

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA



CASE NO.: 48401/2019

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

.....19.11.2024.....

In the matter between:

CITY OF TSHWANE METROPOLITAN
MUNICIPALITY

Applicant

and

ROCHVILLE PROP (PTY) LTD

First Respondent

ZWAVELPOORT HOMEOWNERS' ASSOCIATION

Second Respondent

IGNA STEENKAMP

Third Respondent

DENSA JANINE STEENKAMP

Fourth Respondent

JACOBUS STEFANUS VILLIERS JOUBERT N.O.
[In his capacity as joint trustee of the VTS Business
Trust (IT7098/2006)]

Fifth Respondent

THERESA JOUBERT N.O.
[In her capacity as joint trustee of the VTS Business
Trust (IT7098/2006)]

Sixth Respondent

JUDGMENT

van der Westhuizen, J

- [1] The applicant launched this application in terms of which it sought to review and set aside the decision of its Municipal Appeal Tribunal (MAT), a so-called self-review in terms of section 1(c) of the Constitution, read with section 172(1) thereof. It related to a decision on a land development application taken on appeal by the MAT against a decision of the applicant's Municipal Planning Tribunal (MPT). The MPT refused an application by the first respondent for consent to use its property as a lodge, conference venue and wedding venue. The decision of MAT is the subject of the present review.
- [2] Both the applicant and the first respondent did not comply with the requirements to file several documents timeously and condonation was sought. There was lateness in filing the notice of opposition, the first respondent's answering affidavit and the applicant's replying affidavit. By agreement condonation was granted.
- [3] This review was premised upon the decision of the MAT allegedly suffering from serious procedural and substantive irregularities in contravention of its powers. This is a so-called self-review of a municipal planning decision.¹
- [4] During 2013, the first respondent became the registered owner of immovable property held under Deed of Transfer T103624/2013 and known as Portion 106 (a portion of Portion 2) of the farm Swavelpoort 373 JR , Gauteng Province, in extent 12.3057 ha.

¹ *Department of Transport et al v Tasima (Pty) Ltd* 2017(2) SA 622 (CC); *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd* 2019(4) SA 331(CC) par [38]

- [5] Prior to the first respondent's acquisition of the property and thereafter, the property had a farm description, and still has such a description. Such description implies that the property has as of yet not been subjected to a township establishment process in terms of either the 1965 Ordinance, the 1986 Ordinance, the Development Act, 67 of 1995 (DFA), the Spatial Planning and Land Use Management Act, 16 of 2013 (SPLUMA), or the Land use By-Law. SPLUMA came into effect on 1 July 2015.
- [6] The area where the property is situated, is a rural area. Various agricultural holdings were established on former farms that were known as: Mooiplaats 367 J.R., Kleinfontein 386 J.R., Donkerhoek 365 J.R., Tiegerpoort 371 J.R., and Barossa 742 J.R.
- [7] The property under consideration was zoned as "Undetermined" in terms of the Peri-Urban Areas Town-Planning Scheme, 1975 (Peri-Scheme). In terms of that zoning description, the said property could only be used for purposes of "Agricultural Buildings" and "Dwelling Houses". Contrary to that zoning, the director of the first applicant proceeded to establish the *"Monte De Dios Equestrian Wedding and Conference Venue"* on the property. The applicant alleges that the director of the first respondent was a practising attorney. Allegedly, the property was to be used as a lodge with a wedding hall, a conference venue, guest rooms, a chapel, associated infrastructure, parking facilities, a restaurant, a teagarden, children play areas, outdoor event areas, staff accommodation and a store area. Such use, without consent, was a transgression of the aforementioned zoned use.
- [8] It was common cause between the parties that the first respondent used the property in contravention of the "Undetermined" use zoning. In order to legalise its aforementioned unauthorised use, the first respondent applied during February 2014 to the applicant for consent use in terms of clause 7 of the Peri-Scheme, but continued its illegal use of the property. The continued unlawful use was met with a "Notice of

Contravention of the Tshwane Town Planning Scheme". That notice was served on the first respondent on 13 September 2016.

- [9] Despite the said notice being received, the first respondent continued with its unlawful use of the property. It launched an application in which it sought relief to have the contravention notice suspended pending the review and setting aside thereof. Events subsequent to the launch of that application, and the initial hearing thereof, effectively rendered the application moot. In a written judgment, the court per Dodson, AJ., dealt with the continuance of that application and only granted costs orders. Nothing turns on that application.
- [10] Clause 7 of the Peri-Scheme prescribes the procedure to be followed when applying to use the property for purposes other than its primary use. Prior to the application the publication of a notice of its intention to make such application is required. The notice was to be published in an English newspaper, as well as in an Afrikaans newspaper, both circulating in the area. Simultaneous with the first publication, it is required to post a similar notice, which is to be maintained conspicuously for a period of 14 days on some part of the building or property. Together with such application, the applicant shall lodge with the local authority proof of such publication and posting. The said notice and posting shall state that that any person having any objections to such erection of buildings, or to the proposed use, shall lodge with the local authority such objections, together with the grounds therefor, within fourteen days after the date of the last advertisement. The publication and the posting shall indicate where the plans, if any, may be inspected.
- [11] The first respondent's consent use application of February 2014 informed that the application was made to use the said property as a lodge with ancillary and subservient uses such as a wedding hall, a conference venue, guest rooms, a chapel, associated infrastructure, parking facilities, a restaurant, a teagarden, children play areas, outdoor event areas, staff accommodation and a store area.

- [12] It is to be recorded that the consent application was to inform the Public that the Title Deed contained restrictive conditions and that application was made for the Administrators consent as well, and that final consent would be obtained from the Department of Economic Development after the approval of the proposed consent use application. By the time when the first respondent's application was lodged, the Administrator had been replaced by a Premier. The application consequently had to be submitted to the Municipality as the authorised authority for the consent to the restrictive title conditions. That application was to be advertised in terms of the Removal Regulations and was to be independently considered by the MPT. Such application was never made. It was submitted by the applicant that the failure to apply for the consent to the restrictive title conditions, precluded the MPT from considering any consent use application.
- [13] Attached to the application for consent use, was a motivation memorandum, as well as a Site Plan. The applicant further submitted that it was the custom and practice for a town planner to attach a proposed schedule of town-planning controls and conditions to a consent use application. Such practice provided that potential interested and affected parties would have comprehensive detail in respect of what the consent use application seeks to achieve and how that would impact upon their own properties and the relevant neighbourhood. Furthermore, it would also inform the applicant as to the basis of the application that the applicant was to consider and further what conditions the applicant may consider to impose when granting the consent use. It further reflects the impact of the proposed development on the services infrastructure of the municipality. The applicant's right to impose conditions on approval of a consent use application is permitted *inter alia* in clause 7 of the Peri-Scheme.
- [14] It is submitted by the applicant that the application for consent use and the advertisements only informed in broad and general terms that the

first respondent intended to apply for the establishment of a lodge with ancillary and associated infrastructure. Consequently, interested and relevant parties were not properly informed as to how the consent use would affect their properties and the relevant neighbourhood. In fact, the advertisements placed as required only advised of the submission of a consent use application and that a copy thereof could be inspected at the offices of the town planner who submitted the consent use application. The advertisements further omitted to mention that application was made for written consent in respect of the restrictive title conditions in the Title Deed of the property.

[15] Despite the aforementioned shortcomings, 28 objections were received in respect of the consent use application. On being advised of the objections and being provided with copies thereof, the town planner sought an extension of the period to file a response to the objections. The town planner never filed any response to the objections. The only response by the town planner was to submit a letter and a Master Plan to the applicant. That stipulated, that after the period for objections, an amendment would be made to the first respondent's consent use application. There would accordingly be no public participation in respect of the consent use application. Consequently, it was required to re-advertise. That did not happen. A further amendment to the consent use application was sought by the town planner. The public was again not informed of the intended further amendment.

[16] During February 2015, the first respondent terminated its town planner's mandate and appointed a new town planner. Its mandate was to proceed with the consent use application and to apply for further amendments thereto. On 10 March 2015, the new town planner submitted an annexure by electronic mail to the applicant. That annexure amended the number of guests who would use the lodge and the wedding venue. Needless to record, that annexure did not find its way to the objectors for their comment and neither was it published to inform possible other objectors. For the first time that annexure contained town-planning

controls, which that may impact upon the properties of objectors or other possible objectors. The failure to provide the existing objectors with the said annexure, rendered public participation nugatory.

- [17] On 19 August 2016, the new town planners were advised that the applicant's previous request for the submission of outstanding documents was still not complied with and that the first respondent's reply to the objections received from the objectors was still outstanding. The applicant further advised that the Municipality's Roads and Stormwater department did not support the consent use application. The first respondent was further advised that there had to be compliance with the outstanding documentation within 21 days from the date of the letter, failing which, it would be recommended that the MPT, dealing with the said consent use application, should refuse the consent use application. On 31 August 2016 the new town planner submitted a response to the initial objections received. It did not deal with any of the amendments to the initial incomplete application for consent use.
- [18] On 12 October 2016, in a letter to the new town planner, the applicant advised that the application cannot be recommended in view of various discrepancies set out in the said letter. Comment thereon was invited within a stipulated period. No response to that letter was received from the first respondent. On 21 October 2016 the first respondent launched the aforementioned application to suspend the notice of contravention.
- [19] From the foregoing, it is apparent that the first respondent was remiss in responding adequately, or at all, to the applicant's requests as enumerated above. The clear flaunting of compliance with prescribed requirements was indicative of the first respondent's attitude to legal procedures and requirements. A steamroller approach by the first respondent was followed throughout.
- [20] The first respondent's incomplete and procedurally flawed application for consent use was considered by the MPT. The first respondent, the then

objectors and the applicant's internal service departments were present at that meeting. From the minutes of that meeting it is clear that the issues debated centred on the alleged amendments to the consent use application and whether re-advertisement was required. No discussion took place on the merits of the consent use application. The MPT reserved judgment and proposed that a site inspection be undertaken.

[21] After the site inspection, the MPT reconvened and discussed the issues. It then resolved to refuse the application for consent use. The reasons for the refusal included *inter alia* that no formal amendment to the numbers of occupation of the lodge and the wedding venue, as well as the failure to advertise the increased number of guests. On 23 February 2017, the new town planner of the first respondent was accordingly advised of the refusal by the MPT.

[22] On 15 March 2017, the first respondent appealed the MPT decision to refuse the consent use application and directed the appeal to the MAT. The MAT is the Municipal Appeal Tribunal established by the applicant in terms of section 51(2) of SPLUMA and Council Resolution 23 April 2015. It derives its powers in respect of appeals from section 20 of the Land Use By-law, 2016. Section 20 of the Land Use By-law provides as follows:

“(1) ...

(2) *The Municipal Manager must within a prescribed period submit the appeal to the Appeals Authority established in terms of the Act or any other law as may be determined by the Municipality read with section 19 of the By-law.*

(3) *The Municipal Appeals tribunal must consider the appeal and confirm, vary or revoke the decision.*

(4) ...”

- [23] It is clear from the provisions of section 20(3) of the By-law, that the powers of the appeal tribunal, MAT, on hearing an appeal are limited to either confirm, or vary or revoke a decision from the MPT, the tribunal of first instance.² Section 20(11)(d)(ii) of the By-law explicitly stipulates that the appeal tribunal may not consider any new evidence on the land development application that may negatively affect the respective rights and obligations of interested and affected parties. It follows that the appeal tribunal is a tribunal of record. It is limited in its decision to the record that was before the MPT. The powers of MAT on appeal is solely derived from its empowering authority, section 20 of the Land Use By-law.³
- [24] The appeal was filed in terms of section 20 of the Land Use By-law. Pending the finalisation of the appeal, the first respondent continued its unlawful conduct in its use of the property.
- [25] The appeal was heard by the MAT on 26 January 2018. At the hearing of the appeal, the MAT allowed the leading of new evidence on behalf of first respondent. That evidence was not before the tribunal of first instance, and accordingly did not form part of the record before the MAT. The permitting of the leading of new evidence on appeal was contrary to the powers of the MAT on appeal as recorded above, from which it is clear that the appeal was not a wide and/or *de novo* hearing as contemplated by the first respondent. For this reason alone, the MAT decision stands to be reviewed and set aside.
- [26] Nevertheless, after hearing the appeal, judgment was reserved. Subsequently, on 11 May 2018, the MAT upheld the appeal and decided:

² Section 51 of SPLUMA

³ *Fedsure Life Assurance et al v Greater Johannesburg Transition Metropolitan Council et al* 1999(1) SA 374 (CC) at [58] – [59]; see also *AAA Investments (Pty) Ltd v Micro Finance Regulatory Council et al* 2007(1) SA 343 (CC) at [68]

- "1, *That the appeal succeeds with regard to the application for consent use for a lodge and ancillary uses including 10 rooms, i.e. that the lodge be limited to 10 bedrooms, subject to the following directive:*
2. *That the application be referred back to the Municipal Planning Tribunal (MPT) for the sole purpose of determining the conditions referred to in section 7(3) of the Peri-Urban Town-Planning Scheme of 1975.*

(section 7(3) provides that ... the local authority may , when application is made for its consent to use land or to erect and use a building in a use zone where a building of the proposed description may only be effected and used with the consent of the local authority, grant or refuse consent and in granting consent shall be entitled to impose such conditions as in its discretion may seem necessary for and appropriate to the use of the land or the erection and use of such building: provided that any concession granted thus the local authority may at any time be suspended and/or revoked after a ninety (90) day period of notice if the conditions subject to which approval was granted, are not completed with satisfactorily after the consent use has been exercised.)

3. *In determining the conditions, attached to the grant of consent use as decided by the MAT, the MPT shall consider the written evidence submitted to the MAT, including the record of proceedings before the MAT, and any other written technical evidence deemed necessary by the MPT to arrive at a just and equitable decision concerning the conditions to be attached to the consent use."*

- [27] Section 20(12) of the Land Use By-law provides that the Municipal Appeals Tribunal in taking a decision in terms of subsection (3), read with section 51(3) of the Act, may impose any condition they deem expedient.
- [28] The MAT has no delegating authority. Its powers are prescribed in section 20(3) of the Land Use By-law as recorded earlier. In terms of section 20(12) of the Land Use By-law, it may self-impose conditions it deems expedient.
- [29] It flows from the provisions of section 7(3) of the Peri-Scheme that the granting of consent and the imposition of conditions are not divested. The tribunal considering the application for consent use has the power to impose conditions subject to the consent use. In the present instance where the MAT considered the consent use application on appeal, it was the tribunal to impose conditions subject to granting of consent use. However, the MAT contrary to its powers under section 20 of the Land Use By-law, delegated the imposition of conditions to the MPT.
- [30] As recorded earlier in this judgment, the Title Deed thereof contain restrictive conditions that impact on the granting of consent use. It is required that those restrictive conditions be addressed prior to considering the grant of consent use. The MAT failed to acknowledge that fact at the appeal and nevertheless granted the consent use. Consequently, the grant of consent use in respect of the relevant property was unlawful. In this regard, Bins-Ward, J., in *Ex Parte Optimal Property Solutions CC*⁴ held that any alteration to or removal of restrictive title conditions alters or terminates the contractual rights and obligations of the affected property owners *inter se* and alters or expunges, as the case may be, real rights in property.⁵

⁴ 2003(2) SA 136 (CPD) at [5]

⁵ Ibid at [19]

- [31] It will be re-called that no separate application for the removal of the restrictive title conditions was launched by the first respondent as required as recorded earlier. As a result, the whole exercise of lodging the application for consent use and the subsequent appeal was futile in effect.
- [32] In addition the MAT failed to impose conditions subject to the consent use. It follows that the MAT decision, being null and void, stands to be reviewed and set aside.
- [33] The consequences of all of the foregoing findings, resulted in the whole appeal process being tainted and of no cause or effect. It follows that the decision of the MPT stands unaltered. The refusal of the consent use application remained refused.
- [34] The first respondent filed a counter-application in which it sought that the applicant be compelled to impose the conditions that were directed by the MAT. In view of the findings recorded earlier, there is no merit in the first respondent's counter-application. It warrants no consideration and stands to be dismissed.
- [35] What relief stands to be granted in view of the foregoing, stands to be considered. In this regard, the applicant in its amended notice of motion sought that the decision of the MAT taken on 11 May 2018 be reviewed and set aside and that the first respondent's counter-application be dismissed. The applicant further sought that the joinder application of the fifth and sixth respondents be paid by the first, fifth and sixth respondents. The applicant further sought that the first, fifth and sixth respondents, jointly and severally, bear all the costs, including those reserved earlier, on a punitive scale.
- [36] In its belated answering affidavit, the first respondent pled that the bondholders over the property should be joined in the proceedings in view of their possible interest in the proceedings. As obliged, the

bondholders were joined as fifth and sixth respondents. A conditional answering affidavit was filed on their behalf. The gist thereof related to a possible diminished value of the property should it be found that the MAT decision was unlawful. They then sought that the declaration of invalidity did not result in the setting aside of the MAT decision and that it should stand. That contention was premised on the length of time it took to move the main application to finality. For what follows there is no merit in that contention. The joinder application would be attended to at the hearing of this application. The joinder of the fifth and sixth respondents are ruled to be so joined.

- [37] It was recorded earlier that the first respondent throughout dilly-dallied in responding to the requests of the applicant. Furthermore, no proper response was ever forthcoming from the first respondent. The issue of the bondholder's joinder was only raised 42 months after the launch of the main application, on or about 17 March 2023. The conditional answering affidavit was then filed on 26 May 2023. No real interest in the proceedings were raised in that affidavit. Only a possible financial interest was mentioned. That financial interest did not relate to the merits of the application. Only an indirect interest possibly arose. The fifth and sixth respondents did not contribute to the consideration of any of the issues raised in the application.
- [38] Furthermore, the land use rights that the bondholder sought to retain, does not attach to the property permanently. Any consent use granted is of temporary duration. Such consent use is subject to any revoking thereof at any time.⁶
- [39] In so far as the provisions of section 172 of the Constitution are relevant, those provide that the setting aside of a decision remains discretionary. A number of factors to be considered are set out in section 172(1)(b) of the Constitution. In view of the dilatory conduct on the part of the first

⁶ Clause 7.3 of the Peri-Urban Scheme

respondent as recorded earlier, any discomfort or harm was self-inflicted. It cannot benefit a third party who has no real and substantial interest in the application and the relief that may be granted. In this regard the dicta in *Lester v Ndlambe*⁷ is apt. The applicant has a statutory and moral duty to uphold the law and to oversee due compliance its own town planning scheme.

- [40] The first respondent sought that no declaration of invalidity be granted in respect of the MAT decision and that it should not be set aside. For all the aforementioned reasons there is no merit in that contention. It was found that the MAT lacked the power to accept new evidence on appeal. Its subsequent findings were consequently unlawful and suffered illegality. Furthermore, it was not empowered to delegate its own powers to another party as it did when referring the imposition of conditions to the MPT.
- [41] Under these circumstances, to adhere to the first respondent's contention would flout the principles of law as discussed earlier. It would not be in the public interest not to grant a declaration of invalidity.⁸
- [42] From all the foregoing, the applicant is entitled to have the decision of the MAT of 11 May 2016 reviewed. A declaration of invalidity of that decision is warranted. It would follow that the MAT decision stands to be set aside.

I grant the following order:

1. Condonation is granted in respect of the late filing of all documents;
2. The fifth and sixth respondents are joined as parties to this application;

⁷ 2015(6) SA 283 (SCA) at [27]; see also *City of Tshwane Metropolitan Municipality v Grobler et al* 2006(6) SA 61 (T) at [6], [9] and [12]

⁸ *ibid*

3. The first, fifth and sixth respondents, jointly and severally, are to pay the costs of the joinder on an attorney and client scale;
4. The decision of the MAT of 11 May 2016 is reviewed and declared to be unlawful and invalid;
5. The decision of the MAT of 11 May 2016 is set aside;
6. The MTP's refusal of the first respondent's consent use application stands;
7. The first respondent is to pay the costs of the application on the attorney and client scale, such costs to include the costs of two counsel where so employed.


C J VAN DER WESTHUIZEN
JUDGE OF THE HIGH COURT

On behalf of Applicant:

Adv A Liversage

Adv PC Swele

Instructed by:

Diale Mogashoa Attorneys

On behalf of 1st, 5th and 6th Respondents:

Adv M Rip SC

Adv L Kotze

Instructed by:

Jacques Classen Inc. Attorneys

Judgment reserved:

07 May 2024

Judgment delivered;

19 November 2024