

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: 1045/2016

Heard on: 15/05/2017

Delivered on: 26/05/2017

In the matter between:

EMTHANJENI LOCAL MUNICIPALITY

Applicant

And

THE MEMBER OF THE EXECUTIVE COUNCIL:

1st Respondent

DEPARTMENT OF CO-OPERATIVE GOVERNANCE,

HUMAN SETTLEMENTS AND TRADITIONAL AFFAIRS –

NORTHERN CAPE PROVINCE

THE NORTHERN CAPE DEVELOPMENT APPEAL

2nd Respondent

RAYMOND SWENSON

3rd Respondent

Coram: Mamosebo J et Ndlovane AJ

JUDGMENT ON REVIEW

MAMOSEBO J

Introduction

- [1] The applicant (the Municipality) seeks from this court an order in which we find that the process followed and the decision taken by the second respondent, the Northern Cape Development Appeal Tribunal (NC/DAT), on 29 September 2015 was unconstitutional and that it be reviewed and set aside; a cost order against the respondents opposing the application; and condonation for the non-adherence to time limits prescribed in s 7(1) of the Promotion of Administrative Justice Act, 3 of 2000 (PAJA).

The parties

- [2] The applicant, the Emthajeni Local Municipality, is a local government authority located in the Northern Cape Province (the Municipality). The first respondent is the Member of the Executive Council (the MEC): Department of Co-operative Governance, Human Settlements and Traditional Affairs, Northern Cape Province. The second respondent is the Northern Cape Development Appeal Tribunal and the third respondent is Mr Raymond Swenson a resident and property owner in De Aar.
- [3] The MEC and NC/DAT, represented by the State Attorney, had filed a Notice of Intention to Oppose the application dated 20 June 2016. However, on 17 January 2017 they withdrew the notice and filed a Notice to Abide the decision of this Court.
- [4] The Municipality had issued a Notice in terms of Rule 16A of the Uniform Rules of Court inviting any interested party to apply to Court to be admitted *amicus curiae*. The Rule 16A Notice was served by the sheriff on all the respondents. Ultimately, none accepted the invitation. The application proceeded unopposed.

Condonation

- [5] The municipality asked for condonation for a minimal period of 6 weeks. The explanation is adequate. The condonation is granted. See *Melane v Santam Insurance Co Ltd* 1962 (4) SA 531 (A) at 532C-F.

The issue

- [6] The question that falls for determination is whether the NC/DAT had authority to intervene on appeal and make the decision reached on 29 September 2015 in respect of municipal land-use.

Factual background

- [7] A historical background to the facts is necessary. Mr Isak Visser is the applicant's Municipal Manager and deposed to the founding affidavit. The Municipality is the registered owner of the Remaining Extent of Erf 259, De Aar, held under Deed of Title T7448/1961 (the immovable property). During October 2011 the Municipal council resolved to apply for the rezoning and subdivision of the said immovable property in terms of the Northern Cape Planning and Development Act, 7 of 1998. The Municipality sought to establish up to 350 residential Zone 1 erven with complimentary Business Zone 1, Open Space Zone 1, Institutional Zone 1, Institutional Zone 2 and Transport Zone 2 erven.
- [8] A company known as Townscape Planning Solutions (Townscape) was mandated to see to the processes of rezoning and subdivision of the said property on behalf of the applicant. They, *inter alia*, compiled reports, published notices and made recommendations to the municipality in respect of the proposed development and motivated that the subdivision application be encouraged and approved.

- [9] Interested parties were notified of the rezoning and subdivision application. The third respondent, Mr Raymond Swenson, together with other individuals, objected to the rezoning and subdivision. Mr Swenson wrote a letter dated 17 April 2014 addressed to the deponent. The letter reads:

"Your recent advertisement in the De Aar Echo and the letter from Townscape Planning Solutions dated 28 March 2014 refers.

I hereby object, in my capacity as owner of a residential property namely Erf 3953 situated on the corner of Grundlingh and Noord Streets De Aar, against your above application on the following grounds:

1. *When I bought my property in 2002 the unobstructed view towards Renosterberg over the open Karoo veld as well as the general good upmarket quality of neighbouring properties were primary considerations in coming to my decision to buy this property. I knew that Erf 259 was not zoned for residential purposes and that no danger therefore existed that my view could change or be obstructed or that any additional noise, air or sound pollution could be caused by any nearby residential (or industrial) development.*
2. *It is my considered opinion that your proposed development of a housing project as the stated purpose of the rezoning sub-division of Erf 259, De Aar will substantially reduce the value of my above property.*
3. *I would like to draw your attention to the Constitutional Court decision (Van Wyk 2012:176 -177; 389) where the Court set aside the decision by a Council to approve building plans without consideration to the influence of such a decision on the valuation of surrounding properties. I urge your Council to seriously*

consider the wisdom and potential cost implications, should your Council decide to approve this application.

4. *It is almost certain to be challenged in court.*
5. *Kindly inform me without delay if and when council decides to either uphold or reject my objection."*

[10] The Municipal Manager gave Mr Swenson feedback by letter dated 13 November 2014, almost seven months later, and to all other people from whom objections were received. Not only does the letter explain the recommendations made and reasons therefor but it also addresses the objections he raised as follows:

"At a meeting of the Executive Committee on 06 November 2014, the Council approved the abovementioned rezoning and subdivision (Reference No UK 11 A(3) dated 06 November 2014).

This area (Erf: a Portion of the Remainder of Erf 259, De Aar) was already identified as an area for future residential development in the Spatial Development Framework of Emthanjeni Local Municipality of 2007.

The location and the topography of this area is of such a nature that it is centrally situated for linking to all municipal main services and is very suitable for the purposes for which is to be used.

The following feedback is provided regarding your objections:

1. *[Objection]: The proposed development of a housing project as the stated [reason for] the rezoning and sub-division of Erf 259, De Aar will substantially reduce the market value of our property and thereby cause substantial financial loss.*

[Response]: The proposed development is residential in nature. The 2007 SDF earmarked the Remainder of Erf 259 for residential development. The layout provides for medium income stands for

integration between the two areas ensuring a gradual transfer from high to medium to low income stands. It is unknown what the effect of the sub-economic development will be on the existing development. Intervention from institutions such as NGO's can be initiated to promote skills development, job creation and a higher living standard.

2. ***[Objection]:** The noise levels at the proposed housing development site on Erf 259, De Aar originating from the main railway line from Johannesburg to Cape Town and from the Northern Cape Mines to Coega harbour (Port Elizabeth) that passes in very close proximity to the proposed housing development pose a serious health risk to the poor economically disadvantaged people who are targeted to inhabit the development.*

***[Response]:** The standard prescribed distance is maintained in the proposed layout from the railway line and the servitude of the power supply lines. Measures to ensure the safety of future residents should be put in place.*

3. ***[Objection]:** We believe that the development, which will take place in close proximity to one of the main entrances of our town, will be detrimental to the tourism potential of our town and will therefore detract from business development and job creation in our town.*

***[Response]:** It is unknown what the impact of the proposed development will be on tourism. Community upliftment projects should be initiated by the local NGO's and institutions.*

4. ***[Objection]:** We are concerned about the safety implications for future residents of the proposed development as they have to cross the R48, a main road, to get into town.*

***[Response]:** The Traffic Impact Assessment recommended that sidewalks be provided along major internal roads of the proposed development, especially along Cilliers Street extension access road. A hard surfaced sidewalk should be provided along the northern side of the R48 to link the development to the existing sidewalks along Voortrekker Street. Sufficient street lighting should also be provided within the development and at both accesses. It is recommended that a formal public transport facility should be provided within the development site.*

Should you wish to appeal against the Council resolution it must be done within 21 days of the date of this letter and addressed to:

Chairperson Development and Appeal Tribunal”.

The letter ends with a request for a copy to be furnished to the Municipal Manager at a given address.

[11] The Municipality was required to obtain approval of the Environmental Authorisation in terms of the Environmental Impact Assessment Regulations, issued in terms of the National Environmental Management Act, 107 of 1998. The approval was granted on 09 September 2014. Regulation 10(2) of the Environmental Impact Assessment Regulations, 2010 required the Municipality, in writing, and within 12 calendar days of the date of the decision, to notify all registered interested and affected parties of the department’s decision as well as provision for lodging of appeals.

[12] Before the Municipality obtained the approval of the Environmental Authorisation and on 02 September 2014, seven (7) days before such approval was granted, the Executive Committee of the Council approved the application for the rezoning and subdivision and also resolved that the

imposed restrictions be removed from the title deed. The Municipality notified Mr Swenson of the Council resolution on 13 November 2014.

- [13] It is on the basis of the failure by the Municipality to notify all interested and affected parties in terms of the aforementioned Regulation 10(2) that prompted Mr Swenson to lodge a Notice of Appeal with the Member of the Executive Council, Ministry of Environment and Nature Conservation dated 15 December 2014 in terms of Chapter 7 of the Environmental Impact Assessment Regulations, 2010. This is the essence of Swenson's appeal:

"Emthanjeni Municipality failed to notify me as a registered, interested and affected party as required by regulation 10(2) of the Environmental Impact Assessment Regulations, 2010 within the required time (12 calendar days) after receiving your letter of authorisation. This, in my opinion, nullifies the authorisation as I was denied proper notification as required by me to respond within the prescribed timeframe. If Emthanjeni Municipality disputes this I would like to receive written representation from them, setting out grounds upon which my claim is disputed. I hereby further reserve the right to future appeal once I have been properly notified of the granting of Environmental Authorisation as set out above."

- [14] Mr Swenson also lodged an appeal with the NC/DAT as advised to do within the 21 day period. The appeal was heard on 29 September 2015. At the appeal hearing the Municipality relied on the Constitutional Court judgment in ***Minister of Local Government, Environmental Affairs and Development Planning, Western Cape v Habitat Council and Others*** 2014 (4) SA 437 (CC) and raised several points *in limine*,

inter alia, lack of authority by the NC/DAT to hear the appeal. I deal with the Constitutional Court judgment at para 16 *infra*.

[15] The following are recorded as the findings of the NC/DAT:

*“The Tribunal found that Emthanjeni Municipality did not effectively perform their functions in that they pre-emptively resolved on the matter before the Environmental Authorisation appeal process was completed. Therefore, based on conditions 23 – 25 of the Environmental Authorisation, the failure of Emthanjeni Municipality (as holder of the authorisation) to timeously notify every registered interested and affected party (inter alia the appellant [Mr Swenson] and the fact that the appeal against the Environmental Authorisation has not been finalized as yet, the proposed rezoning and sub-division, as well as the removal of restrictive conditions of a portion and the remainder of Erf 259, De Aar is referred back to Emthanjeni Municipality for re-consideration **AFTER** completion of Environmental Authorisation appeal process.”*

[16] In the **Habitat** case (*supra*) at 445B – E (para 12) the remarks by Cameron JA are instructive:

“[12] That constitutional vision of robust municipal powers has been expanded in the jurisprudence of this Court, and succinctly summarised by Mhlantla AJ in Lagoonbay [Minister of Local Government, Western Cape v Lagoonbay Lifestyle Estate (Pty) Ltd and Others 2014 (1) SA 521 (CC)]:

“This Court’s jurisprudence quite clearly establishes that: (a) barring exceptional circumstances, national and provincial spheres are not entitled to usurp the functions of local government; (b) the constitutional vision of autonomous spheres of government must be preserved; (c) while the Constitution confers planning responsibilities on each of the spheres

of government, those are different planning responsibilities, based on 'what is appropriate to each sphere'; (d) "planning" in the context of municipal affairs is a term which has assumed a particular, well-established meaning which includes the zoning of land and the establishment of townships'; and (e) the provincial competence for 'urban and rural development' is not wide enough to include powers that form part of 'municipal planning'."

Justice Cameron continued at para 13 as follows:

"[13] This Court in Lagoonbay concluded, without deciding, that '[a]t the very least there is therefore a strong case' for holding that it is constitutionally impermissible for the Province to refuse rezoning and subdivision applications under LUPO. That strong case must be given effect here. Section 44 of LUPO does not withstand constitutional scrutiny. This is for all the reasons the Lagoonbay synopsis sets out. The provincial appellate capability impermissibly usurps the power of local authorities to manage "municipal planning", intrudes on the autonomous sphere of authority the Constitution accords to municipalities, and fails to recognise the distinctiveness of the municipal sphere. This is because, as Jafta J said in Gauteng Development Tribunal[Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and Others 2010 (6) SA 182 (CC) in paras 49 -57], the planning competence that the Constitution ascribes to municipalities "includes the zoning of land and the establishment of townships". So the Provincial Minister was correct to concede that section 44's general appellate power is unconstitutional. Municipalities are responsible for zoning and subdivision decisions, and provinces are not." (Own emphasis)

- [17] First and foremost the reasons for Mr Swenson's objection to the rezoning and subdivision of the remainder of Erf 259 gave rise to the appeal and the decision that resulted in the subject matter of this review. The Constitution of the Republic of South Africa is the supreme law against which all laws and conduct is tested. Mr Swenson says the Municipality should not rezone and subdivide the available land to establish, among others, the proposed residential property because not only will his view of the Renosterberg Mountain be obstructed or obscured but the value of his property will be diminished. He says his decision to acquire the property where he is currently settled was made way back in 2002 and was informed by the fact that there would not be any development or sound pollution that will disturb his tranquillity. He certainly has not taken account that the population of any municipality grows rapidly (the urbanisation) and the planning by each municipality must keep pace with its socio-economic challenges as well as the constitutional imperatives.
- [18] The Municipality is further enjoined by the Constitution in s 26 to provide housing. The section stipulates:
- “Housing – (1) Everyone has the right to have access to adequate housing.***
- (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.”*
- [19] Yacoob J writing for the unanimous court in ***Government of the Republic of South Africa v Grootboom and Others*** 2001 (1) SA 46 (CC) at 83E – F (para 82) pronounced:

“All levels of government must ensure that the housing program is reasonably and appropriately implemented in the light of all provisions in the Constitution. All implementation mechanisms and all State action in relation to housing falls to be assessed against the requirements of s 26 of the Constitution. Every step at every level of government must be consistent with the constitutional obligation to take reasonable measures to provide adequate housing.”

[20] It is common cause that the Council of the Municipality approved the application to rezone and subdivide the Erf in question on 02 September 2014 whereas the Environmental Authorisation was only granted on 09 September 2014, a period of 7 days preceding the authorisation date. Mr Swenson claims that because the Municipality failed to notify him of the approved authorisation it must be nullified. The Appeal Tribunal, pursuant to the appeal by Mr Swenson, decided on 25 September 2014 that the proposed rezoning and sub-division, as well as the removal of restrictive conditions of the remainder of Erf 259, De Aar, be referred back to Emthanjeni Municipality for re-consideration AFTER completion of the Environmental Authorisation appeal process. It is this decision by the Appeal Tribunal that we need to determine whether the Tribunal had the requisite authority to make that decision. In my view, because the Environmental Authorisation has already been granted I do not think it would serve any useful purpose to refer the matter back to the Municipality for re-consideration.

[21] It is not contended that the decision itself by the Municipal Council, the substance thereof, was not properly taken. It is the precipitate decision (the 7 days early), the form thereof, that the objection relate to. There is no suggestion that a different outcome is anticipated or the most probable

outcome would be different. Ideally, the Municipality ought to have waited for the environmental authorisation before approving the application. It also ought to have notified interested and affected parties. It is my view, nevertheless, that those shortcomings by the municipality, viewed holistically and in the spirit and purport of the constitution are not sufficiently material to nullify the authorisation already granted. The guise of objecting to the fact that his view (the panorama) being obscured by the proposed development may have to do with a deeper but inarticulate motive to frustrate the integration of a diversity of communities, which act is selfish.

[22] The applicant's counsel submitted that since the first and second respondents had filed the notice to abide the decision of this court having initially filed the notice of intention to oppose the matter, she will not ask for an order for costs against them. The third respondent, Mr Swenson, did not oppose the application.

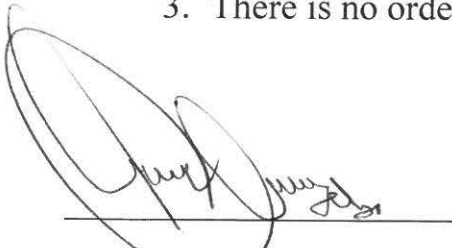
[23] It is in the light of the aforementioned instructive views by the Constitutional Court and the provisions in the Constitution referred to hereinbefore that the decision taken by the Northern Cape Development Appeal on 29 September 2015 is found to be unconstitutional and must be reviewed and set aside.

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

It is ordered:

1. The application for condonation is granted.
2. The process followed by the second respondent, The Northern Cape Development Appeal, and the decision taken on 29 September 2015 in

3. There is no order as to costs.

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MAMOSEBO J

NORTHERN CAPE DIVISION

I concur

A handwritten signature in black ink, appearing to be 'Ndlovane AJ', written over a horizontal line.

NDLOKOVANE AJ

NORTHERN CAPE DIVISION

For the applicant:	Adv A Stanton
Instructed by:	Du Toit & De Beer Attorneys
For the 1 st and 2 nd respondents:	No appearance
Instructed by:	Office of the State Attorney
For the 3 rd respondent:	No appearance