

IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Case No.: 4875/2014

In the matter between:

ENSEMBLE TRADING 535 (PTY) LTD

Applicant

and

MANGAUNG METROPOLITAN MUNICIPALITY
SIBONGILE MAZIBUKO N.O.

1st Respondent

2nd Respondent

[In her capacity as Municipal Manager of the
Mangaung Metropolitan Municipality]

THE MEMBER OF THE MAYORAL COMMITTEE
OF THE MANGAUNG METROPOLITAN
MUNICIPALITY: MUNICIPAL PLANNING

3rd Respondent

THE MEMBER OF THE EXECUTIVE COUNCIL,
FREE STATE PROVINCE: DEPARTMENT OF
CO-OPERATIVE GOVERNANCE, HUMAN
SETTLEMENTS AND TRADITIONAL AFFAIRS

4th Respondent

JUDGMENT BY: DAFFUE, J

HEARD ON: 26 MARCH 2015

DELIVERED ON: 30 APRIL 2015

I INTRODUCTION

[1] This application turns around the process to be followed to amend the Spatial Development Framework (“SDF”) as component of the Integrated Development Plan (“IDP”) of a

municipality in terms of the provisions of section 34(b) of the Municipal Systems Act, 32 of 2000 (“the Systems Act”).

II THE PARTIES

- [2] The applicant is Ensemble Trading 535 (Pty) Ltd. It is represented by Adv Pienaar, assisted by Adv Rautenbach. First respondent is the Mangaung Metropolitan Municipality (“the municipality”), whilst Ms Sibongile Mazibuko, the municipal manager of the municipality, is cited as second respondent. The member for municipal planning of the mayoral committee of the municipality is cited as third respondent. The application is opposed by first, second and third respondents who are represented by Adv Ncongwane SC. The MEC for Co-operative Governance, Human Settlement and Traditional Affairs of the Free State Province is cited as fourth respondent. Fourth respondent does not oppose the application. References herein to “respondents” are to the first three respondents.

III THE RELIEF CLAIMED

- [3] Applicant claims the following relief in its notice of motion:

1. *“That the First Respondent and/or Second Respondent and/or Third Respondent, in their official capacities, be ordered to commence with the process of amending the First Respondent’s Spatial Development Framework as component of the First Respondent’s Integrated Development Plan in terms of the provisions of Section 34 of the Municipal Systems Act, Act 32 of 2000 read with the Local Government: Municipal Planning and Performance Management*

*Regulations published under GNR796 in GG22605 of 24 August 2001 ("The Regulation") in respect of the Applicant's application submitted on the **18th of June 2013**;*

- 2. That the Second Respondent and/or Third Respondent be ordered to prepare a memorandum as contemplated in Regulation 3(2)(a) of the Regulation in respect of the Applicant's application and to refer the proposal for amendment to the First Respondent's Municipal Council, in accordance with Regulation 3 within 21 (twenty one) days from the date hereof;*
- 3. That the First Respondent be ordered to comply with the provisions of Regulation 3(4)(a) and 3(4)(b) of the Regulation within 30 (thirty) days from the date within which the memorandum as referred to in Regulation 3(2)(a) was submitted to the First Respondent.*
- 4. That the First Respondent be ordered to consider the memorandum and take a decision in respect of the amendment of the Spatial Development Framework in accordance with the Applicant's application within 1 (one) month from complying with the provisions of Regulation 3(4) of the Regulation, alternatively such date to be set by the Honourable Court.*
- 5. The First Respondent be ordered to pay the costs of the application.*
- 6. Further and/or alternative relief."*

IV THE CRISP ISSUE TO BE DECIDED

- [4] I mentioned to the parties from the onset that the solitary aspect in dispute to be adjudicated by me is whether applicant is entitled to an order that the municipality's municipal council should be ordered to decide the application

for amendment of the SDF at this stage after compliance with the requirements contained in regulation 3 of the Local Government: Municipal Planning and Performance Management Regulations, published under GNR796 in Government Gazette 22505 dated 24 August 2001 (“the regulation”), or whether the municipal council could only be ordered to do so once an application for township establishment has been filed as well.

- [5] In this regard respondents blame applicant for filing a “multi-pronged” application instead of a simple application for amendment of the SDF and as applicant has decided to embark on this avenue, the municipality’s officials were fully within their rights not to refer the application to the municipal council, but to insist on a township establishment application to be filed as well.
- [6] It must be emphasised that applicant merely requires an order directing respondents to commence with the prescribed process in order for the municipal council to eventually consider the application for amendment of the SDF.

V FACTUAL BACKGROUND

- [7] In order to understand the parties’ different viewpoints it is necessary to provide some factual background which is not in dispute.

- [8] Applicant is the owner of a farm just outside Bloemfontein, known as Portion 3 of the Farm Kwaggafontein 2300, district Bloemfontein (“applicant’s farm”). First respondent is the owner of the remainder of the farm Bloemfontein 654, district Bloemfontein. The portion of first respondent’s property which is relevant to this application is situated along the old Kimberley road, the R64, with Van Blerk Avenue and the N1 as its boundaries. It must still be subdivided and the extent thereof – the proposed subdivision - was agreed to be just over thirteen hectares.
- [9] An exchange and sale of land agreement (“the agreement”) was entered into between the parties in terms whereof the proposed subdivision, properly defined and identified, would be exchanged for applicant’s property. It is common cause that first respondent intends to relocate the Bloemfontein Zoo, presently in close proximity of the city centre, to applicant’s farm once registration of transfer of the properties has taken place. The difference between the agreed valuations of the two properties, to wit R6 460 160.00, is to be paid by applicant to first respondent against registration of transfer.
- [10] It was common cause during the negotiations to conclude the agreement that applicant intended to utilise the proposed subdivision for development. The agreement clearly reflects this. It was also common cause that it would be necessary

to apply for the amendment of the SDF, the rezoning of the proposed subdivision and the amendment of the town planning scheme to enable the applicant to execute the development of the property. It would also be necessary to apply for subdivision of first respondent's property in order to transfer the proposed subdivision to applicant.

[11] In terms of the agreement applicant is responsible for all costs in relation to, and including, any approvals for subdivision of the proposed subdivision and for township development, or for an amendment of the Town Planning Scheme to rezone the proposed subdivision to enable applicant to execute development. I emphasise the word "or" above as it is my impression that respondents probably misread this. Notwithstanding the fact that the registration of the properties has not been taken place, applicant was allowed to apply in its own name at all relevant authorities for subdivision and rezoning of the proposed subdivision.

[12] Applicant instructed MDA Town and Regional Planners to submit an application for the amendment of first respondent's SDF, for subdivision of the proposed subdivision and further subdivision thereof, the amendment of the Town Planning Scheme and the rezoning of the proposed subdivision.

[13] The amendment of the SDF is necessary since the SDF currently indicates first respondent's property as "Metropolitan open spaces" or "MOSS", being a green

category and which does not allow for any development. Applicant seeks an amendment of the SDF to use category “mixed use (without industrial)” to allow for the kind of development anticipated by applicant. This proposed special use will allow for uses such as residential buildings, restaurants, shops, places of assembly, business premises, hotels, guesthouses, offices and several other uses set out in applicant’s communication to respondents.

[14] The effect of it all is that applicant’s application consists of four different sub-applications and this led to the application being referred to by respondents as a “multi-pronged” application.

[15] Once the SDF has been amended, the proposed subdivision will have to be rezoned. The current zoning of the property is indicated as “undetermined” and this does not allow for development. Several letters were exchanged between the parties after the filing of the applicant’s application. In its letter of 22 October 2013 first respondent mentioned that the SDF had to be amended first, and *“after the amendment of the SDF you are requested to submit an application for township development due to the extent of your development.”* In a later letter, dated 20 February 2014, it became clear that first respondent required a township establishment application to be filed prior to amending its SDF. In this regard it relied on clause 5.7.1.3 (f) of the SDF which stipulates that *“no township establishment by means of special uses will be allowed.”* First

respondent failed to quote the first part of the sub-paragraph which reads as follows: “*The rezoning process cannot be used as an alternative for a township development and should not be applied in the yellow area to encourage densification or change of land use to commercial or business, **except for approved mixed land use areas.***” I added the emphasis. This is really the bone of contention between the parties as applicant is of the view that it will eventually seek rezoning and not township establishment. In any event, neither an application for rezoning, nor a township establishment application can be considered without the SDF first being amended. Applicant insists that the application submitted by it has been done in the normal manner and that it is not custom to file separate applications.

VI **APPLICABLE LEGISLATION AND LEGAL PRINCIPLES**

- [16] A SDF has no statutory or legal force, but is a tool used for land use planning at local level. See **Camps Bay Ratepayers and Residents Association and Others v Minister of Planning, Culture and Administration, Western Cape and Other** 2001 (4) 294 (CPD) at 326I – 327B. A municipality’s SDF sets the urban development boundary as a planning criterion, but recognises that it does not preclude the approval of developments beyond such delineation. See **Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and Others** 2008 (4) SA 572 (WLD) 614G – 615C. The purpose of the SDF is to indicate in which areas the relevant municipality intends to

allow development and for which purposes. It is accepted that the aims of the SDF are to promote sustainable, functional and integrated human settlements, maximise resources efficiently and enhance regional identity and unique character of place.

- [17] An amendment to the SDF requires an amendment of first respondent's IDP, the guideline document. See section 26 of the Systems Act. Section 35 of the Systems Act reflects the status of an IDP as *“the principal strategic planning instrument which guides and informs all planning and development, and all decisions with regard to planning, management and development, in the municipality.”* The IDP binds the municipality and all other persons to the extent set out in section 35. Section 35(2) stipulates that a SDF contained in an IDP *“prevails over a plan as defined in section 1 of the Physical Planning Act, 125 of 1991”*.

- [18] The adoption of IDP's is set out in section 25 of the Systems Act. An IDP may be amended in terms of section 34 of the Systems Act which section reads as follows:

“34 Annual review and amendment of integrated development plan
A municipal council-

- (a) must review its integrated development plan-
 - (i) annually in accordance with an assessment of its performance measurements in terms of section 41; and
 - (ii) to the extent that changing circumstances so demand; and

- (b) may amend its integrated development plan in accordance with a prescribed process." (emphasis added.)

[19] The prescribed processes referred to in section 34 are to be found in regulation 3 of the regulation. I quote the regulation in full:

"3. Process for amending integrated development plans

- (1) Only a member or committee of a municipal council may introduce a proposal for amending the municipality's integrated development plan in the council.
- (2) Any proposal for amending a municipality's integrated development must be-
 - (a) accompanied by a memorandum setting out the reasons for the proposal; and
 - (b) aligned with the framework adopted in terms of section 27 of the Act.
- (3) An amendment to a municipality's integrated development plan is adopted by a decision taken by a municipal council in accordance with the rules and orders of the council.
- (4) No amendment to a municipality's integrated development plan may be adopted by the municipal council unless-
 - (a) all the members of the council have been given reasonable notice;
 - (b) the proposed amendment has been published for public comment for a period of at least 21 days in a manner that allows the public an opportunity to make representations with regard to the proposed amendment;
 - (c) the municipality, if it is a district municipality, has complied with subregulation (5); and

- (d) the municipality, if it is a local municipality, has complied with subregulation (6).
- (5) A district municipality that considers an amendment to its integrated development plan must-
 - (a) consult all the local municipalities in the area of the district municipality on the proposed amendment; and
 - (b) take all comments submitted to it by the local municipalities in that area into account before it takes a final decision on the proposed amendment
- (6) A local municipality that considers an amendment to its integrated development plan must-
 - (a) consult the district municipality in whose area it falls on the proposed amendment; and
 - (b) take all comments submitted to it by the district municipality into account before it takes a final decision on the proposed amendment.”

[20] Regulation 3 does not stipulate that a township establishment application has to be filed prior to considering an amendment of the SDF. It is also apparent from the regulation that the municipal council is the only entity that may adopt an amendment of the municipality’s IDP.

[21] Applications for township establishment are lodged with the fourth respondent and not the first respondent, the latter being a mere role player in such procedures who may lodge objections and make presentations to the Township’s Board. See section 8(1) of the Township’s Ordinance, 9 of 1969 read with section 9(2) of the Ordinance. No such application is required if the developer merely wishes to develop the

property instead of establishing a township. An application for rezoning might be necessary and *in casu* it is indeed necessary.

- [22] First respondent's Executive Mayor has delegated powers in respect of amendments to its SDF, being a part of IDP. See Power A18 of Delegation of Powers Policy. The Head of Department: Planning and General Manager: Land Use Control who was responsible for the communication on behalf of first respondent, does not have delegated powers to withhold the applicant's application for the amendment of the SDF from the municipal council or the Executive Mayor *ex facie* the particular Policy.

VII EVALUATION OF THE EVIDENCE AND SUBMISSIONS

- [23] Respondents have taken a point in *limine* in their answering affidavit to the effect that applicant's deponent to the founding affidavit, Mr Daniel Springvale Kross "*has not been authorised to bring this application before the honourable court.*" It was further stated under oath that Mr Kross' assertion that he had been duly authorised to act on behalf of applicant was evidently false. Respondents stated further: "The fact that the deponent is a mere director of the applicant strengthens the first respondent's objection even more and there is cogent reason to conclude that the applicant did not pass a proper resolution authorising the institution of the proceedings against the respondents and that the present proceedings are not those that fall within the objects of the applicant as contained in its founding document."

[24] Mr Ncongwane wisely decided not to make any submissions in this regard, either in his heads of argument or in oral argument. There is no merit in the point taken and it is unbelievable that first and second respondent's deponent could accuse Mr Kross of lying without relying on any factual foundation. In any event, challenges to authority should be done in terms of the provisions of rule 7(1) of the High Court rules and not in the answering affidavits. See **Unlawful Occupiers of School Site v City of Johannesburg** 2005 (4) SA 199 SCA at paras [14] – [16].

[25] It has been repeatedly mentioned in first and second respondent's answering affidavit that applicant's application for the amendment of the SDF cannot be considered by the municipality's council without the lodging of an application for township establishment. Applicant on the other hand is of the view that such an application is neither a statutory, nor a contractual requirement and that first respondent's officials, who do not have delegated powers to consider applicant's application, were trampling on its right to fair administrative action that should be afforded applicant as mentioned above. As mentioned earlier, this dispute is in essence the crux of the matter.

[26] It is apparent from paragraph 2.1.6.2 of the agreement that applicant is entitled to either apply for township establishment on the proposed subdivision, or an amendment of the town planning scheme to rezone the property, as the case may be, to enable it to execute the development of the property. It is stipulated in paragraph 2.1.7 of the agreement that *“this agreement does not constitute consent to or an automatic endorsement by the municipality for the company to proceed within any kind of development on property A without the municipality’s approval for such development.”* Property A is the proposed subdivision. It is stated in paragraph 2.1.8 as follows:

“Should the company which to commence with any development on property A, the company must:

2.1.8.1 submit a detailed rezoning and/or development application to the municipality for consideration and approval of the municipal council;

2.1.8.2 adhere to any conditions that may be imposed by the municipal council and implement such conditions imposed fully;

2.1.8.3 attend to all issues relating to traffic, civil services and the amendment of the Town Planning Scheme to the entire satisfaction of the Mangaung Metropolitan Municipality.”

[27] Neither sub-clause 2.1.6.2, nor sub-clause 2.1.8 obliges applicant to apply for township establishment. Furthermore it was agreed that the municipal council may impose conditions upon approval of an application and this obviously excludes municipal officials. These officials cannot insist on

the lodging of an application for township establishment, in any event not before the application for amendment of the SDF is tabled in the municipal council.

- [28] Township establishment is not a statutory requirement for development in accordance with the Township Ordinance, 9 of 1969. The Ordinance also deals with amendments to town planning schemes in the form of rezoning applications and is not prescriptive of which process to be followed. In any event applications in this regard have to be considered by fourth respondent, and not first respondent or its municipal council, although first respondent has an important role to play and may make any relevant submissions in that regard. Township establishment is also not a requirement in terms of the SDF, notwithstanding respondents' insistence. I refer to the portion quoted from clause 5.7.1.3 *supra*. The application for amendment of the SDF has its purpose to compel respondents to utilise regulation 3 in order for the ultimate decision-maker, the municipal council, to take a decision in respect of that application. The municipal council is not required to determine whether applicant eventually has to apply for township establishment or not. The basis upon which future development shall take place, i.e. by way of township establishment, or by way of rezoning of the proposed subdivision, is immaterial at this stage. Respondents have been provided with sufficient documentation and information in order to proceed with the process set out in regulation 3.

[29] It is clear that the respondents were “bewildered” as stated by their counsel on receipt of the so-called “multi-pronged” application of applicant. Mr Ncongwane went so far during oral argument to concede that the application for amendment of the SDF would have been referred to the municipal council if it consisted of one or two pages only. It should have been a simple application and not an extensive application as relied upon by applicant. I cannot accept such statement. Notwithstanding the detailed application and further information supplied, respondents are still not satisfied. The application, a copy of which is attached to applicant’s founding affidavit, consists of 183 pages. Mr Ncongwane submitted that applicant had elected to lodge its multi-pronged application and it had therefore made its bed and should be prepared to lie on it. Therefore, according to him, officials of first respondent were fully entitled to insist on the lodging of a township establishment application before the matter was considered any further. He submitted in his heads of argument that first respondent could not on its “*own embark on the process as it is not privy to the details and the nature of the development that is to be undertaken by the applicant.*”

[30] Mr Ncongwane went so far to say that, in line with first and second respondent’s answering affidavit, a proper lay-out plan of the development should have been presented, indicating all individual stands, roads, bridges, open spaces, etc, as would be the case when application is made for

township establishment. When I mentioned to him that such a plan has to be drawn by a surveyor at huge costs and eventually been approved by the Surveyor-General, he conceded that in order to save costs, a draft plan would suffice. I find it unacceptable that, in the absence of statutory or contractual requirements, such instructions could have been issued. It is for first respondent's municipal council to consider in principle whether future development on the proposed subdivision should be allowed and if so, it would make sense to amend the SDF as requested by applicant. If the property falls in an area where development should not take place, the municipal council may well refuse to amend the SDF. This court was not called upon to pre-judge the issue and therefore I refrained from considering any arguments for or against development in the particular area. I accept however that applicant recognised the development potential of the proposed subdivision, bearing in mind the developments to the west of Bloemfontein along the R64 and that it would not have concluded the agreement otherwise. A piece of land, in extent thirteen hectares, with no prospect of developing it, is not worth the millions that applicant was prepared to pay.

- [31] First respondent's officials acted unfairly to insist on a requirement such as they have done instead of referring the matter to the municipality's municipal council in accordance with regulation 3. They did not have any authority in this regard and their failure to act is unfair, unjust and unlawful.

Mr Ncongwane relied on the powers and functions stated in section 156 of the Constitution and the judgment in **Johannesburg Metropolitan Municipality** *supra* for a submission that the official(s) of first respondent acted within their rights to insist on the lodging of a township establishment application. The reliance on these authorities is misplaced. It ignores the aforesaid Delegation Policy whilst the court in the judgment relied upon dealt with the authority of properly established tribunals such as the Gauteng Development Tribunal and its Appeals Tribunal established under the Development Facilitation Act, 67 of 1995.

[32] The failure to embark on the process set out in regulation 3 is wrong, unreasonable and inequitable. As mentioned, the application does not require of the court to consider the merits of the application for amendment of first respondent's SDF. Applicant merely seeks an order compelling the first to third respondents in their official capacities to commence with the process of amending the SDF as requested in applicant's application submitted on 18 June 2013, nearly two years ago. Regulation 3 sets out the procedure to be followed and the prayers contained in the notice of motion are in line with those procedures.

[33] If the municipality's municipal council refuses applicant's application to amend the SDF, all further processes anticipated by applicant in the so-called multi-pronged

application will be halted and applicant would not be able to continue, unless the municipal council's decision is set aside upon review. An amendment of the SDF would not give applicant *carte blanche* to develop the proposed subdivision as it wishes without first respondent having any role to play whatsoever. This is trite and does not need to be addressed any further in this judgment.

[34] In summary, the officials of first respondent were not authorised to insist that a township establishment application be lodged, and in any event, no statutory or contractual obligation rests upon applicant in this regard. The insistence is unwarranted, *ultra vires* and, at best, premature.

[35] I am satisfied that applicant has made out a proper case for the relief set out in the notice of motion. I indicated to both counsel during argument that prayer 4 of the notice of motion refers to "first respondent", whilst it would be more appropriate to refer to "first respondent, acting through its municipal council". There was no objection to such an amendment in the event of a finding in favour of the applicant. The same applies to prayer 3. My orders will reflect the amendments.

VIII COSTS

[36] Mr Pienaar submitted that in the event of the application being successful, the costs order should include the costs of two counsel. The prayer for costs in the notice of motion

does not refer thereto and no mention was made to this aspect in the written heads of argument, although the heads were prepared by two counsel. The matter is obviously of tremendous importance to the parties, so much so that respondents instructed senior counsel from Pretoria to argue the matter on their behalf. I am prepared to allow the costs of two counsel for the following reasons: (1) the papers are voluminous; (2) the importance of the matter to both parties; (3) the value of the properties and the amount of money involved; (4) the intricacy of the legal dispute and (5) both counsel instructed by applicant are junior counsel, although Mr Pienaar is the senior of the two.

IX ORDERS

[37] Therefore I grant the following orders:

1. First respondent and/or second respondent and/or third respondent, in their official capacities, are ordered to commence with the process of amending first respondent's Spatial Development Framework ("SDF") as component of first respondent's Integrated Development Plan ("IDP") in terms of the provisions of Section 34 of the Municipal Systems Act, Act 32 of 2000, read with the Local Government: Municipal Planning and Performance Management Regulations published under GNR796 in GG22605 of 24 August 2001 (*the regulation*) in respect

of the applicant's application submitted on the **18th of June 2013**;

2. Second respondent and/or third respondent are ordered to prepare a memorandum as contemplated in regulation 3(2)(a) of the regulation in respect of applicant's application and to refer the proposal for amendment to first respondent's municipal council, in accordance with regulation 3 within 21 (twenty one) days from the date hereof;
3. First respondent, acting through its municipal council, is ordered to comply with the provisions of regulation 3(4)(a) and 3(4)(b) of the regulation within 30 (thirty) days from the date when the memorandum as referred to in regulation 3(2)(a) was submitted to it.
4. First respondent, acting through its municipal council, is ordered to consider the memorandum and take a decision in respect of the amendment of the SDF in accordance with applicant's application within 1 (one) month from complying with the provisions of regulation 3(4) of the regulation.
5. First respondent is ordered to pay the costs of the application, such costs to include the costs of two counsel.

J. P. DAFFUE, J

On behalf of applicant: Adv. C. D. Pienaar
with Adv. J.S. Rautenbach
Instructed by:
Blair Attorneys
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On behalf of respondent: Adv. A. T. Ncongwane SC
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