

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO.: 54750/2016

2/2/2017

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

DATE

SIGNATURE

In the matter between:

ISAGO@N12 DEVELOPMENT (PTY) LTD

APPLICANT

and

THE CITY OF MATLOSANA LOCAL MUNICIPALITY

FIRST RESPONDENT

MATLOSANA GARDENS (PTY) LTD

SECOND RESPONDENT

THE SURVEYOR GENERAL

THIRD RESPONDENT

THE REGISTRAR OF DEEDS

FOURTH RESPONDENT

THE DEPARTMENT OF RURAL, ENVIRONMENT AND

AGRICULTURAL DEVELOPMENT, NORTH WEST

PROVINCIAL GOVERNMENT

FIFTH RESPONDENT

Heard: 26 October 2016

Delivered 2 February 2017

JUDGMENT

A.A.LOUW J

Introduction

[1] The applicant applied in part A of an urgent application for the following relief:

"2. That the Second Respondent be interdicted from continuing with and directed to cease all physical development activities, including, but not limited to, groundworks, installation of services, construction of buildings and all other activities related to the development and establishment of Erven 2450 and 2451 in the township known as Flamwood Extension 24, pending the finalisation of the review applications, including any appeals, contemplated in Part B hereof;"

[2] Part B aims to obtain orders against the first, third, fourth and fifth respondents in respect of the establishment of the township Flamwood Extension 24. The object is to have those various resolutions set aside which will have the effect of disestablishing the township.

[3] Flamwood Extension 24 (the township) is situated on the Klerksdorp/Stilfontein corridor. The applicant has developed substantial property in close vicinity to that of the property.

[4] The original township as approved on 29 November 2006 comprised of 110 erven which constituted about 10 residential units per hectare.

[5] That general plan for the approved township was neither submitted nor approved by the Surveyor General within a period of one year after the date of approval of the application. Applicant contends that the application has accordingly lapsed as provided in section 101 of the Town Planning and Townships Ordinance, 15 of 1986.

[6] The approved dwelling units were increased to approximately 675 on application by the second respondent's predecessor. This was followed by an application of 21 October 2013 in terms of which the permissible number of residential stands was increased from 675 units to 1173 units.

[7] In that regard the following is stated in paragraph 10.8. of the founding affidavit:

"10.8. Despite the fact that the application for amendment was clearly material and constituted a substantively new application, the Municipality accepted same, processed same (without any form of circulation or notification to affected parties) and approved same no sooner than 12 November 2013, as is evident from the letters of approval, attached to the Notice of Motion as Annexure "A". To put it differently, an application with far reaching impacts on services, traffic generation, the environment, owners of adjacent and other properties in close proximity to the subject property and numerous other aspects related to the development of land was accepted by the Municipality as an application for the amendment of an approval that did not exist anymore (i.e. that had lapsed), without any proper motivation or supporting studies and proceeded to approve it within 18 (eighteen) days after date of receipt thereof, without any form of public participation, notification or opportunity given to parties, such as the applicant, who may be affected by the development, to consider an application, studies in support

thereof and to then form a view as to whether it intends objecting thereto, commenting thereon or simply let it be."

[8] The applicant's grievances in this regard are the following:

- 8.1. Its right to a fair administrative justice process has been ignored.
There were no public participations at each stage of the "amendments" to the original approval and thus there was no opportunity to object, comment or make any other input.
- 8.2. The development on the property causes environmental damage.
The second respondent interfered with the watercourse of the Palmietspruit and is constructing storm water drainage therein.
Furthermore, part of the parking area of the development is below the 1:100 year flood line which is contrary to the conditions of approval.
- 8.3. There is no clarity where the bulk services to support the development will come from. In this regard the applicant fears that bulk services it supplied in the surrounding areas it developed will simply be used for the benefit of the second respondent. In this regard the first respondent has authorised the connection by the second respondent to a mini substation erected by the applicant.
- 8.4. The high density of the development will also impact on the traffic flow in the vicinity.

Urgency

[9] The construction on the property started in January 2016. By the time this application was issued in July 2016 extensive developments had already taken place. This appears from a bundle of photographs attached to the answering affidavit. A number of the buildings had reached two or three storeys in height and there were substantial groundwork and other construction in process for further phases to follow. The applicant states the reason the application was not brought sooner is that alarm bells only started ringing when substantive structures appeared. Thereafter the applicant tried to obtain information from the first respondent and the second respondent as to what was going on i.e. obtain copies of the approvals and all other relevant documentation. This it only received during the second half of June 2016. It says thereafter it moved as speedily as possible to have this application issued. I accept the applicant's explanation and find that the application is urgent.

Prima facie right

[10] The fact that there was no public participation has the result that the applicant was denied his right to fair transparent and open administrative action and as a meaningful and serious roll player in the area to be able to comment and participate in the decision-making process that led to the disputed approvals of the rights for the second respondent.

Irreparable harm

[11] The absence of a fair administrative justice process in itself leads to irreparable harm in that failure to be allowed to exercise its rights and participate in the decision-making process leads thereto that the applicant has been irreparable harmed.

[12] The interest of the environment and the flood line, the watercourse and other related aspects dealt with above show that there could be meaningful damage to the environment and other persons' properties upstream and downstream, including the properties being developed by the applicant.

[13] This is apart from the bulk infrastructure questions. It has been stated that the second respondent is making use of the bulk electrical infrastructure that the applicant has, at great cost, installed for the benefit of its development. No provision has been made for storm water, roads or sewerage in the area and, if these questions are not addressed, could be to the detriment of all the developers and occupiers in the broader area around the development that is currently underway.

No alternative relief

[14] Applicants submit that it has no alternative relief than approaching this court on an urgent basis for the relief in part A. If this relief is not granted, the court hearing part B will be presented with a *fait accompli*. I accept this argument.

Balance of convenience

[15] This brings me to consideration of the difficult question of the balance of convenience or the balance of harm.

[16] The second respondent's development is a social housing project in terms of the Social Housing Act, 16 of 2008. "Social Housing" is a national government programme for subsidised rental housing to cater for the housing needs of low to medium income households. Of the total development costs of R390 million the Social Housing Regulating

Authority and the Department of Local Government and Human Settlement, North West Province has respectively provided 40% on 29% in grant funding.

[17] With reference to the bundle of photographs attached to the answering affidavit one can see how far the building works have progress in the six months from January to July 2016. It is now a further six months later and the development must be at an advanced stage. Well over half of the budget must have been expended. The second respondent stated that any order to stop the development would be devastating and ruing the financial feasibility of the future development. It sets out a calculation consisting of contractors costs, developers costs and loss of rental income amounting to R115 million and representing the costs of a stop work order.

[18] It is highly questionable whether the balance of convenience justifies the granting of interim relief in these circumstances which will mean that a partly completed building will stand derelict for months, if not years, whilst the review and any appeal thereto are finalised.

[19] The contravention of the environmental authorisation has also now been addressed by the North West Department for Rural, Environment and Agricultural development. On 28 September 2016 it issued a notice of its intention to issue a compliance order in terms of section 31L of the National Environmental Management Act, 107 of 1998. It is specifically stated therein that the second respondent has contravened the environmental authorisation by constructing a parking area within the 1:100 year flood line of the Palmietspruit and also that it has constructed storm water channels within the flood line of the Palmietspruit. In a supplementary affidavit the second respondent stated that it has

halted all construction in the abovementioned area and it promises its full cooperation with the Department to remove all offending construction and to rehabilitate the affected sites.

[20] This to a large extent, although in an imperfect manner, takes care of the environmental concerns.

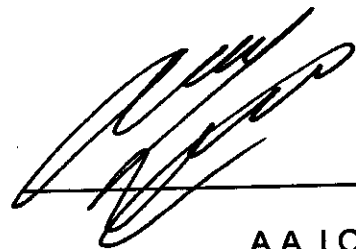
[21] The issue of bulk electricity, water and sewerage to the developments in the area is something that role players in conjunction with the first respondent will have to sort out.

[22] In all the circumstances I am of the view that the harm the second respondent will suffer if the interim relief is granted far outweighs the harm to the applicant if the relief is not granted.

[23] In all the circumstances the application for interim relief cannot be granted.

Order

Part A of the application is dismissed with costs, including the costs of two counsel.

A handwritten signature in black ink, consisting of stylized, overlapping loops and strokes, positioned above a horizontal line.

A.A. LOUW

Judge of the High Court