



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

CASE NO: 9234/15

In the matter between:

**MARTIN BRUCE RENKEN
IM A RENT COLLECTOR (PTY) LTD**

**FIRST APPLICANT
SECOND APPLICANT**

and

KWADUKUZA MUNICIPALITY

FIRST RESPONDENT

MENLYN MAINE INVESTMENT HOLDINGS (PTY) LTD

SECOND RESPONDENT

FLANAGAN & GERHARD INVESTMENTS (PTY) LTD

THIRD RESPONDENT

KWAZULU-NATAL DEPARTMENT OF TRANSPORT

FOURTH RESPONDENT

**MEMBER OF THE EXECUTIVE COUNCIL FOR TRANSPORT,
COMMUNITY SAFETY & LIAISON, KWAZULU-NATAL**

FIFTH RESPONDENT

Date of Hearing : 18 May 2017

Date of Judgment : 30 May 2017

ORDER

The following order is granted:

The applicants are ordered to pay the costs of all the respondents.

JUDGMENT

D. Pillay J:

Introduction

[1] This application, launched in July 2015 to review and set aside certain approvals for the development of a mall, has become moot. The only remaining issue for determination is liability for costs of the application.

[2] When litigation becomes moot the usual order regarding costs is that each party pays its own. This is to avoid incurring further costs and burdening the already overstretched resources of the court with having to adjudicate the substantive issues merely to determine the liability for costs. In this matter the pleadings exceed 1006 pages. Counsel assisted the court in narrowing down the material to be covered for which I am indebted.

Applicants' Review

[3] The relief that the applicants sought in their amended notice of motion was first to interdict and restrain any building work in the development of the Ballito Junction Shopping Mall (Ballito Mall) until all conditions in the building plans had been fulfilled. Second, the applicants sought to review, declare unlawful and set aside the first respondent Municipality's approval of the Site Development Plan pertaining to the Ballito Mall, any other approvals granted in terms of the National Building Regulation and Building Standards Act, 103 of 1977 as well as approvals

relating to the access road or its rezoning. The applicant contended that the approvals were unlawful first, because the second respondent Menlyn Maine Investment Holdings (Pty) Ltd and the third respondent Flanagan & Gerhard Investments (Pty) Ltd (collectively referred to as 'the Developers') had not complied with one of the conditions precedent for the approval of the development namely the rezoning of the link road as a public road. The rezoning entitled the applicant and other interested persons to participate in the process, of which they were consequently deprived. Furthermore, by approving the development when the condition had not been complied with the Municipality violated the town planning scheme.

[4] Second, the fourth respondent, the KwaZulu-Natal Department of Transport (KZN DOT), had not finally reviewed or approved the traffic impact assessment, the access and the detailed drawings for the proposed development. Its 'in principle approval, subject to final consideration and approval' was inadequate.

[5] To determine whether the applicants are entitled to their costs the court must assess whether they had any prospects of success for obtaining the order they sought when they launched the review. Hence I investigate first whether the applicants had good cause to challenge the decisions of the Municipality. Irrespective of the answer to the first question, the second question I consider is whether the remedy the applicants sought was appropriate.

Did the applicants have good cause to review the decisions of the Municipality when they launched the application?

[6] This issue depends mainly on whether the conditions were precedent, that is, if they had to be complied with in advance before the Municipality approved the site and building plans and before the development commenced. The Developers contend that the applicants' challenge was based on a rationality test whereas

applicants persist that it is a legality challenge. This is an irrelevant distinction for the purposes of determining costs when all that is required is a finding that the approvals were simply unlawful for non-compliance with a condition precedent.

[7] The relevant conditions read as follows:

- a. '10. A letter of compliance with the DOT requirements shall be lodged with the Minister prior to the issuing of the certificate contemplated by the KwaZulu Natal Provincial Roads Act No 4 of 2001. Such requirements shall be undertaken prior to the commencement of any development.'

And

- b. '14. That the proposed road, road reserve be rezoned from General Commercial 1 purposes to Road purposes; and be constructed in accordance to KwaDukuza Municipality Technical Services recommended road classifications, and once completed be transferred to the municipality as a public road.' (*sic*)

[8] These conditions upon which the Municipality approved the plans must be construed in the context.¹ They are conditions in the Site Plan for the development. As such they are directions at a formative stage to regulate how the development should proceed.² Furthermore, the conditions of the Site Plan have many drafting and typographical imperfections but it communicates the overall intention of presenting a way forward for the development. To rezone and to construct the link road stipulated in condition 14 would be to commence development which condition 10 precludes. A sensible interpretation of condition 10 would be that a letter undertaking to comply with the KZN DOT requirements had to be lodged with the Minister before the development commenced.

¹ *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) para 18; *Du Plessis N.O and Another v GoldCo Motor & Cycle Supplies (Pty) Ltd* 2009 (6) SA 617 (SCA); R.H. Christie *The Law of Contract* 4ed at 149 and 150.

² *Cohen N.O. and Others v Verwoerdburg Town Council* 1983 (1) SA 334 (A); *Oertel en Andere N.N.O v Direkteur Van Plaaslike Bestuur en Andere* 1983 (1) SA 354 (A); *Sandton Town Council v Original Homes (Pty) Ltd and Others* 1975 (4) SA 150 (W).

[9] Last, conditions are not precedent if non-compliance can be waived or remedied.³ Sections 4 and 10(1) of the National Building Regulations and Building Standards Act anticipate that the Municipality may determine the conditions from time to time as the development proceeds. The applicants ought to have been alive to the possibility of the Municipality invoking these provisions to change the conditions that it imposed. Given the scale of the development of about R1.4 billion and its economic and social impact in the region, changing conditions to facilitate the development was more a probability than a mere possibility. As it turned out subsequent to approving the plans the condition fell away. Whether this was by resolution of the Municipality or with the promulgation of the Spatial Planning and Land Use Management Act 16 of 2013 is immaterial. The mere fact that it was possible to dispense with or vary the condition confirms that it was not precedent.

[10] Mr *Goddard* submitted that the Municipality did not intend the conditions to be conditions precedent. The applicants' current stance in accepting that the conditions could be complied with in the course of the development concludes the debate as to whether the conditions were precedent. Manifestly they were not.

Were the remedies appropriate?

[11] The stated harm the applicants sought to avert in launching the interdict and review was the inconvenience they anticipated they would suffer if the conditions pertaining to the link road were not fulfilled. Allegedly they feared that the increased traffic volume would obstruct access to their properties. But the remedies the applicants sought went far beyond protecting their road access. They were expansive, dramatic, drastic and wholly out of proportion to their interest in safeguarding their road access. A targeted remedy would have been to require the respondents to ensure that the development did not inconvenience the

³ *Oertel en Andere N.N.O v Direkteur Van Plaaslike Bestuur en Andere* 1983 (1) SA 354 (A).

applicants in accessing their residence. The applicants could not reasonably have expected to succeed in securing such remedies that overreached the anticipated harm.

[12] Whether a court will grant an order directing a township owner to carry out conditions of establishment will depend on all the facts. Depending on the nature of the conditions the court may refuse to grant such an order if it will be unable to enforce it.⁴ An order seeking compliance with a condition that is not precedent will not, without more, be granted.

[13] The conditions pertain to the zoning and construction of a road yet to be undertaken, not to a building, which, once constructed contrary to approved plans, raises the spectre of demolition as a possible remedy. Even then the National Building Regulations and Building Standards Act limits demolition as a remedy for breach of building laws to specific circumstances.

[14] For as long as the Municipality could determine the conditions from time to time as the development proceeded, the application was on shaky grounds. Furthermore, there was always the ultimate remedy available for non-compliance with any conditions of the development: the Municipality could withhold the certificate of occupancy if the building was not erected in accordance with conditions of approval that it imposed.⁵ The applicants could have called on the Municipality to invoke this provision, by which time it would also have become clearer whether the road would pose an inconvenience.

⁴ *Cohen* 347C-E.

⁵ Section 14 read with s 7 of the National Building Regulations and Building Standards Act, 103 of 1977

[15] The KZN DOT has since approved the plans in so far as it relates to the management of traffic. As it turns out the applicants' fears of the traffic inconveniences have not materialised.

[16] The Developers' contention that the applicants have anticompetitive motives in launching the review is not without substance. The applicants have interests in the Lifestyle Mall that competes with the Ballito Mall. Although the applicants' motives for launching the application are irrelevant to determining its success, they do go to explaining the extraordinary remedies they sought for a harm that could have been averted in so many ways if it had materialised at all.

[17] Finally, the applicants protested about the Municipality's delay in advising them as late as April 2017 of their approval in December 2016. The delay allegedly prejudiced the applicants because the Ballito Mall opened in March 2017 after which they could not proceed with their application. Now that the applicants concede that the substantive issues in dispute are moot it is hard to find that the applicants suffered any prejudice at all from the delay.

Conclusion

[18] The applicants sought costs against all the respondents including the KZN DOT and the fifth respondent, the MEC for Transport, Community Safety & Liaison, KwaZulu-Natal (the MEC). The KZN DOT and the MEC had delivered notices to abide the decision. The KZN DOT had delivered an affidavit to complete the information to assist the court. At the hearing Mr *Kemp*, counsel for the applicants, conceded that they were no longer seeking costs against KZN DOT and the MEC. Accordingly I did not have to hear Mr *A Choudree* who appeared for them.

Order

[19] The applicants are ordered to pay the costs of all the respondents.

D. Pillay J

APPEARANCES

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Date of Hearing : 18 May 2017

Date of Judgment : 30 May 2017