February 2018, that the reasons were received from the municipality. On 28 February 2018, the respondents served and filed their internal appeal in terms of section 51 of the Spatial Planning & Land Use Management Act 16 of 2013 (SPLUMA) read with section 121 of the By-law. The merits of the application scheduled for 1 and 2 March 2018, were subsequently postponed to 14 and 15 May 2018 at the request of the respondents.

[13] On 10 May 2018, the third respondent advised that the hearing scheduled for 14 and 15 May 2018, could not be proceeded with until the internal appeal had been finalised. Subsequently, on 4 December 2018, the applicant instituted an application to compel the municipal manager and the executive authority of the municipality to administratively process the respondent's internal appeal. On 18 April 2019, this Court (per Van der Westhuizen J) granted an order on an unopposed basis in accordance with the relief sought by the applicant. On 14 June 2019, the Municipality was compelled by way of a court order to consider and finalise the appeal hearing. Subsequently, on 26 April 2019, the Municipality issued a hearing notice in respect of the pending appeal, which was to be held on 16 May 2019.

[14] On 14 May 2019, the respondents dispatched a letter to the Municipality by which they advised that they intended to request a postponement of the appeal hearing scheduled for 16 May 2019, which they formally did on 15 May 2019 and as a result, the Municipality acceded to their request. Because of these developments, the applicant instituted a contempt of court application under case number 40904/2019 enrolled for 10 February 2020 on the unopposed motion court roll. Faced with a contempt of court application, on 5 July 2019, the Municipality issued a notice of an appeal hearing scheduled for 25 July 2019, on the same date that the applicant instituted the application under consideration as per case no. 476864/2019. The applicant and the respondents attended the scheduled appeal hearing before the Municipality's Appeal Tribunal on 25 July 2019, which hearing by agreement did not proceed because of *inter alia*, this pending application.

[15] The applicant contends that, there has been an inordinate delay in the taking of the aforesaid decisions causing unjustifiable prejudice to the applicant; the dismissal of the appeal and the approval of the township applications are foregone conclusions and a remittal of such decisions would constitute a waste of time and a mere formality; those respondents responsible for the taking of the decisions are incompetent; it would be unfair for the applicant to submit to the same jurisdiction again; and that this Court is in as good a position to take the relevant substituting decisions, having been favoured with all the relevant information.

[16] The applicant alleges that the lawful appointment and jurisdiction of the Appeal Tribunal was suspect, in that the Municipality refused or neglected to submit proof of statutory compliance and delegation to the applicant or to respond to

the alleged procedural and statutory flaws in the appointment of the Appeal Tribunal.

[17] The declaratory relief sought regarding the internal appeal process is on the following basis. At the time when the appeals were lodged, the procedure was regulated by section 51 of SPLUMA and Section 121 of the By-law, both of which required such appeals to be lodged within 21 days after the decision of the third respondent was made known to the parties involved. Regarding the internal appeal, the allegation was that the public participation process followed by the applicant was flawed as the Controller, the office in the relevant department which regulates only the issue of site and retail licenses in terms of the Petroleum Products Act¹ ("the Act") and has no interest in any land use change application, was not notified of the applications. The respondents submitted that the Controller and the Minister constitute interested parties and organs of State for the purposes of adjudication of an application that envisages the establishment of a filling station.

[18] It is common cause between the parties that annexure "DP 50" is a letter in which the Controller confirmed in writing that:

"[A]n applicant is therefore only qualified to lawfully apply for site and retail licenses at this Department (Energy) and the Controller after it has already successfully obtained the land use zoning certificate from a competent authority or a person authorising retailing from the site. Consequently...The Controller have no concern with any lodged or pending land-use applications in terms of Town Planning legislation by virtue of which a land owner applies for filling station land-use rights".

¹ Act 120 of 1977.

[19] Section 121 of the By-law provides, "[a]n appellant must commence an appeal by delivering a Notice of Appeal approved by the Municipality to the registrar of the relevant appeal authority within 21 days as contemplated in section 51 of the Act". Section 51 of SPLUMA provides that a person whose rights are affected "*...may appeal against that decision by giving written notice of the appeal and reasons to the municipal manager within 21 days of the date of notification of the decision.*"

[20] The applicant contends that the appeal should therefore have been filed within 21 days after 12 December 2017, i.e. on or before 2 January 2018. It was filed on 28 February 2018. Also, the applicant relies on Section 124(4) of the By-law, which provides that if a notice of appeal is received by the appeal authority after the required time limit has expired, the party seeking the appeal is deemed to have abandoned the appeal. The applicant contends accordingly that the purported appeal is invalid and a nullity. In our law, every person's rights that have been adversely affected by an administrative action has the right to written reasons. Section 33(2) of the Constitution read in conjunction with Section 5(1) of PAJA provides that a person adversely affected by an administrative decision may request reasons.² The respondents' request for written reasons can therefore not be faulted.

[21] The second ground upon which the applicant relies for the declaratory relief is that the third respondent's decision on the points *in limine* is, in any event, not appealable. In their notice of appeal dated 20 February 2018, the respondents rely on the provisions of section 22 of SPLUMA and section 127 of the By-law to appeal the dismissal of their point *in limine* on the basis that it was not

² *Kyobe v Minister of Home Affairs* 2010 (4) SA 327 (CC) at para 61.

procedurally fair as contemplated in PAJA. Section 51(1) of SPLUMA grants the right of appeal to a person "...whose rights are affected by a decision ...". This requirement is qualified in section 51(5) to persons whose pecuniary or proprietary interests are adversely affected by the decision or who are able to demonstrate that she or he will be adversely affected by the decision. The applicant contends that the decision concerned is therefore not a "decision" which is appealable as contemplated by SPLUMA and the By-law. The applicant, *inter alia*, contends that the decision was not final in nature but a preliminary or interlocutory step with no determinative effect on the respondents' rights.³

[22] I respectfully agree with the submissions by counsel on behalf of the applicant that the following factors militate against the ruling being appealable. The ruling would not have had the effect of disposing of at least a substantial portion of the approval sought by the applicant in the township applications, if upheld.⁴ To qualify as an administrative act in terms of PAJA, the decision has to adversely affect the rights of any person.⁵

[23] In terms of section 127 of the By-law the appeal authority is empowered to consider an appeal on the following grounds:

"(i) the administrative action was not procedurally fair as contemplated in the Promotion of Administrative Justice Act, 2000 (Act No 3 of 2000); and

(ii) the merits of the land development or the land use application."

³ *Eastern Metropolitan Substructure v Peter Klein Investments* 2001 (4) SA 661 (W) at 674D-E.

⁴ *Zweni v Minister of Law and Order* 1993 (1) SA 523 (A) at 536B-D; *Maize Board v Tiger Oats LTD and Others* 2002 (5) SA 365 (A) at paras [4]–[8].

⁵ *Grey's Marine Hout Bay (Pty) Ltd v Minister of Public Works* 2005 (6) SA 313 (SCA) at para [23].

Both of these activities are yet to be undertaken by the Municipality since they are the subject of the townships application. Accordingly, to allow the decision to be subject to appeal would lead to the piecemeal appellate disposal of issues in litigation.⁶ In any event, the pending appeal has been rendered academic in view of the contents of the letter from the Controller alluded to above.

[24] With regard to the pending township applications, it is contended on behalf of the applicant that, given the length of the delay read with the events relating to the appeal, the inaction should be reviewed in terms of section 6 (2) (g) and that a substituting order should be made in terms of section 8 (1) (c) (ii) (aa) of PAJA, approving the township applications. The decision to grant or refuse a township establishment application lies within the purview of the Municipality and its administrative authority.

[25] Section 8 relied upon, which deals with “remedies in proceedings for judicial review” provides as follows:

“(1) The court or tribunal, in proceedings for judicial review in terms of section 6(1), may grant any order that is just and equitable, including orders —

...

(c) setting aside the administrative action and —

...

(ii) in exceptional cases —

(aa) substituting or varying the administrative action...”

[26] The applicant also submitted that the first to the fourth Respondents are simply not competent to deal with the township applications. I am asked to consider that the decision-making relating to a township application is guided by section

⁶ *Guardian National Insurance Co LTD v Searle N.O.* 1999 (3) SA 296 (SCA) at 301B-C, *SABC SOC LTD and Others v DA and Others* 2016 (2) SA 522 (SCA) at paras [66]-[67] and *Cloete v S* 2019 (4) SA 268 (CC) at para [57].

42 of SPLUMA. Section 42(1)(a) provides that a Municipal Planning Tribunal's decision must be guided by the development principles set out in Chapter 2 which the applicant contends in this instance, has been dealt with by the expert town planner.

[27] In contrast, section 8 (2) of PAJA provides as follows:

“(2) The court or tribunal, in proceedings for judicial review in terms of section 6(3), may grant any order that is just and equitable, including orders—

(a) directing the taking of the decision;”

[28] The applicant however, readily concedes that, flowing from the doctrine of separation of powers in terms of the common law, a Court will be reluctant to assume decision-making power for itself where the discretion has been entrusted to another functionary.⁷

[29] The power to substitute the court's decision for that of the administrator is, correctly, provided for in Section 8(1) (c) (ii) (aa) of PAJA. However, this power must be exercised judiciously and in accordance with the requisite degree of deference dictated by the facts of a given case. In *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism (Pty) Ltd*,⁸ O’ Regan J endorsed the SCA approach where Schultz JA⁹ cited with approval Professor Hoexter's account as follows:

⁷ *Premier, Mpumalanga & Another v Executive Committee, Association of State-Aided Schools, Eastern Transvaal* 1999 (2) SA 91 (CC) at para [51]; *International Trade Administration Commission v SCAW South Africa (Pty) Ltd* 2012 (4) SA 618(CC) at para [95]; *Doctors For Life International v Speaker of the National Assembly and Others* 2006 (6) SA 416 (CC) at para [37].

⁸ 2004 (4) SA 490 CC at para [46].

⁹ The SCA judgment is reported as *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).

“(A) judicial willingness to appreciate the legitimate and constitutionally-ordained province of administrative agencies; to admit the expertise of those agencies in policy-laden or polycentric issues; to accord their interpretation of fact and law due respect; and to be sensitive in general to the interests legitimately pursued by administrative bodies and the practical and financial constraints under which they operate. This type of deference is perfectly consistent with a concern for individual rights and a refusal to tolerate corruption and maladministration. It ought to be shaped not by an unwillingness to scrutinise administrative action, but by a careful weighing up of the need for - and the consequences of - judicial intervention. Above all, it ought to be shaped by a conscious determination not to usurp the functions of administrative agencies; not to cross over from review to appeal.”

[30] In *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd and Another*,¹⁰ it is stated at paragraph 42 that:

"The administrative review context of s 8(1) of the PAJA and the wording under ss (1)(c)(ii)(aa) make it perspicuous that substitution remains an extraordinary remedy. Remittal is still almost always the prudent and proper course."

The court went on further to state that:

"[46] A case implicating an order of substitution accordingly requires courts to be mindful of the need for judicial deference and their obligations under the Constitution. As already stated, earlier case law seemed to suggest that each factor in the exceptional circumstances enquiry may be sufficient on its own to justify substitution. However, it is unclear from more recent case law whether these considerations are cumulative or discrete.

[47] To my mind, given the doctrine of separation of powers, in conducting this enquiry there are certain factors that should inevitably hold greater weight. The first is whether

¹⁰ 2015 (5) SA 245 CC.

a court is in as good a position as the administrator to make the decision. The second is whether the decision of an administrator is a foregone conclusion. These two factors must be considered cumulatively. Thereafter, a court should still consider other relevant factors. These may include delay, bias or the incompetence of an administrator. The ultimate consideration is whether a substitution order is just and equitable. This will involve a consideration of fairness to all implicated parties. It is prudent to emphasise that the exceptional circumstances enquiry requires an examination of each matter on a case-by-case basis that accounts for all relevant facts and circumstances.

[48] A court will not be in as good a position as the administrator where the application of the administrator's expertise is still required and a court does not have all the pertinent information before it. This would depend on the facts of each case. Generally, a court ought to evaluate the stage at which the administrator's process was situated when the impugned administrative action was taken. For example, the further along in the process, the greater the likelihood of the administrator having already exercised its specialised knowledge. In these circumstances a court may very well be in the same position as the administrator to make a decision. In other instances some matters may concern decisions that are judicial in nature. In those instances — if the court has all the relevant information before it — it may very well be in as good a position as the administrator to make the decision.”

[31] In this matter, this Court can never be in an as good a position in circumstances where the merits have not been considered by the municipality's functionaries, and more particularly, where the township establishment applications have not even been placed before the Court either as an attachment to the founding affidavit or as part of the formal record of proceedings, but some expert opinions. The question of need and desirability as it relates to economic

feasibility is an aspect, which is highly contested in this application. In my view, it cannot be easily resolved on papers. As Khampepe J held in *Trencon* at para 49:

"Indubitably, where the administrator has not adequately applied its unique expertise and experience to the matter, it may be difficult for a court to find that an administrator would have reached a particular decision and that the decision is a foregone conclusion."

The proper planning and management of land use is complex, and primarily the domain of local authorities to consider.

[32] The high watermark in the applicant's case is that incompetence is the reason for its review regarding the processes embarked upon by the municipality adjudicating the internal appeal and the delay in the township establishment applications, and not the adjudication of the merits. As for the question of delay, the applicant also contributed to the delay complained about from the onset, and accordingly, does not approach this court with clean hands. In contravention of section 69(9) of the Ordinance, the applicant, through its representatives, Van Zyl & Benade Town and Regional Planners, only tiled their response to the respondents' objections on 20 January 2017, which is approximately 15 months, after being requested to do so by the municipality without any explanation for its tardiness.

[33] Significantly, section 7(2) of PAJA provides:

- “(a) Subject to paragraph (c), no court or tribunal shall review an administrative action in terms of this Act unless any internal remedy provided for in any other law has first been exhausted.
- (b) Subject to paragraph (c), a court or tribunal must, if it is not satisfied that any internal remedy referred to in paragraph (a) has been exhausted, direct that the person concerned must first exhaust such remedy before instituting proceedings in a court or tribunal for judicial review in terms of this Act.
- (c) A court or tribunal may, in exceptional circumstances and on application by the person concerned, exempt such person from the obligation to exhaust any internal remedy if the court or tribunal deems it in the interest of justice.”

[34] It would also seem to me that the applicant's reliance on the provisions of section 8(1)(c)(ii)(aa) of PAJA is misplaced. The applicant's case for a review and substituting order is, in my view, misplaced and based on an incorrect appreciation of the provisions of PAJA. The relief sought by the applicant is provided for in section 8(2), which is however, not the applicant's case. It is clear that the legislature purposefully distinguished between the remedies provided in section 8(1) and section 8(2) of PAJA. In addition, the order sought in this regard has far-reaching implications for the local municipality. There is merit in the Municipality first considering the townships establishment.

[35] It would appear that the remedies in section 8(1), as counsel for the respondents contended, deal with a situation where there has been some action by an administrator. In contrast, the remedies in section 8(2) are directed at circumstances where an administrator has failed to take a decision and are therefore aimed at facilitating the taking of said decision. In all the circumstances, the application to review the Municipality must fail. It follows

accordingly that the relief sought for a substituting order lacks merit. The applicants and the respondents were each partially successful regarding this matter and for that reason, it is fair and just that each party be responsible for their own costs.

[36] Order:

1. The late filing of the respondents' answering affidavit is condoned;
2. The Rule 30 (1) application is upheld;
3. It is declared that the Internal Appeal lodged on behalf of the fifth, seventh and eighth respondents on 28 February 2018, against the ruling of the third respondent dated 12 December 2017, is invalid;
4. The application for the substitute order in terms of section 6(2)(g) and section 8(1)(c)(ii) of PAJA is dismissed; and
5. There is no order as to costs.



T P MUDAU
Judge of the High Court

Date of Hearing: 16 November 2020

Date of Judgment: 11 February 2021

APPEARANCES

For the Applicant: Adv. J L Venter

Instructed by: ADRIAAN VENTER ATTORNEYS & ASSOCIATES

For the 5th, 7th and

8th Respondent:

Adv. E Van AS

Instructed by:

IVAN PAUW AND PARTNERS ATTORNEYS