REPUBLIC OF SOUTH AFRICA

GAUTENG HIGH COURT
Johannesburg Local Division
CASE NO: 20291/2013

(1) REPORTABLE: No
(2) OF INTEREST TO OTHER JUDGES: No
(3) REVISED.

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DATE SIGNATURE

In the matter between:

Spies, Ronald Wynand N.O. **1st Applicant**

Lourens Mathys Stephanus N.O. **2ND Applicant**

The Persons/Entities listed in Annexure "A" **3RD to 142 Applicants**

And

The MEC for the Dept of Local Government And Housing of the Gauteng Province **1st Respondent**

The City of Johannesburg **2nd Respondent**

JUDGMENT

Introduction

1. Section 80 of the Local Government: Municipality Property Rates Act, 6 of 2004 (MPRA) provides:

> "(1) The MEC for local government in a province may, on good cause shown, and on such conditions as the MEC may impose, condone any non-compliance with a provision of this Act requiring any act to be done within

a specified period or permitting any act to be done only within a specified period.

(2) Non-compliance with section 21, 31 or 32 may not be condoned in terms of subsection (1).

(3) The powers conferred in terms of this section on an MEC for local government may only be exercised within a framework as may be prescribed."

2. The Municipal Property Rates Regulations (the Regulations) were published in Government Gazette No R1036 of 18 October 2006, where the framework referred to in s 80(3) of the MPRA was spelt out. It provides, *inter alia*:

> "(1) An MEC for Local Government may, within the framework set out hereunder, condone the non-compliance with a provision of the Act requiring any act to be done within a specified period or permitting any act to be done only within a specified period, having regard to:
>
> (a) The fair and effective administration of the Act (good governance);
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> (b) The merits of each case (reasonableness);
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> (c) The institutional, financial and other matters having a bearing on the capacity of the municipality to discharge its duties in relation to the implementation of the Act;
>
> (d) Whether the municipality is progressively making improvements on matters of compliance related to the meeting of timeframe in terms of the Act, including where applicable, the fulfilment of previously imposed conditions by the MEC; or
>
> (e) Any other matter that is considered relevant and is not inconsistent with the provisions of the Act."

3. The applicants invoked s 80 of the MPRA after failing to lodge an appeal timeously in accordance with s 54(2) of the MPRA against a decision of the second respondent (the City) to place certain values on their immovable property. In terms of s 54(2) of the MPRA any person affected by a decision of a municipal valuer may appeal against the decision within thirty (3) days of receiving written notice of the decision, or within twenty-one (21) days after receiving reasons for the municipal valuer's decision if the reasons were sought and provided. The applicants failed to lodge their appeal within these time-periods. They applied to the MEC to condone this failing of theirs. He decided

not to accede to their request. They now seek to have his refusal of their application reviewed and set aside. They also seek costs from any of the respondents that oppose the application.

Background facts

4. The applicants are all owners of nine erven and of the units constructed on the erven. Ownership of the units has been divided amongst them in terms of a sectional title scheme they devised and registered. They concluded an agreement with a hotel wherein they have let their units to the hotel, who in turn let it out to guests on a daily basis, and pay them a share of the income it receives from the guests. They are thus lessors while the hotel is the lessee of the units and the erven. The hotel conducts its business under the name and style of the Protea Hotel Parktonian All Suite (the hotel). It is part of the Protea Hotel Group, which is a well established brand operating nationally.

5. In 2008 the City issued a valuation roll (the valuation roll) in terms of s 10 of the MPRA, which provides for the levying of rates on property in sectional title schemes. It placed certain values on each of the units. The valuation roll was open for inspection from 27 February 2008 to 27 May 2008. The valuations reflected on the roll took effect on 1 July 2008 (the 2008 roll). The values attached to each are to a large extent determinative of the rates that are payable in terms of that unit. The larger units comprising of 55m^2 were valued at R530 000.00 and the smaller units comprising 51m^2 were valued at R500 000.00

6. Objections to the values placed on all the properties listed on the valuation roll had to be lodged by 27 May 2008. None were received with regard to the valuations of the units.

7. In 2009 the City issued a supplementary valuation roll (the supplementary) in terms of s 77 (a) of the MPRA. This roll, too, covered the units. It placed certain values on each of the units. The supplementary roll was open for inspection from 8 April 2009 to 27 May 2009. Objections to the values reflected on the supplementary roll had to be lodged by 22 May 2009. The valuations reflected on the supplementary roll took effect on 1 May 2009 (the 2009 valuations).

8. The hotel, which it will be recalled is the tenant, was dissatisfied with the valuations and on behalf of the applicants engaged a firm of professional valuers, Venter and Associates (Venter), on 12 February 2009 to value the units as well as lodge objections to the 2008 valuations. These objections should have been lodged by 27 May 2008. Venter lodged objections to the 2008 valuations only on 22 May 2009. Even then his objections did not differentiate between large and small units. The objections were almost one year late. However, it was on the last day of the period allowed for the lodging of objections for the 2009 valuations, i.e. in terms of the supplementary roll. Ten months later, on 31 March 2010, the City gave notice to the hotel that its objections were rejected. In the notice the City informed the hotel that the objections were considered to be against 2009 roll (i.e. the supplementary roll). The notice further informed the hotel that it had thirty (30) days from the date of the notice to lodge an appeal in terms of s 54(1) of the MPRA. The applicants

make great weight of the fact that the City read the objections to be against the 2009 roll and not against the 2008 roll as they understood the case that Venter was supposed to have made, though they concede that Venter had not indicated that the objections were against the 2008 roll.

9. The accountant of the hotel who deposed to the founding affidavit in this matter avers that he telephonically instructed Venter to lodge an appeal against the notice. He claims that this telephonic instruction was given within the thirty (30) day period allowed for the lodging of the appeal, but does not say exactly when this instruction was given. Venter, he claims, did not execute this instruction.

10. In about February 2012 the hotel decided to instruct its present attorneys of record to "*expedite the conclusion of the appeal*". The attorney only made contact with Venter two months later on 23 April 2012. Venter is said to have told him that he no longer had the file in his possession, but that he could try to obtain a copy of the file from a Mr Minnaar (Minnaar) of the City. The attorney was only able to make contact with Minnaar on 21 June 2012. The attorney contacted counsel on 2 August 2012, presumably to get advice. However, nothing was done until 12 December 2012 when by way of a letter an application for condonation was made to the MEC. In effect, applicants allowed two years to pass before they realised that their appeal had not been lodged by Venter and that their attorney had taken another year before he brought the application for condonation.

The application to the MEC for condonation for failing to timeously file their appeal

11. The letter sets out the history of the matter, (which is captured in the paragraphs hereinbefore). It quotes sections of the MPRA and claims that the municipal valuer had valued the properties at R406 000.00, and that the hotel had on 28 March 2012 engaged a professional valuer, Mr William Hewitt (Hewitt), who had placed a value of R350 000.00 on the large unit and a value of R330 000.00 on the small unit as at 1 July 2007. On these bases the attorney claimed that the hotel had good prospects of succeeding with the appeal. Thus the applicants claim that they have shown good cause and should therefore succeed in their application for condonation. They say, further, that the factors identified in the framework[1] within which the MEC should take her decision are not relevant to this matter.

The decision of the MEC

12. On 30 May 2013 the MEC responded in writing to the application for condonation. The MEC refused the application. The MEC deposed to the answering affidavit wherein she detailed her reasons for refusing the application. She pointed out that she had examined the reasons furnished for failing to comply with the thirty (3) day time period, and was concerned at the fact that the applicants failed to explain why it took them so long to find out that Venter was delinquent in his duties towards them. She pointed out that they did not furnish any details as to why they failed to "follow up with Venter", either to check that the appeals were lodged or to enquire as to the progress of the appeals. Had they done this they would have discovered soon enough that he failed them. They took two years to discover this basic fact, and given their

[1] See para 2 above

failure to explain why they themselves did not engage with Venter all that time, she found their explanation for the delay to be unreasonable. In this regards, she reminded them that during that period they would have been receiving statements of account from the City and they would, or rather should, have realised that they were being charged rates calculated on the amounts reflected on the 2008 roll. They paid these rates in that time. The MEC further pointed out that they failed to furnish her with an explanation as to why it took them a further eight months after realising that no appeal had been lodged by Venter before they sought condonation from herself. These no doubt are legitimate concerns. The MEC was certainly correct to raise them when considering their application. In this regard she said that she found their explanation for such a lengthy delay to be unreasonable, and that was one of the reasons why she refused the application.

13. The MEC went on to consider the prospects of the applicants succeeding in their appeal should she grant their application for condonation. She examined each of the grounds they advanced for objecting to the valuations placed on each of the units. Thus, she scrutinised their complaint that the units were categorised as "*business*" when they should be categorised as "*residential*", and found that such categorisation did not affect the valuation as reflected on the 2008 roll. She further considered their complaint that the valuation on that roll included the Value Added Tax (VAT) and was, therefore, inflated by at least fourteen percent (14%) and found that the complaint lacked merit, since they concede in their application for condonation that this ground of objection was incorrectly raised by Venter.

14. The MEC also filed an affidavit from a Mr Cornelius Minnaar, who is employed by the City and who was asked by the MEC to respond to the allegations contained in the application for condonation. He responded by furnishing the MEC with a note which, in essence, spelt out how the valuations of R500 000.00 and R530 000.00 as reflected on the 2008 roll were arrived at. The note he provided contained tables of sales of similar units that took place during the 2005, 2006 and 2007 years. In the note provided, he also indicated that other issues were taken into account during the valuation process::

> "The matter of VAT was not taken into consideration and it was admitted that VAT was set at a zero rate.
>
> It was alleged that the units were refurbished and that each purchaser paid R70,000 for refurbishment and that the movable property (such as furniture) belonged to the tenants. I therefore had a look at deeds records where units were purchased through funding from financial institutions by way of bonds. In most cases the bond amount was equal to the purchase price. This was the case with unit 2305 which was sold in May 2008 for R560,000 (bond amount R560,000 at ABSA bank), unit 1815 (purchased June 2007 for R525,000 – bond R525,000 Standard Bank), unit 903 (purchased May 2008 for R530,000 – bond R533,055 Nedbank), unit 1209 (purchased February 2008 for R535,000 – bond R602,969 Nedbank) and so on.
>
> It is a well-known fact that financial institutions only grant a bond for the purchase of fixed property, and not to cover costs for moveable property. It is therefore safe to assume that the financial institutions at that stage granted 100% bonds over these units because their bond originators and valuers were of the opinion that the bond amount was equal to the market value of those units, and that the bank would be able to recover the loan amount in the event that the unit had to be repossessed."

15. The MEC carefully considered the submission of Minnaar and came to the conclusion that there was no prospect of the applicants succeeding in their appeal. Thus, upon finding that the delay of the applicants was unreasonable

and that the applicants have failed to demonstrate that they had any prospect of succeeding with their appeal, she refused the application for condonation.

The grounds for review raised by the applicant

16. To secure the relief they seek, the applicants rely upon and draw specific reference to ss 6(2)(g) and 6(2)(h) of the *Promotion of Administrative Justice Act, No 3 of 2000* (PAJA). Their reliance on PAJA is correct as it is the legislation that gives effect to s 33 of the Constitution, which guarantees that all administrative action shall be treated lawfully, reasonably and in a manner that is procedurally fair.[2] The relevant sub-sections of PAJA read:

> "6(2) A court or tribunal has the power to judicially review an administrative action if-
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> ...
>
> (g) the action concerned consists of a failure to take a decision
>
> (h) exercise of the power or the performance of the function authorised by the empowering provision, in pursuance of which the administrative action was purportedly taken, is so unreasonable that no reasonable person could have so exercised the power or performed the function;
>
> ..."

17. The ground of review based on s 6(2)(g) of PAJA has fallen away as the MEC had taken a decision. The only ground that is relied upon then is that the decision is "*so unreasonable that no reasonable person*" exercising the power to condone their late filing of their appeal could have taken the decision the MEC took, which was to refuse it.

18. Section 80 of the MPRA confers upon the MEC a discretion to grant or refuse an application for condonation. Read with s 6(2)(h) of PAJA, which has been

[2] *Minister of Health v New Clicks SA (Pty) Ltd and Others (Treatment Action Campaign and Another as Amici Curiae)* 2006 (2) SA 311 (CC) at [95]

invoked by the applicants on this matter, this discretion has to be exercised reasonably.

19. The MEC's conclusion that the delay was lengthy and the explanation furnished for it was unreasonable is really unassailable. The MEC was not wrong to look into the length of the delay as well as the explanation provided therefore. That she found the explanation to be lacking in substance is borne out by the evidence before her. The framework impels the MEC to have regard to "*the fair and effect administration of the Act*" as well as "*the institutional, financial and other matters having a bearing on the capacity of the municipality* (the City) *to discharge its duties in relation to the implementation of the Act* (the MPRA)." By scrutinising the delay caused by the applicants in prosecuting their appeal, the MEC has, albeit not explicitly, effectively carried out her mandate as per the framework. A delay of such length as has appeared in this case certainly impacts negatively on the City's capacity to discharge its duties in relation to the implementation of the MPRA, which includes its duty to provide "*services to communities in a sustainable manner.*"[3] Thus, the delay is prejudicial to the City. There is a further consideration which is of significance: which is that "*there is a public interest element in the finality of administrative decisions and the exercise of administrative functions.*"[4] To recapulate: the MEC's decision that the extensive delay and the inadequate explanation for it "*was unreasonable*" is neither irrational, nor unreasonable.

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[3] Section 152(1)(c) of the Constitution. In fact the whole of s 152 of the Constitution is relevant to a matter such as the present as it spells out what the objects of Municipalities, (like the City) are. The MPRA is meant to and, in my view, does aim to, give effect to these objects.

[4] *Khumalo and Another v Member of the Executive Council for Education: KwaZulu Natal* 2014 (3) BCLR 333 (CC) at [46].Compare:*Wolgroeiers Afslaers (Edms) Bpk v Munisipaliteit van Kaapstad* 1978 (1) SA 13 (A) at 41B.

20. The MEC's rejection of the complaint that the 2008 roll incorrectly categorised the units as business when they should be categorised as residential on the basis that it had no material effect on the valuation is, too, neither irrational, nor unreasonable. The categorisation did not affect the valuation of the units. The units were valued according to the price they could command on the open market as of the date of valuation. The categorisation was merely descriptive. That is what the evidence before the MEC demonstrated. As for the valuations of the units as reflected on the 2008 roll she was of the view, based on Minnaar's submission, that they were not significantly outside the range of the prices paid on the open market by some of the unit holders. The MEC's conclusion is supported by the evidence placed before her.

21. Finally, focus must not be lost of the fact that this is an application to review the decision of the MEC. It is not an appeal against her decision. The test for review while significantly expanded over the years is, nevertheless, narrower than that of an appeal. An appellate court or tribunal is concerned with the correctness of the decision that forms the subject of its proceedings. A court sitting in review, on the other hand, is not concerned with the correctness of the decision, but with its reasonableness. A review court does not have to share the conclusion arrived at by the body whose decision is being impugned, but would, nevertheless, not interfere with it if it was a decision that a reasonable person in the position of the decision maker would take. While examining the question of reasonableness of the decision it is important to scrutinise the evidence placed before the decision maker, but focus must not be lost of the fact that the court is

sitting in review and not in an appeal of the decision.[5] Consequently, I need not find that the decision of the MEC was correct, though in this case I think it was, only that it was one that no reasonable person considering the application for condonation would have taken.

22. For these reasons, I conclude that the applicants have not demonstrated that there is a reason for me to interfere with the MEC's decision.

Conclusion and Costs

23. The application stands to be dismissed.

24. Both parties agreed that costs should follow the result.

The order

25. The following order is made:

1 The application is dismissed.

2 The applicants are jointly and severally liable for the costs of the application.

Vally J
Gauteng High Court, Johannesburg Local Division

Appearances:

For the applicants : Adv H B Marais SC with Adv D S Hodge
Instructed by : Shapiro-Aarons Inc

[5] See: *Carephone (Pty) Ltd v Marcus NO and others* 1999 (3) SA 304 (LAC) at [36]; *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others* 2004 (4) SA 490 (CC) at [44]-[45]

For the respondents:		Adv B Makola
Instructed by	:	State Attorney
Dates of hearing	:	18 November 2014
Date of judgment	:	19 December 2014