Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO

IN THE HIGH COURT OF SOUTH AFRICA
NORTHERN CAPE DIVISION, KIMBERLEY

Case No's: 704/20 & 900/20
Determined on paper
Delivered on: 22/01/2021

In the matter between:

DEMOCRATIC ALLIANCE ("THE DA") Applicant

and

SOL PLAATJE LOCAL MUNICIPALITY 1st Respondent
THE MUNICIPAL MANAGER, SOL PLAATJE 2nd Respondent
LOCAL MUNICIPALITYAFRIBIZ [INVESTMENTS] 3rd Respondent

Coram: Mamosebo J et Mofokeng AJ

JUDGMENT ON REVIEW

MAMOSEBO J

[1] This application was lodged on an urgent basis on 26 March 2020. The applicant sought to interdict the respondents from developing Erven commonly known as 4112 to 4117 into houses for the indigent members of the community pending the outcome of a review application.

[2] Mayet AJ granted an order by agreement on 19 May 2020 in terms of which: The urgent application was removed from the roll; costs to be costs in the review application; that the applicant files its review application by 04 June 2020 with a schedule for filing the record and other documents, including heads of argument. When the application served again before this Court on 24 August 2020 the papers were not in order. The parties agreed to update the court file consequent to which the review would be decided on the papers. The file was only returned on 08 October 2020.

The parties

[3] The applicant is the Democratic Alliance (the DA), a political party registered in terms of s 15 of the Electoral Commission Act[1] . The first respondent is Sol Plaatje Local Municipality, a local government established in terms of s 154(6) of the Constitution of the Republic of South Africa[2] (the Constitution) read with s 2 of the Local Government: Municipal Systems Act[3] (the Systems Act). The second respondent is the Municipal Manager of Sol Plaatje Municipality in his nominal capacity as the accounting officer of the Municipality. The third respondent is Afribiz Investments, a business firm or entity, whose further details are unknown to the applicant.

[4] The relief sought by the DA is the following:

4.1 Declaring the decision to allocate or award land known as Erven 4112, 4113, 4114, 4115, 4116, and 4117 Kimberley or to award the right to their use or control to Afribiz Investments or any

[1] 51 of 1996
[2] 108 of 1996
[3] 32 of 2000

other person or entity to be in non-compliance with mandatory legal prescripts and consequently unconstitutional and invalid;

4.2 Reviewing and setting aside the decision in para 4.1 (above), alternatively granting a just remedy;

4.3 Ordering the Municipality and the Municipal Manager to pay the costs of the application including the costs of the application under Case Number 704/2020 jointly and severally, the one paying the other to be absolved. Save for Afribiz Investments all other respondents are opposing the urgent application and the review application.

Background

[5] The African National Congress (the ANC) hosted its Annual January gathering in Kimberley, Northern Cape, on 09 January 2020 to commemorate its birth on 08 January 1912. According to the Acting Municipal Manager, Mr Boy Dhluwayo, the visit by President Cyril Ramaphosa was in his capacity as both the President of South Africa and of the ANC. Among those accompanying the President when they conducted a house-to-house visit were the Premier of the Northern Cape and the Executive Mayor of the Municipality. During the walk-about in the Colville suburb of Kimberley one resident, Ms Lydia Kok, invited the President to her residence where he witnessed the abject inhumane living conditions of her extended family of 42 members comprising the elderly, children and disabled members, crammed into her three-roomed dwelling.

[6] Mr Dhluwayo maintains in his answering affidavit that the President immediately impressed on the Executive Mayor to *"do something about*

the situation." The presidential exhortation made headlines in one of the local newspapers, the Diamond Field Advertiser (the DFA), on 28 January 2020. Afribiz was moved by the heart wrenching article and committed to build homes for the 42 family members on a charitable basis at no cost to either the government or the Municipality. The DFA published this story:

> ***"Good news for 42 people living in one house***
> *Six houses will be built for the 42 Colville residents currently crammed into one house.*
> *This pledge was made by a Venda-based company, Afribiz Investments, which partnered with its corporate social investment foundation, the Collen Mashawana Foundation.*
> *Each family will now get a house while the existing house will be renovated for the seventh family to remain in.*
> *The company, which has been in existence for 15 years, saw an article in the DFA and contacted the newspaper for more details on how it could intervene.*
> *The company builds the houses, while other parties and individuals step in [and] donate furniture."*

[7] The offer by Afribiz was entertained or pursued by the Executive Mayor by convening a meeting of Executive Directors, and giving instructions to the Municipal Manager, who then occupied the position of Executive Director of Infrastructure and Services, to identify available land, to conduct a feasibility study and to prepare a report on its suitability for human settlement. This feasibility report was commendably promptly filed on 31 January 2020 in accordance with which possible suburbs for the construction of the six houses were identified at Homelite, Beaconsfield, Moghul Park, Lerato Park and Colville. On an elimination process based on the infrastructural challenges, the sites were narrowed down to two: Greenpoint and Beaconsfield as both were already zoned for residential use. According to the Municipal Manager, the site was already identified in the Municipality's Integrated Development Plan (IDP) as zoned to be developed for housing for the poor.

[8] On 19 February 2020 the office of the Executive Mayor addressed a letter to the Afribiz Project Manager (SP4) expressing gratitude for the gesture and confirming the available sites earmarked for the development. The contention by the Municipality is that ownership of the said erven vests in the Municipality.

[9] However, a spoke in the wheel appeared via Mr Andrew Louw, the leader of the applicant (the DA), who deposed to the founding affidavit on behalf of the DA. He made the averment that there were disgruntled community members in Beaconsfield who expressed their opposition to their ward counsellor, Mr Herbert Jafta, that the identified erven had already been allocated or disposed of to an independent organisation or Construction Company and who had already commenced with the development project of houses for the six families. Mr Louw maintains that he was also approached by other disgruntled community members, which obliged him to launch his own investigation and obtain further information from the Municipality.

[10] In light thereof that the DA avers that it could not find any council resolution that dealt with the allocation or disposal of the said erven it concluded that the Municipality had acted outside the prescripts and Mr Louw then demanded written reasons from the Municipality for their decision. When the reasons were not forthcoming the DA approached this Court for the initial urgent interdictory relief pending the review application. It is the Beaconsfield site which the Municipality found to be most suitable to address the need at hand that has now become the subject of this review application.

<u>The grounds for review</u>

[11] The DA has raised the following as grounds for this review:

11.1 The decision whether or not to utilise municipal land for anything other than to render basic municipal services is reserved for the Municipal Council. The impugned decision to award the land in question to Afribiz constitutes administrative action as defined by s 1 of the Promotion of Administrative Justice Act (PAJA) but was seemingly taken by the Municipal Manager whilst he was not authorised to do so thereby and accordingly acted in contravention of s 6(2)(a)(i) of PAJA;

11.2 Sec 6(2)(b) of PAJA requires mandatory and material procedures to be complied with or adhered to:

11.2.1 That Regulation 5 and 34 of the Municipal Asset Transfer Regulations[4] required the Municipal Manager to have conducted a public participation process to precede subsequent determinations by the Municipal Council on how the land may be used;

11.2.2 In addition to the public participative process and before any decision could be made to award or allocate a right to use or control over the land that there ought to also have been a determination by the Municipal Council as contemplated by s 14(2) of the Municipal Finance Management Act (MFMA)[5].

11.2.3 The administrative action was procedurally unfair in terms of s 6(2)(c) of PAJA; based on the assertion that

[4] R878 dated 22 August 2008
[5] 56 of 2003

interested parties were not afforded an opportunity to make inputs before any decision was taken;

11.2.4 The flawed belief by the Municipal Manager that he could allocate or award a right of use of land to the poor without following mandatory prescripts as required contravened s 6(2)(e)(i) of PAJA cannot be left unchallenged;

11.2.5 Sec 6(2)(e)(iii) and (iv) of PAJA requires the decision to have been based on relevant considerations and not be based on unauthorised or unwarranted dictates of another person or body. In this instance the Municipal Manager was influenced by the noble intentions of Afribiz to provide housing for the destitute extended family following the expressed concerns of the President of the country and the ANC;

11.2.6 The administrative action must not contravene any law and must be authorised by the empowering legislation – Sec 6(2)(f) of PAJA. The Municipality and its Municipal Manager have failed to comply with the mandatory procedures and therefore the impugned decision was not authorised by the empowering provisions;

11.2.7 The decision is not only unlawful but it is also invalid and stands to be set aside as contemplated by s 8(1)(c) of PAJA.

Thus the DA contended.

The Spatial Planning and Land Use Management Act 16 of 2013 (SPLUMA)

[12] The DA's argument pertaining to SPLUMA is contained at para 24 of Mr Louw's founding affidavit which reads:

> *"Jafta subsequently conducted enquiries which involved perusing records of council meetings and council resolutions and was unable to find any evidence of a council resolution where it was decided that the Erven were not needed for the [rendering] or supplying of basic municipal services and that it may be disposed of, whether by sale or merely by making it available to Afribiz for construction and subsequent allocation and awarding to members of the community. He could also not find any resolutions that the provisions of SPLUMA be deviated [from] and that land be distributed on a basis other than that provided in the Municipality's policies and other legal prescripts."*

[13] The DA has also cited the following from the objects of SPLUMA to support their viewpoint:

> *"...to provide for a uniform, effective and comprehensive system of spatial planning and land use management for the Republic, ...to ensure that the system of spatial planning and land use management promotes social and economic inclusion, ...to provide for development principles and norms and standards, ...provide for sustainable and efficient use of land, ...redress the imbalances of the past and to ensure that there is equity in the application of spatial development planning and land use management systems."*

[14] The DA does not specify the sections in SPLUMA which the respondents have contravened. However, s 51 of SPLUMA which deals with internal appeals is relevant in the circumstances before us (not referred to by the DA). It stipulates:

> *"(1) A person whose rights are affected by a decision taken by a Municipal Planning Tribunal 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.*
>
> *(2) The municipal manager must within a prescribed period submit the appeal to the executive authority of the municipality as the appeal authority.*
>
> *(3) The appeal authority must consider the appeal and confirm, vary or revoke the decision.*

> (4) *A person whose rights are affected within the provisions of subsection (1) includes –*
>
> *(a) an applicant contemplated in section 45(1);*
>
> *(b) the municipality where the land affected by the application is located;*
>
> *(c) an interested person who may reasonably be expected to be affected by the outcome of the land development application proceedings.*
>
> (5) *An interested person for the purposes of subsection (4)(c) must be a person having a pecuniary or proprietary interest who is adversely affected or able to demonstrate that she or he will be adversely affected by the decision of the planning tribunal or an appeal in respect of such a decision.*
>
> (6) *A municipality may, in the place of its executive authority, authorise that a body or institution outside of the municipality or in a manner regulated in terms of a provincial legislation, assume the obligations of an appeal authority in terms of this section.*
>
> (7) *No appeal in respect of a decision taken in terms of or pursuant to this Act may be lodged in terms of section 62 of the Municipal Systems Act."*

[15] As stated, the information was furnished by the Municipal Manager that the Erven were already identified and zoned off for residential use in the Municipality's Integrated Development Plan as a site to be developed for housing for the poor. However, it is also known as an infill site, meaning that it is an open space within a built-up area as approved in terms of SPLUMA which is used for the upgrading of existing informal settlements or the development of new residential developments. This information has not been disputed by the DA hence its argument, which is suggestive of a failure to adhere to spatial planning in respect of the six identified erven, lacks substance.

[16] Further, the two opposing respondents highlighted the following at para 17.6 in their answering affidavit under Case No 704/2020: *"What is worrying is that the homeowners in this area are now worried about the value of their properties dropping because of the shanties."* This contention is unsupported because the only shanties on site referred to in these papers are the two intended for utilisation as a site office and storage facility during the construction phase.

[17] **The upshot is that it is evident that the applicant had an alternative remedy in terms of SPLUMA to lodge an appeal as envisaged in s 51 and has failed to do so.**

Consideration of the specific grounds raised by the DA

[18] First, the DA alleged that the decision whether or not to utilise municipal land for purposes other than to render basic municipal services is reserved for the Municipal Council. The submission is that the impugned decision to award the land constitutes administrative action as defined by s 1 of the Promotion of Administrative Justice Act (PAJA) was taken by the Municipal Manager whilst he was not authorised to do so thereby contravening of s 6(2)(a)(i) of PAJA[6].

[19] The contention is incorrect. The letter dated 19 February 2020 written under the letterhead of the office of the Executive Mayor and addressed to Ms Karabo Phihlela, the Project Manager, Afribiz, has been written on behalf of the entire Municipality and is not the Mayor acting on a frolic of his own. The letter ("FA4") reads:

> *"Dear Madam*
>
> *This letter serves to inform you that the Office of the Executive Mayor [is] extremely pleased with your kind gesture of providing housing to one of our destitute families within the municipality.*
> *We as a municipality are committed to improve the lives of our communities by delivering basic quality services.*

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[6] Section 6(2)(a)(i) of PAJA stipulates:
(2) A court or tribunal has the power to judicially review an administrative action if –
(a) the administrator who took it –
(i) was not authorised to do so by the empowering provision.

It is against this background that I [commit] myself and the municipality in providing the following six (6) serviced sites for you to construct these houses at your earliest possible date.

The sites are as follows and [are] located within the suburb of Beaconsfield:

- *Site (erf) 1: 4112*
- *Site (erf) 2: 4113*
- *Site (erf) 3: 4114*
- *Site (erf) 4: 4115*
- *Site (erf) 5: 4116*
- *Site (erf) 6: 4117*

These sites are located within the provision of services such as water, sewerage, electrical reticulation. The provision of these services will be for the cost of the municipality.

I trust you will find this in order.

Yours in community development

Regards,

Mr GE Arends
Executive Manager"

[20] It is incontrovertible that the six erven were already zoned for residential purposes. SPLUMA's objectives are that past racially discriminatory spatial planning and regulatory imbalances must be addressed. It must also include persons beset by poverty and disadvantaged communities. The six families resort within such rubik. They also meet the preferential criteria based on people with disabilities as well as the children. I am of the firm view that expecting the court to nullify the Municipal decision for a fresh council resolution or public participation may be over-fastidious and may entangle the Municipal Council in red tape which will simply exacerbate and prolong the misery of the long suffering families. In any event, I do not think any disposal or transfer

of this land was ever in issue. Even if this court were to accept that the decision to award the land to these families was influenced by the President I do not think it is a consequence of taking into consideration irrelevant considerations as opposed to failing to consider the relevant considerations. In my view the applicant has not made out a case for the claimed contravention of s 6(2)(e)(iii) and (iv) of PAJA.

[21] Our country has been tainted with malfeasance and corruption to such an extent that even when a philanthropist offers to do good for indigent citizens the gesture may be viewed with suspicion or linked to ulterior motives. I have not discerned in this transaction between the Municipality and Afribiz that it has been tainted by fraud or gross irregularity that would lead to it being undone.

[22] The DA maintains that the respondents contravened s 6(2)(b) of PAJA because the respondents have failed to comply with mandatory and material procedures or conditions prescribed by an empowering provision, namely, Regulations 5[7] and 34 of the Municipal Asset Transfer Regulations (MATR). In the answering affidavit, the Municipality and the Municipal Manager vehemently deny transferring ownership of the said erven.

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[7] "Regulation 5 Part 1: Decision-making process for municipalities
Transfer or disposal of non-exempted capital assets
5. (1) A municipality may transfer or dispose of a non-exempted capital asset only after –
(a) the accounting officer has in terms of regulation 6 conducted a public participation process to facilitate the determinations a municipal council must make in terms of section 14(2)(a) of the Act; and
(b) the municipal council –
(i) has made the determinations required by section 14(2)(a) and (b); and
(ii) has as a consequence of those determinations approved in principle that the capital asset may be transferred or disposed of.
(2) Subregulation (1)(a) must be complied with only if the capital asset proposed to be transferred or disposed of is a high value capital asset. If the combined value of any capital assets a municipality intends to transfer or dispose of in any financial year exceeds five percent of the total value of its assets, as determined from its latest available audited annual financial statements, subregulation (1)(a) must be complied with in relation to all the capital assets proposed to be transferred or disposed of during that year.

Disposal is defined in Chapter 1 of the MATR as follows:

"in relation to capital asset, includes –

(a) the demolition, dismantling or destruction of the capital asset; or

(b) any other process applied to a capital asset ***which results in loss of ownership of the capital asset otherwise than by way of transfer of ownership;***

"disposal management system" means the system contemplated in Regulation 40 of the Municipal Supply Chain Management Regulations, published by General Notice No. 868 of 2005"

"Transfer", in relation to a capital or subsidiary asset, ***means transfer of ownership*** *in the asset as a result of a sale or other transaction."*

[23] The respondents argued that Regulation 34(1) of MATR is not applicable to this case because the capital asset in respect of which the proposed right is to be granted does not exceed R10 million and there was therefore no need for public participation. Regulation 33(2)(b) further stipulates that the chapter does not apply to the granting by municipalities and municipal entities of rights on municipal land to housing for the poor to the beneficiaries of such housing. By virtue of the conclusion that I have come to, there is no need to decide this issue.

[24] I have not discerned in the papers that a case has been made out by the applicant that the said erven have either been disposed of or transferred to Afribiz. FA 2.1, FA 2.2, FA 2.3, FA 2.4, FA 2.5 and FA 2.6 are copies of the Deeds search that confirm that the owner of the said erven remains Sol Plaatje Municipality.

[25] The DA contends in reply to the Municipality's averments relating to s 14(1) and s 90 (1) of the Municipal Finance Management Act[8]

[8] Section 14(1) of the Municipal Finance management Act 56 of 2003 stipulates: "A municipality may not transfer ownership as a result of a sale or other transaction or otherwise permanently dispose of a capital asset needed to provide the minimum level of basic municipal services."
Sec 90(1) stipulates: "A municipal entity may not transfer ownership as a result of a sale or other transaction or otherwise dispose of a capital asset needed to provide the minimum level of basic municipal services."

(MFMA) (disposal of capital assets) that the Municipality still had to approach the Municipal Council for a resolution that the said sites were not required to provide a minimum level of basic municipal services, but had failed to do so. The DA continued in its argument to submit that what is at issue is that the right of use or control of the land is allocated or given to a person for an indefinite period which necessitated prior council resolution.

[26] Counsel for the respondents has argued the doctrine of necessity in their heads of argument which case, submitted the DA, was not made out in the answering affidavit. The respondents' reliance on the doctrine of necessity cuts across the spectra of the right to housing, and the paramountcy of the children's best interests which includes the right of a child to be treated and kept in conditions suitable to a child. The DA was alive to the submission by the respondents that the doctrine of necessity requires progressive realisation of these rights. The respondents' argument has been strengthened by the doctrine of necessity which is crisply explained in an article by Saad Abdulbaqi Sabti YP Rama Subbaiah: *Administrative Law: Doctrine of necessity, doctrine of legitimate expectation and doctrine of delegation*[9]. A closer scrutiny of the facts and the genesis of the matter shows that from as far back as the alleged walk-about by the President of the country the issue has always been the dismay and appalling conditions in which the 42 members of the Lydia Kok family found themselves in. As much as the doctrine of necessity was not specified in so many words in the answering affidavit the context in which the plight of the Kok family was captured in the DFA article, understood and apparently reacted upon firstly by all who participated in this process, displays the simplified form of necessity. I

[9] International Journal of Law, ISSN: 2455 – 2194, RJIF 5.12, www.lawjournals.org Volume 3, Issue 3 May 2017 Page No 59 - 62

do not agree with the submission by the DA that necessity only comes out for the first time in the heads of argument.

[27] Another ground relied upon by the DA is that, because the respondents have taken into consideration and acted upon the apparent intimidation by the President, the decision to award the 6 erven to the destitute families was therefore informed or influenced by irrelevant considerations emanating from the President or Afribiz and relevant considerations were not considered making the decision unwarranted and in contravention of s 6(2)(e)(iii) and (iv) of PAJA. In countering this submission, the respondents' counsel relied on what was stated by the Pakistani Chief Justice Muhammed Munir, validating what was termed the extra constitutional use of emergency powers by Governor General, Ghulam Muhammad, quoting from Bracton's maxim, *"that which is otherwise not lawful is made lawful by necessity."*

[28] The in-fill site comprises 6 stands and are not vast tracks of land which can accommodate a large population. This court is aware of the importance of not creating a wrong precedent and the need to ensure that the laws of this country are promoted and upheld. The continued failure of the local government to perform in its service delivery, had caused ordinary citizens such as Ms Lydia Kok to pin their hopes on the President of the Country. Nothing prevented the parties from resolving this matter amicably in the interests of the indigent families. The Municipality ought also to have played a more responsible and transparent role to avoid such unnecessary litigation. Why did it have to take the President of the Country and the ANC to kick the Municipality into action when the plight of Ms Lydia Kok's extended family must have been known to them? There is no doubt in my mind that they are guilty of dereliction of duties.

[29] It is hoped that Afribiz Investments, partnered by its Social Investment Foundation, will still be willing to provide its resources to ameliorate the impoverished circumstances of the mentioned families. The construction of the said houses is therefore found not to be attended by any illegality or malfeasance. **The decision by the Municipality is consequently endorsed.**

[30] On a conspectus of all the aforementioned considerations, I am of the view that, by allowing the Municipality to proceed with the construction, it will restore the families' right to dignity, to decent shelter and for their improved wellbeing. See *Government of the Republic of South Africa and Others v Grootboom and Others*[10] where Yacoob J, writing for the unanimous court made the following pronouncements:

> *"[24] The right of access to adequate housing cannot be seen in isolation. There is a close relationship between it and the other socio-economic rights. Socio-economic rights must all be read together in the setting of the Constitution as a whole. The State is obliged to take positive action to meet the needs of those living in extreme conditions of poverty, homelessness or intolerable housing. Their interconnectedness needs to be taken into account in interpreting the socio-economic rights, and, in particular, in determining whether the State has met its obligations in terms of them."*

The ConCourt continued with the following[11]:

> *"[41]...A court considering reasonableness will not enquire whether other more desirable or favourable measures could have been adopted, or whether public money could have been better spent. The question would be whether the measures that have been adopted are reasonable. It is necessary to recognise that a wide*

[10] 2001 (1) SA 46 (CC) at para 24
[11] At para 41H

range of possible measures could be adopted by the State to meet its obligations. Many of these would meet the requirement of reasonableness. Once it is shown that the measures do so, this requirement is met."

The following remarks by Yacoob J are also instructive[12]:

"[44] Reasonableness must also be understood in the context of the Bill of Rights as a whole. The right of access to adequate housing is entrenched because we value human beings and want to ensure that they are afforded their basic human needs. A society must seek to ensure that the basic necessities of life are provided to all if it is to be a society based on human dignity, freedom and equality. To be reasonable, measures cannot leave out of account the degree and extent of the denial of the right they endeavour to realise. Those whose needs are the most urgent and whose ability to enjoy all rights therefore is most in peril, must not be ignored by the measures aimed at achieving realisation of the right. It may not be sufficient to meet the test of reasonableness to show that the measures are capable of achieving a statistical advance in the realisation of the right. Furthermore, the Constitution requires that everyone must be treated with care and concern. If the measures, though statistically successful, fail to respond to the needs of those most desperate, they may not pass the test."

[31] There is no doubt in my mind that the living conditions of Ms Lydia Kok and members of her extended family were lamentable and the measures intended to be put in place by the Municipality to restore their dignity would have passed the muster of the test of reasonableness.

[32] **On a question of costs**. Both parties have urged this court to order punitive costs against each other. I do not think either party has persuaded me to do so. In this case, there is no winner and loser. Therefore I find no value in granting costs against either party. It is in instances like these where an appropriate order will be that each party pays its own costs, including the costs in Case 704/2020.

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[12] At para 44

[33] In the result, the following order is made:

It is ordered that:

1. the application of the Democratic Alliance (the DA) is dismissed.

2. each party pay its own costs including the costs in Case Number 704/2020.

[redacted]

MAMOSEBO J
NORTHERN CAPE DIVISION

I concur

[redacted]

MOFOKENG AJ
NORTHERN CAPE DIVISION

For the applicant:	Adv MC Louw
Instructed by:	JG Keyl Attorneys
	c/o Haarhoffs Inc
For the respondents:	Mr S Groenewaldt
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