

**FREE STATE HIGH COURT, BLOEMFONTEIN**  
**REPUBLIC OF SOUTH AFRICA**

Case No. : A209/2011

In the matter between:-

**THE FRIENDS OF THE SEVEN DAMS**  
**CONSERVANCY**

Applicant

and

**THE MEMBER OF THE EXECUTIVE COUNCIL:** First Respondent  
**ECONOMIC DEVELOPMENT, TOURISM AND**  
**ENVIRONMENTAL AFFAIRS:**  
**FREE STATE PROVINCE**

**MANGAUNG METROPOLITAN**  
**MUNICIPALITY**

Second Respondent

**PROPERTY COMMERCE CC**

Third Respondent

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**CORAM:** JORDAAN, J *et* CLAASEN, AJ

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**HEARD ON:** 12 MARCH 2012

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**JUDGMENT BY:** JORDAAN, J

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**DELIVERED ON:** 22 MARCH 2012

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[1] This is an application for a review brought by the applicant in which the following relief is, *inter alia*, sought;

“The first respondent’s decision that authorises the third respondent to do development on the remainder of farm Bayswater No 2865, Bloemfontein, Free State in accordance

with the layout plan(s) 40154 MD 52 T and/or 40154 MD 52 X is reviewed and set aside.”

[2] Applicant is The Friends of the Seven Dams Conservancy, an association of which the main objective is to promote the interests of The Seven Dams Conservancy, including the conservation of its natural habitat, etc. The first respondent is the Member of the Executive Council: Economic Development, Tourism and Environmental Affairs, Free State Province. Second respondent is the Mangaung Metropolitan Municipality. Second respondent did not oppose the application and did not take part in the proceedings. Third respondent is Property Commerce CC, herein referred to as “the developer”.

[3] The developer wished to establish township development on a piece of land adjacent to the existing township development of the second respondent. The relevant property was zoned for agricultural land or undetermined use and, for the aforesaid purpose, had to be rezoned to a township establishment. That, being an activity which was identified as a probably detrimental activity in terms of section 21 of the Environment Conservation Act, No. 73 of

1998, required the developer to obtain the necessary authorisation from the competent authority referred to and prescribed in section 22 of the aforesaid Act.

[4] For that purpose an environmental impact assessment report was obtained by the developer, which first report was prepared during November 2005 and a further report amending the aforesaid one, was finalised during July 2007. In a letter dated 25 November 2007, the applicant objected to the proposed development, which letter was addressed to the Townships Board. In the letter the applicant's objections and reservations about the proposed development were listed.

[5] During 2008 an environmental development plan relating to the area, was prepared by Dr. Brand, the deponent to the applicant's replying affidavits. It is alleged that the said report was completed in March 2008 and distributed to, *inter alia*, the MEC (first respondent) and the developer.

[6] A decision authorising the requested change of land use in terms of section 22 of the Environment Conservation Act

(*supra*), apparently signed by the head of the department of first respondent on 29 April 2009 and allegedly issued on 3 May 2009 (the ROD) came to the applicant's knowledge. The aforesaid decision (ROD) contained a general basis for the decision as well as some conditions pertaining to the authorisation. The applicant decided not to request reasons for the decision, but instead to lodge an appeal to the MEC in terms of section 35 of the last-mentioned Act. The appeal was lodged on 12 May 2009 and thereafter the first respondent, on 29 July 2009, decided to confirm the ROD and dismissed the appeal. The notice in that regard addressed to the applicant's representative, mentioned that the applicant is entitled to request reasons for the decision within 90 days of receipt of the letter and secondly, the applicant's attention is drawn to sections 6 up to 8 of PAJA (Act 3 of 2000), stating that any proposed judicial review of the decision should be instituted not later than 180 days from receipt of the said letter.

- [7] In response to the invitation to request reasons, the applicant by means of a letter dated 9 September 2009, requested reasons for the MEC's decision and, when no response was forthcoming, repeated such request in a letter dated 21

January 2010. The first respondent supplied such reasons on 8 February 2010.

- [8] The applicant alleges that the supplied reasons did not include the alleged revised layout plan, which was referred to in the reasons and that the applicant could therefore not ascertain whether the development authorised were on areas where the Bloemfontein Karroid Shrubland occurs. It also alleges that the applicant was uncertain about which plan was authorised, since the original ROD referred to the plan numbered “Q” and, if there existed a revised plan to the aforesaid one, the new plan should have been numbered “R”.

Since the applicant was not satisfied with the reasons, as aforesaid, a letter dated 1 March 2010 was sent on behalf of the applicant to the MEC, requesting, *inter alia*, a copy of the layout plan approved. The applicant received no response to the last-mentioned letter. On 15 June 2010 the applicant sent a letter to the head of the department of first respondent requesting information and documents in terms of the Promotion of Access to Information Act, No. 2 of 2000. In response to that a plan numbered “X” and a map were

supplied to the applicant on 1 July 2010. The applicant then called for a meeting with the first respondent, which meeting was held on 12 August 2010 and on the same date the first respondent issued a notice calling a meeting regarding the initial ROD and the proposed development, which invitation was, *inter alia*, sent to the third respondent, MDA Consultants, and an attorneys firm. According to the applicant, it was envisaged that the meeting would be held within two weeks, but was only held eventually on 7 December 2010 between the applicant and the head of the aforesaid department. It is alleged that the HOD undertook to forward the approved plan, showing less extensive development where Shrubland occurs, to the applicant, which did also not happen.

On 7 February 2011 the applicant obtained the alleged approved plan numbered “T” from the developer.

The present application for review was instituted on 5 August 2011.

- [9] Apart from dealing with the merits of the application, both the first and third respondents took the view that the application

for review has become time barred due to the provisions of section 7 of the Promotion of Administrative Justice Act, No. 3 of 2000 (PAJA). It is common cause that subsection 1(a) of section 7 of the aforesaid Act is applicable to the present application. It is also common cause that the period of 180 days provided in section 7 of the Act has not been extended by agreement between the parties and no formal application in terms of section 9 of the Act was filed.

[10] The stance of the respondents is that the internal remedy consisting of the appeal to the MEC have been concluded when the MEC made his decision on 29 July 2009 as envisaged in section 7(1)(a) of PAJA. The review should therefore have been instituted within 180 days after the last-mentioned date. The present application has been instituted more than two years later.

[11] In argument, the applicant endeavoured to meet this difficulty on mainly three alternative grounds:

1. Uncertainty

According to the argument, it would have been unreasonable and even reckless to expect of the applicant to lodge an application for review without

knowing the reasons for the decision. Since the reasons were only supplied after the expiration of 180 days from the date of the decision, they would not have been in the position to lodge an application for review before that. The reasons in itself, so the argument went, created the impression that the developer was prohibited from doing development in areas on the property where the Karroid Shrubland occur and a revised layout plan, making provision for the preservation of the said species, was approved. Since the revised layout plan was not annexed to the reasons, the applicant was not in a position to ascertain whether the said plan did indeed make provision for the protection of the Karroid Shrubland where it occurs on the property. The applicant's endeavours to obtain the revised layout plan from the first respondent was unsuccessful and such plan was only received and came to the knowledge of the applicant on 7 February 2011, when it was received from the developer. The 180 days prescribed in the Act should therefore only run from the last-mentioned date meaning that the application was indeed brought within 180 days. It was also argued that the applicant

was justified to interpret the reasons of the MEC to mean that a revised plan were drawn and approved by the MEC.

2. Interpretation of section 7(1)

It was argued that in terms of section 7(1)(b) the 180 days would only start running after the date on which the person concerned was informed of the administrative action, became aware of the action and the reasons for it or might reasonably have been expected to have become aware of the action and the reasons for it. The legislature could never have intended, so the argument went, that someone who made use of internal remedies, as provided for in subsection (a) of the aforesaid section, should be in a worse position than someone whose application is brought in terms of section 7(1)(b). An interested person is entitled to request reasons in terms of PAJA within 90 days of the decision and such reasons have to be supplied within 90 days after that. That also applies to a party who made use of internal remedies, as envisaged in subsection (a). In view of that, the internal remedies are only concluded in terms of

subsection (a) once reasons are supplied. In the present case, the reasons supplied were contradictory, vague and, in view of the omission to annex the revised layout plan, incomplete. It was only when the layout plan was received from the developer on 7 February 2011 that the applicant was in a position to ascertain the full impact of the decision and the reasons therefore and it must therefore be deemed that the internal remedies were only concluded on the last-mentioned date.

3. Inherent powers to condone

Lastly, it was argued that, at common law, it is open to a court, *mero motu*, to raise the issue of inordinate delay in bringing an application for review of an administrative decision. If that is the position, so the argument went, the court also has the inherent power to condone inordinate delays, in its discretion. Counsel for applicant then asked for such condonation from the Bar during argument.

[12] Regarding the argument in par. [1] above, it must be kept in mind that the MEC, in his decision in the appeal, confirmed

the decision of the head of the department and dismissed the appeal. In his reasons he referred to the decision of the HOD and therefore the original ROD. In argument, counsel for the applicant intimated that the applicant exclusively relies on the uncertainty as to which layout plan was approved and was under the impression that the MEC asked for and approved a revised plan.

It is however clear from the reasons given by the MEC that he referred to the decision of the department and explicitly said that the department did not approve the initial layout plan, but requested a revised new layout which was designed to assure that housing remains outside sensitive areas, and that was the approved plan. The decision of the MEC on appeal makes no mention of any alteration to the ROD issued by the head of the department and simply confirmed the decision. There could be no reasonable doubt as to the fact that the plan referred to in the original ROD was the relevant authorised and approved layout plan, namely the plan marked "Q". The applicant's alleged uncertainty was therefore ill-founded and not borne out by the evidence read in context.

The argument that the applicant was not in a position to bring the application for review before being apprised of the full reasons and the impact thereof is also without substance. The applicant requested reasons and, when that was not forthcoming within 90 days, decided to repeat the request after the 180 days has already expired. The reasons were requested on 9 September 2009 and should have been supplied within 90 days thereafter in terms of section 5(2) of PAJA. If that has not been done, section 5(3) comes into play, which provides:

“If an administrator fails to furnish adequate reasons for an administrative action it must, subject to subsection (4) and in the absence of prove to the contrary, be presumed in any proceedings for judicial review that the administrative action was taken without good reason.”

The 90 days from 9 September 2009 expired in the beginning of December 2009 after which the applicant was in an excellent position to bring the application for review based on the last-mentioned subsection of section 5 of PAJA. That would still have been within the prescribed 180 days.

Even if, in favour of the applicant, it is accepted that the applicant was entitled to await the reasons for the decision, those decisions were supplied on 8 February 2010, almost one and a half year before the application for review was brought. I have already alluded to the fact that there was nothing unclear in the reasons, if it was read in context with the original ROD. If the applicant regarded the reasons as inadequate, section 5(3) of PAJA again came into play and could have been made use of.

- [13] As to the interpretation of section 7(1) of PAJA, it is clear that subsection (b) provides for the situation where an interested party only becomes aware of an administrative action and the reasons therefore after the decision has been taken or the action completed. It stands to reason that such knowledge should form the basis of the clock starting to tick towards the expiry of the 180 days. However, where a party makes use of internal remedies, he obviously knows about the administrative action and his knowledge is therefore not an issue. It is for that reason that the 180 days starts to run from the day when the internal remedies have been concluded. More often than not such a party would have, after the initial action or decision has been taken, have

requested and received reasons for that decision already. There can be little doubt that the internal remedies are concluded when the decision is made pertaining thereto. Even if I am wrong in that view, there can be less doubt that the conclusion of such remedies would at least coincide with the supply of reasons, which, as referred to above, occurred almost a year and a half before the review application was brought.

- [14] As to the argument concerning the court's inherent jurisdiction, the dicta relied on in CAMPS BAY RATEPAYERS' AND RESIDENTS' ASSOCIATION AND ANOTHER v HARRISON AND ANOTHER 2011 (4) SA 42 (CC) at par. [53] go no further than to establish that the court has an inherent jurisdiction to raise the issue of inordinate delay whether in common law review proceedings or in relation to PAJA insofar as section 7 refers to "without unreasonable delay". That is far from saying that a court has inherent jurisdiction to condone the non-compliance with a statutory prescription. I know of no such authority and none has been referred to by counsel. Section 7 explicitly prescribes that proceedings for review shall not be brought later than 180 days after the (in this case) internal remedies

have been concluded. It then empowers the court to extend that period for a fixed period on application by a concerned party. No application has been filed and the half-hearted and belated oral application from the Bar can in no circumstances be entertained. Even if the evidence in the application justifies a finding as to the reasons for the delay in bringing the review application, there are no evidence or justification for the delay in bringing the application for condonation.

[15] The conclusion to which I come, is therefore that the application has been brought well outside the 180 days time limit and therefore time barred. Although that disposes of the application in effect, I regard it as prudent to make some general remarks regarding other issues in the application.

[16] Review of what decision?

1. On the strength of the decision in **SEA FRONT FOR ALL AND ANOTHER v MEC, ENVIRONMENTAL AND DEVELOPMENT PLANNING, WESTERN CAPE AND OTHERS** 2011 (3) SA 55 (WCC) it was argued that the appeal to the MEC was an appeal in the wide sense. In that matter an ROD of the MEC was brought under review and it appeared that the MEC

reconsidered the application and issued a new ROD. The MEC concerned the application afresh and replaced the initial ROD of the official with his ROD. In the present matter, although the MEC considered the appeal, he only confirmed the ROD of the head of the department, dismissed the appeal and made no new order or issued a new ROD. The aforesaid decision is therefore clearly distinguishable.

2. In view of the aforesaid, the applicant applied for an amendment to the Notice of Motion so as to include the decision of the “department” in the review application. The application for amendment was filed on 21 February of this year.

If I were to decide the issue, I would not have granted the amendment. Firstly, the head of the department who issued the ROD, is not a party to the proceedings and has not been joined. If, on the strength of the dicta in JAYIYA v MEMBER OF THE EXECUTIVE COUNCIL FOR WELFARE, EASTERN CAPE, AND ANOTHER 2004 (2) SA 611 (SCA) paras [4] and [5], I am wrong in this respect, then, secondly, I would have

refused the amendment on the basis that it is seeking to bring another decision on review, even more belatedly than the initial review. The review of that decision will also be time barred.

- [17] As set out in the beginning, the applicant seeks to set aside a decision authorising the development on the property. Counsel for applicant conceded that the wording does not reflect the true position. The true position is that the ROD only authorised the rezoning in respect to land use. The amendment of the town planning scheme and establishment of the development was authorised by a totally different department.

[18] Late filing of replying affidavit

The respondents agreed to the late filing of the replying affidavits and gave an extension to 27 January 2012. The affidavit was only filed on 16 February. An application for condonation for the late filing of the replying affidavit was served on 5 March 2012, in which it is stated that, due to the magnitude of issues and the time of year in which the opposing affidavits were filed, being December, the applicant was not able to file the replying affidavit timeously. Apart

from applying for condonation, the applicant also asks that the costs of the application for condonation be ordered to be costs in the main application. I would have granted the application, but ordered the applicant to pay the costs occasioned by the application. The affidavits were filed relatively shortly after the agreed extended date. It is in the interest of justice that the whole picture is before court and no real prejudice could have been done by the filing of the replying affidavits.

[19] Merits

Notwithstanding the various points raised initially in the objections on behalf of the applicant, the objections were in argument limited to the “conditions” under which the approval was granted. According to the argument on behalf of the applicant, the objection to the conditions relates exclusively to the layout plan which authorises development, also in areas where the Karroid Shrubland occurs.

The application is based on three grounds as far as the merits are concerned, namely:

- i) that the procedure was procedurally unfair in that the applicant was not afforded a reasonable opportunity to

influence the decision of the competent authority;

- ii) that the decision was taken arbitrarily or capriciously in that the approval of the layout plan was done without the competent authority being aware of precisely where the Karroid Shrubland occurs on the property; and
- iii) that the decision was not rationally connected to the reasons given for it, in that the MEC in his reasons intimated that the developer will not be allowed to develop in identified zones where the Shrubland occurs, whilst the approved layout plan indeed authorises such development in areas where it does occur.

The record and evidence shows that the applicant informed the township's board of its objections by means of the letter dated 25 November 2007 already and in which letter it is intimated that it already interacted with the developer. In the letter the objections and reservations of the applicant about the development were listed.

The deponent to the applicant's replying affidavit, Dr. Brand, drew an environmental management plan relating to the area in 2008 already. It is alleged that that plan was completed in March 2008 and distributed to the first and third respondents

at the time. The said plan explicitly deals with, *inter alia*, the existence of the Karroid Shrubland in the area, the importance thereof and the high irreplaceable value thereof.

It is clear that the head of the department in the ROD took full cognisance of the Karroid Shrubland's existence in the area, as well as the high irreplaceable value thereof. The ROD mentions that it is impossible to reach conservation goals without the Shrubland and it indicates its high significance and ecological value. The ROD then continues to state that the layout of the proposed development has been designed to minimise disturbance of areas of conservation worthiness and which contain areas of environmental sensitive receptors. The ROD also contains certain conditions in relation to environmental issues. It requires the submission of an environmental management plan, the appointment of an environmental officer to monitor compliance with the conditions on site and provides for a certain rescue project to be implemented prior to development of the area. Because of his cognisance of the environmental effect of development, various specialists' input were obtained, for example, in the field of botanical and wetland issues, as well as cultural, historic and

archaeological issues.

It is abundantly clear that the applicant's concerns were indeed taken into account. The ROD and other documents contained in the record, shows a thorough investigation and consideration of all material issues and relevant aspects pertaining to the development.

In the result I am not convinced that any justifiable reasons exist to review and set aside the decisions of either the MEC or the head of the department on the grounds advanced by the applicant.

[20] Costs

It was submitted on behalf of the applicant that, if the application is unsuccessful, the applicant should not be ordered to pay the costs of the application, but that no order as to costs should rather be made. In that regard reliance was placed on section 32 of the National Environmental Management Act, No. 107 of 1998, which, in subsection 2, provides as follows:

“A court may decide not to award costs against a person who, or group of persons which, fails to secure the relief sought in

respect of any breach or threatened breach of any provision of this Act, including a principle contained in Chapter 1, or of any provision of a specific Environmental Management Act, or of any other Statutory provision concerned with the protection of the environment or the use of natural resources, if the court is of the opinion that the person or group of person acted reasonably out of a concern for the public interest or in the interest of protecting the environment and had made due efforts to use other means reasonably available for obtaining the relief sought.”

It goes without saying that the applicants acted out of concern in the broader public interest as well. Even their initial concerns and objections are obviously well-founded and reasonable.

There are, however, other considerations that play a role as well. The application was instituted well beyond the 180 time limit. The relief claimed was against a decision that authorised the development of the property, which was not the decision taken by the MEC. After the unsuccessful appeal the relevant effective decision was that of the head of the department and not of the MEC. In circumstances where applicant should have foreseen as a real possibility that the application was instituted well beyond the time limit

prescribed by PAJA, it failed to apply for condonation or an extension of time in terms of the Act. The rezoning of the area has been done, the development approved and the subdivision of the erven done. All that has been done in lieu of decisions by other officials in other departments. There is no application for the review of any of those decisions, with the effect that, even if the application would have been successful, it would not follow as of necessity that the other decisions by other officials are automatically also set aside.

In all the circumstances the applicant brought an application when it should have been clear that it was bound to fail, even if only because of the lapse of the 180 days time limit. There is no reason why the respondents should, in those circumstances, be compelled to pay their own costs.

[21] In the result the application is dismissed with costs.

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**A.F. JORDAAN, J**

I concur.

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**J.Y. CLAASEN, AJ**

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|------------------------------------|----------------------------------------------------------------------------------------------------------------|
| On behalf of appellant:            | Adv. B. Knoetze SC<br>With him:<br>Adv. P.J.J. Zietsman<br>Instructed by:<br>Webbers Attorneys<br>BLOEMFONTEIN |
| On behalf of the first respondent: | Adv. L.M. du Plessis<br>Instructed by:<br>State Attorney<br>BLOEMFONTEIN                                       |
| On behalf of third respondent:     | Adv. F.W.A. Danzfuss SC<br>Instructed by:<br>Rossouws Attorneys<br>BLOEMFONTEIN                                |

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