

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Appeal No.: A99/2012

In the matter between:

STYLIANOS REIZIS N.O.

Applicant

and

MEC FOR THE DEPARTMENT OF SPORT, ARTS, 1st Respondent
CULTURE & RECREATION

FREE STATE HERITAGE RESOURCES 2nd Respondent
AUTHORITY

FREE STATE HERITAGE RESOURCES 3rd Respondent
AUTHORITY COUNCIL

CORAM: RAMPAL, J *et* LEKALE, J

HEARD ON: 4 FEBRUARY 2013

JUDGMENT BY: LEKALE, J

DELIVERED ON: 28 FEBRUARY 2013

INTRODUCTION AND BACKGROUND

- [1] On 28 September 2009 the applicant, in his capacity as trustee of the Reizis Trust (the trust), applied to the second respondent in terms of section 35(1) of the National Heritage Resources Act 25 of 1999 (the NHRA) for permission to demolish the trust

dwelling which is older than 60 years in favour of a new business development.

[2] The application was, however, not successful with the second respondent's permit committee communicating its decision to the applicant in terms of a letter dated 14 October 2009.

[3] The applicant, thereafter, lodged an appeal with the third respondent's appeal committee on 29 October 2009 in terms of applicable regulations.

[4] The appeal committee heard the appeal on 26 November 2009 and on 3 December 2009 it decided that:

- "1. The applicant will submit detailed proposals showing at least two alternatives. These alternatives should include an option that incorporates the existing residence within the larger development, or a second option that will produce a new development plan that will replace the residence with a development that could enhance the area as a whole...**
- 2. After the proposals have been completed they will be presented to the Permit Committee who will then reconsider these proposals and could reconsider their original decision if they deem one of both of the alternatives satisfactory.**
- 3. The Appeal Committee will then consider the recommendation from the Permit Committee in this regard. It is recommended that the new proposals be**

presented to the Permit Committee at the first meeting in February 2010...”

- [5] The applicant, eventually, submitted the proposals solicited by the appeal committee for the attention of the permit committee on 10 February 2011 after a delay attributed to the involvement of experts in compiling the proposals.
- [6] On 13 March 2011 the applicant, through its attorneys, notified the permit committee of its intention to approach the court in terms of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) for an injunction in the event of failure, on its part ,to take a decision within ten days.
- [7] On 7 April 2011 the chairman of the second respondent responded to the said letter and advised the applicant that the first respondent had appointed a new Provincial Heritage Resources Authority Council on 7 February 2011 and that the said council had taken note of the applicant’s appeal against the decision of the appeal committee and was in the process of referring the matter to the first respondent to make a final decision in terms of section 49(2) of the NHRA.
- [8] The applicant’s attorneys, thereafter, directed a letter dated 12 May 2011 to the second respondent drawing its attention to, *inter alia*, the decision of the appeal committee and requesting clarification on whether or not the permit committee had already

reconsidered the matter and made recommendations to the appeal committee.

[9] The applicant could, however, not get joy from the second respondent and, on 12 August 2011, launched an application in this court under case number A218/2011 for an order, *inter alia*, compelling the latter to deal with the matter as directed by the appeal committee.

[10] On 17 October 2011 and before the application to compel the second respondent could be heard, the first respondent notified the applicant as follows, among others:

- “2. After due consideration of the grounds of appeal and other relevant information, I decided to confirm the decision of the independent tribunal committee.**
- 3. Your appeal is therefore unsuccessful.”**

[11] The injunction application was, thereupon, regarded as having been overtaken by events and the parties agreed to remove the same from the roll with the respondents paying the costs.

[12] The applicant feels aggrieved by the first respondent's decision and now approaches this court in terms of Rule 53 of the Uniform Rules of Court for, *inter alia*, an order reviewing and setting aside the same and directing:

- “2. That the second and/or third respondent's decision of**

the 14th October 2009... in terms of which the applicant's application for a permit to demolish the structures on Erf 1768, 3 Torbet Street, Waverley, Bloemfontein was refused, be reviewed and set aside;

3. That the first and/or second and/or third respondent be ordered to issue a permit to the applicant in terms of the National Heritage Resources Act No 25 of 1999 for permission to demolish the structures on Erf 1768, 3 Torbet Street, Waverley, Bloemfontein;
4. Alternatively to paragraph 3 above, that the second respondent be ordered to consider the applicant's proposals as set out in annexure 'E' to the applicant's founding affidavit within 21 days after the granting of this order and to make recommendations, in writing, to the first respondent in terms of the decision dated 3rd December 2009, annexure 'D' to the applicant's founding affidavit, whereafter the matter be remitted to the first respondent for a decision on the applicant's appeal as contemplated in section 49 of the National Heritage Resources Act 25 of 1999;
5. In the further alternative to paragraphs 3 and 4 above that the applicant's appeal against the refusal of the permit as referred to in paragraph 2 above, be remitted to the first respondent for reconsideration, together with the proposals set out in annexure 'E' to the applicant's founding affidavit, which shall be reconsidered by the first respondent within 30 days after the granting of this order;
6. The respondents, jointly and severally, be ordered to pay the costs of this application."

RESPONDENT PARTIES

- [13] The first respondent is the Member of the Executive Council (MEC) responsible for the Department of Sport, Arts, Culture and Recreation in the Free State Province.
- [14] The second respondent is the Free State Heritage Resources Authority, a body corporate established in terms of section 23 of the NHRA and responsible for the management of the relevant heritage resources within the Free State Province.
- [15] The third respondent is the Council of the Free State Heritage Resources Authority appointed in terms of Regulation 2 of the Regulations regarding the Free State Heritage Resources Authority and which governs the second respondent in terms of section 23 of NHRA.

ISSUES IN DISPUTE

- [16] The applicant relies on a number of grounds in support of its prayer for the review of the relevant decision. It is, however, not necessary for us to deal with such grounds in toto in the light of the facts that are common cause between the parties as well as the view we have taken of the matter.
- [17] The primary question to be determined is whether or not the first respondent's decision of 17 October 2011 is reviewable in terms of section 6(2)(a) of PAJA on, *inter alia*, the ground that the first respondent was not authorised and/or entitled to take a

final decision on the applicant's appeal when he purported to do so.

- [18] In the event of this question being decided in the affirmative, the next enquiry, which only arises in that eventuality, is whether or not it is fair, in the circumstances of the instant matter, for the court to substitute its discretion for that of the respondents by directing any or all of them to issue the relevant permit to the applicant.

APPEAL STRUCTURES IN TERMS OF NHRA AND RELEVANT REGULATIONS

- [19] Section 49(1) of the NHRA requires the regulations published by the Minister and the MEC to provide for a system of appeal to the South African Heritage Resources Authority (SAHRA) or a provincial heritage resources council, such as the third respondent, against the decision of a committee or other delegated representative of SAHRA or a provincial heritage resources authority in the position of the second respondent.
- [20] In compliance with this legislative injunction the office of the first respondent published regulations providing for, *inter alia*, an appeal to the third respondent against a decision of a committee or other delegated representative of the second respondent on 10 October 2003 in terms of Provincial Notice No 195 of 2003 (see Regulation 6 of Regulations regarding the Free State Heritage Resources Authority).

[21] Section 49(2) of NHRA provides, *inter alia*, for an appeal to the MEC against the decision of a council in the position of the third respondent in the following terms:

“2. Anybody wishing to appeal against a decision of the SAHRA Council or the council of a provincial heritage resources authority must notify the Minister or MEC in writing within 30 days. The Minister or MEC shall then appoint an independent tribunal consisting of three experts having expertise regarding the matter.”

[22] It follows, therefore, that in the Free State Province an appeal against the decision of the permit committee of the second respondent lies to the appeal committee which is a committee of the third respondent. The MEC, on his part, is the ultimate appellate body and only entertains appeals from the decisions of the third respondent.

SUBMISSIONS BY THE PARTIES

[23] It is clear from the papers before us that the parties are in agreement that the applicant never lodged an appeal with the MEC.

[24] It is further, effectively, common cause between the parties that the decision of the third respondent, through the appeal committee, was not final or appealable and was in the nature of a directive or an advice requiring further proposals from the applicant and recommendations thereon by the second

respondent.

- [25] The parties are, furthermore, *ad idem* that the applicant did not consent to the abridged appeal procedure which saw the matter serve before the MEC without a final decision by the third respondent and, further, without a written notice to the MEC as contemplated by section 49(2) of NHRA.

REVIEW

- [26] The MEC derives the powers to hear and determine appeals in matters of the present nature from section 49(2) of NHRA which is the source of his administrative authority in that regard.
- [27] In the exercise of the relevant appellate powers the MEC is “constrained by the principle that he may exercise no power and perform no function beyond that conferred upon” him by the NHRA. (See **FEDSURE LIFE ASSURANCE LTD AND OTHERS v GREATER JOHANNESBURG TRANSITIONAL METROPOLITAN COUNCIL AND OTHERS** 1999 (1) SA 374 (CC) at para [58].)
- [28] An administrative action taken by an administrator who was not authorised by the empowering provision to take it is judicially reviewable. (See section 6(2)(a) of PAJA.)
- [29] In order for the MEC to lawfully deal with an appeal the following must exist simultaneously:

29.1 A final decision on an applicant's appeal by a body in the position of the third respondent's appeal committee;

29.2 A written notice of appeal to the MEC by an applicant submitted within 30 days of the date of the impugned decision.

[30] In the instant matter the MEC was, consequently, not legally authorised or entitled to assume and exercise appellate powers over the matter in the absence of such jurisdictional facts and, as such, exceeded his powers in so doing. His decision is, ipso facto, reviewable in terms of section 6(2)(a)(i) of PAJA. In our judgment the first respondent, in effect, purported to entertain an appeal against the decision of the second respondent which was the only appealable decision in existence as at the date of the impugned decision.

REMEDY

[31] The next question which arises for determination is whether or not the court can, in the circumstances, fairly direct the respondents to issue the relevant permit to the applicant.

[32] Mr Pienaar, for the applicant, passionately beseeches the court to make such an order. We are, however, not persuaded that it would be fair to the parties to do so regard being had to what is dealt with below.

[33] Section 8(1)(c) of PAJA empowers a court in the instant

proceedings to set aside the impugned action and to either remit the matter for reconsideration by the relevant administrator with or without directions or, in exceptional cases, to substitute or vary the administrative action in question or correct a defect resulting from such an administrative action.

- [34] A court undertaking a judicial review is, further, empowered to, *inter alia*, direct the taking of a decision by the relevant administrator. (See section 8(2)(a) of PAJA).
- [35] The courts are generally loath to substitute their decision for that of the original decision-maker and do so only under exceptional circumstances. (See **PREMIER, MPUMALANGA, AND ANOTHER v EXECUTIVE COMMITTEE, ASSOCIATION OF STATE-AIDED SCHOOLS, EASTERN TRANSVAAL** 1999 (2) SA 91 (CC) at p 133 paragraph [50]).
- [36] In the instant matter the MEC simply did not have authority to deal with the matter and same was, as such, not properly before him. The matter was in the third respondent's court. The appeal committee had retained jurisdiction over it and still had to deal with it when the same was improperly escalated to the first respondent. The third respondent still has a discretion in the matter because it has not yet made a final or appealable decision and the result cannot, reasonably, be said to be a foregone conclusion. (Compare **PREMIER, MPUMALANGA v ASSOCIATION OF STATE-AIDED SCHOOLS**, *supra*.)

[37] There is, further, nothing before us indicative of bias or incompetence on the side of the third respondent. (See **COMMISSIONER, COMPETITION COMMISSION v GENERAL COUNCIL OF THE BAR OF SOUTH AFRICA AND OTHERS** 2002 (6) SA 606 (SCA) at paragraph [16]).

[38] Although time considerations may be important in the circumstances of the present matter due to the need for finality, among others, it is not, in our view, of such essence as to justify depriving the third respondent an opportunity to finalise what it has already started lawfully. (Compare **RUYOBEZA AND ANOTHER v MINISTER OF HOME AFFAIRS AND OTHERS** 2003 (5) SA 51 (C) at p 65 C – 66 B.)

[39] In our view it would not be fair *in casu* to assume the powers of the appeal committee by exercising the discretion conferred upon it by law. (See generally **LIVESTOCK AND MEAT INDUSTRIES CONTROL BOARD v GARDA** 1961 (1) SA 342 (A) at 349 G.)

COSTS

[40] The applicant is, at common law, entitled to his costs regard being had to, *inter alia*, the success it has attained in the matter. The general rule that costs follow the event is, therefore, applicable.

- [41] Mr Pienaar persists in the applicant's prayer for the respondents to be ordered to pay costs jointly and severally.
- [42] Ms Van Rhyn, for the respondents, effectively leaves the issue in the hands of the court.
- [43] Section 8(1)(f) of PAJA permits the court to make just and equitable orders including, *inter alia*, orders as to costs.
- [44] In matters concerning the award of costs the determinative issue is justice or fairness to all the parties involved regard being had to, *inter alia*, their conduct relative to the proceedings. (See **FRIPP v GIBBON & CO** 1913 AD 354 at 363 and **GELB v HAWKINS** 1960 (3) SA 687 (A) at 694.)
- [45] It is not apparent from the papers that the third respondent played any role whatsoever in either the delay involved in finalising the matter or in the referral of the appeal to the first respondent. The applicant submitted further proposals to the permit committee as directed by the third respondent's appeal committee. The chairperson of the second respondent communicated with the applicant's attorneys and, eventually, advised them that the matter was being referred to the first respondent as an appeal against the decision of the appeal committee. The applicant's attorneys wrote to the second respondent to set the record straight but nevertheless the matter was erroneously tabled before the first respondent.

- [46] On his part the first respondent acknowledges and reiterates in the opposing affidavit that the applicant did not lodge an appeal against the decision of the appeal committee in terms of section 49(2) of NHRA. (See p 154 paragraph 13.2 as well as p 155 paragraph 13.4 of the indexed bundle of review papers.)
- [47] It is, further, evident ex facie the provisions of section 49 of NHRA that its language is clear, unambiguous and comprehensible. The first respondent was clearly aware or ought reasonably to have been aware of the applicable appeal procedures.
- [48] In paragraph 13.4 of opposing affidavit and on p 155 of the indexed bundle of review papers the first respondent deposes to the effect that he decided to invoke the provisions of section 49(3) of NHRA and appointed the independent tribunal to deal with the matter because of the fact that the applicant had issued the application under case number A218/2011 notwithstanding the fact that no appeal was lodged against the decision of the third respondent.
- [49] It is, thus, apparent that the first respondent was alive to the provisions of the NHRA with regard to his appellate powers when he usurped the powers of the third respondent by effectively dealing with an appeal against the decision of the second respondent.

ORDER

[50] In consequence I make the following order:

50.1 The decision of the first respondent dated 17 October 2011 is hereby reviewed and set aside.

50.2 The matter is remitted to the second respondent who is directed:

- (a) to reconsider afresh, within 21 days hereof, the applicant's amplified application taking into account the proposals as set out in annexure "e" to the founding affidavit;
- (b) to submit to the third respondent, within 7 days thereafter, recommendations in accordance with the latter's directives as set out in annexure "d" to the founding affidavit;
- (c) to communicate to the applicant, within the same period as referred to in sub-par (b) *supra*, its decision as well as the recommendations it has made to the third respondent.

50.3 The third respondent is directed, within 21 days after receipt of the second respondent's recommendations

- (a) to hear the applicant's appeal; and
- (b) to communicate its decision thereon, within 7 days, to the applicant;

50.4 The second and the third respondents respectively shall afford the applicant an opportunity of presenting its case or its appeal before they make their respective decisions concerning the application or appeal.

50.5 The first and second respondents shall pay the applicant's costs, jointly and severally, the one paying the other to be absolved.

L. J. LEKALE, J

I concur.

M.H. RAMPAL, J

On behalf of applicant:

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Instructed by:
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Aliwal Street
BLOEMFONTEIN

On behalf of respondents:

Adv I van Rhyn
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