

IN THE HIGH COURT OF SOUTH AFRICA



GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 07725/2015

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED.
<u>29/11/2016</u>	
DATE	SIGNATURE

In the matter between:

LANSERIA AIRPORT 1993 PROPRIETARY LIMITED

APPLICANT

and

MEMBER OF THE EXECUTIVE COUNCIL
FOR LOCAL GOVERNMENT, GAUTENG PROVINCE

FIRST RESPONDENT

CITY OF JOHANNESBURG
METROPOLITAN MUNICIPALITY

SECOND RESPONDENT

THE MUNICIPAL VALUER FOR THE CITY OF
JOHANNESBURG METROPOLITAN MUNICIPALITY

THIRD RESPONDENT

THE VALUATION APPEAL BOARD FOR THE CITY OF
JOHANNESBURG METROPOLITAN MUNICIPALITY

FOURTH RESPONDENT

JUDGEMENT

COLLIS AJ:

INTRODUCTION

[1] This is an application to review and set aside the decision of the first respondent (*the MEC*) dated 17 October 2014 to decline to condone the Applicant's late filing of an objection in terms of section 50(1)(c) of the Local Government: Municipality Property Rates Act 6 of 2004 (*the Rates Act*), against the general valuation roll of the second respondent, for the period 1 July 2008 to 30 June 2013.

[2] The Rates Act commenced on 2 July 2005 and the first valuation roll compiled under the Act became effective on 1 July 2008. The roll opened for inspection and objection from 27 February 2008 to 27 May 2008.

[3] In terms of section 80 of the Rates Act, the MEC may, on good cause shown and on such conditions as the MEC may impose, condone any non-compliance with a provision of the Act, *inter alia* permitting any act to be done within a specific period, or permitting any act to be done, only within a specified period.

[4] Section 50(1) of the same Act provides further for any person to inspect the roll during office hours within the period stated in the notice referred to in section 49(1), or on payment of a reasonable fee, request the municipality during office hours to

make extracts from the roll, and if so desire to lodged an objection with the municipal manager against any matter reflected in, or omitted from, the roll.

[5] Section 32(1)(b) of the Act stipulates that a valuation roll remains valid for that financial year or for one or more subsequent financial years as the Municipality may decide, but in total not more than four financial years. The MEC may extend the period for which a valuation roll remains valid to five financial years subject to conditions contained in section 32(2).

[6] To the matter at hand the valuation roll against which the Applicant wishes to object has lapsed and was replaced by another one effective from 1 July 2013. This aspect is common cause between the parties.

[7] What is also common cause between the parties is that the MEC's refusal to grant the Applicant condonation was communicated to the Applicant in a letter authored by the Head of the Department dated 17 October 2014 (*the letter*).¹

REASONS ADVANCED FOR REFUSAL OF CONDONATION

[8] In the letter, the Head of Department states that the MEC refused to condone the Applicant's late submission of objection, as he had failed to object even within three weeks of becoming aware of the closure of the period for noting objections; that no reasonable explanation was given by him for having waited nearly four (4) years before an application for condonation was brought and thirdly that the 2008 Valuation roll had ceased to exist and to allow the Applicant to bring an objection

¹ Founding Affidavit Index p13 para14

thereunder would not be in the best interest of the administration of the Act. These were the totality of the reasons provided by the MEC for his refusal of the condonation application.

PRESCRIBED LEGISLATIVE FRAMEWORK

[9] Section 80(3) provides that the power to grant condonation conferred on an MEC for local government may only be exercised within a prescribed framework and in doing so any such condonation must not result in the provisions of section 32(1)(a) of the Act not being complied with. Furthermore, that where the MEC for local government condones the non-compliance with a provision of the Act, regard should be had to-

- (a) the fair and effective administration of the Act;
- (b) the merits of each case;
- (c)
- (d).....
- (e)²

PRINCIPLES APPLICABLE IN DETERMINING CONDONATION

[10] In considering whether it would have been in the interest of justice to grant the Applicant condonation for the failure to perform an act within a prescribe time period, the MEC had to consider, whether the Applicant provided:

- (a) a satisfactory reasonable explanation for its delay, which translates to an explanation sufficiently full to have enabled the MEC to understand how the delay came about and to assess its conduct and motives; and

² Government Notice No R 468 published in Government Gazette No 32187 on 30 April 2009

(b) secondly, the Applicant's prospects of success in the main case.³

[11] These two factors are not individually decisive, but are interrelated and must be weighed against each other. The prospects of success if condonation is granted play a significant role. The decision maker must assess the merits in order to balance that factor with the cause of the delay as explained by the Applicant. Strong merits may mitigate fault, whereas no merits may render mitigation pointless. Thus, strong prospects of success may compensate for a long delay and possible weak explanation. Whereas good cause primarily concerns the Applicant's conduct and motives, the absence of unreasonable prejudice shifts the focus onto the State organ and the protection of its interest by receiving timeous notice.

[12] The above factors were restated in the decision of eThekweni Municipality⁴, where the Court said:

"Two factors assume importance in determining whether condonation should be granted. They are the explanation furnished for the delay and the prospects of success. In a proper case, these factors may tip the scales against the granting of condonation. In a case where the delay is not a short one, the explanation given must not only be satisfactory but must also cover the entire period of the delay."

³ Minister of Agriculture and Land Affairs v C.J. Rance (Pty) Ltd 2010 (4) SA 109 (SCA); Silber v Ozen Wholesalers (Pty) Ltd 1954 (2) SA 345 (A) at 353A

⁴ eThekweni Municipality v Ingonyama Trust 2014 (3) SA 240 (CC) at para [28]

APPLICANT'S SUBMISSIONS

[13] *In casu*, the Applicant alleges that the 2008 roll was open for inspection and lodging of objections from 27 February 2008 until 27 May 2008. In substantiation thereof, it annexed the Provincial Gazette dated 20 February 2008. The valuation roll as per the Gazette covered the period 2008 to 2012.⁵ The Applicant alleges that publication of the notice in the Gazette in terms of section 49(1) (c) and other publications did not come to its attention.

[14] On 11 October 2013, the Applicant served its condonation application⁶ on the Municipality. Therein, the Applicant sets out, that it did not timeously object to the entry on the roll that valued its property on 1 July 2007 at a market value of R 550 million, as it did not receive any notice and further that it only became aware of the new value of the property on or about 16 July 2008, when the period for objecting to entries on the roll had closed. This allegation was repeated in its founding affidavit⁷.

[15] In response to the above, the First, Second and Third respondents denied that the notice in terms of section 49(1) (c) was not dispatched to the Applicant. They alleged that it was so dispatched by ordinary mail to the Applicant's address on the City's billing system and as confirmation thereof, annexed "COJ1" and "COJ2" to their answering affidavit.⁸ If one however has regard to the said annexures, both are undated and the notice specifically refers to an apparent incorrect date by which any objection should have reached the Municipal Manager. The said notice also refers to

⁵ Founding Affidavit p 19 para 30 annexure FA 2 pp 177-178

⁶ See Index to Pleadings Bundle p 1-58

⁷ Founding Affidavit p19 para 31

⁸ Answering Affidavit Second and Third Respondents p 288 para 36

any objection to be made to the supplementary valuation roll as opposed to the valuation roll referred to in the published Gazette.

[16] To my mind, nothing turns on it. On the Applicant's contention, it did not receive the said notice and as such it could not have acted on it at the time when it was required to do so.

[17] Thereafter, the Applicant alleges that it had continuously engaged the municipality to rectify the incorrect entries on the roll until ultimately on 27 January 2012, when the Valuation Appeal Board finally determined the market value of its property to be R 358 million as at 1 May 2010. The recalculated value assigned to the property is common cause between the parties, and the value so determined, is R192 million less than the initial value assigned by the municipal valuer on the same property three years earlier.

[18] Albeit, that a recalculated value had been assigned to its property, the respondents did not adjust the rates levied on the property for the period 1 July 2008 to 30 April 2010. It is for this reason that the Applicant submitted a formal objection on 30 July 2012, in essence objecting to the original entries on the roll. The recalculated value assigned, the Applicant contends, is indicative of strong prospects of success to the main claim and it is for this reason that it contends that condonation should have been granted by the MEC.

RESPONDENTS SUBMISSIONS

[19] Counsel for the respondents made the following submissions:

19.1 The application falls to be dismissed because it is moot. It was contended that the general valuation roll which became effective on 1 July 2008 against which the Applicant seeks an objection has lapsed in accordance with section 32(1) and was replaced by a new one in 2013. A valuation roll takes effect from the start of the financial year following completion of the public inspection period required under section 49 and remains valid for that financial year or for one or more subsequent financial years as the municipality may decide but in total not more than four financial years. As the Act does not provide for the revival of a lapsed roll; lodging an objection against a lapsed valuation roll would result in decisions being made in respect of such a lapsed roll, to be legally incompetent and ineffective.

19.2 Secondly, it was submitted by counsel that there has been an inordinate delay in bringing the condonation application before the MEC and that the explanation proffered by the Applicant is unreasonable and unconvincing. Albeit that the respondents concede that there had been several interactions between the Applicant's legal representative and advisors on the one hand, with that of the respondents on the other, the Applicant should have raised objections to the roll in the prescribed manner as soon as it became aware of the published valuation roll, albeit that the period to have raised an objection by then had lapsed. To have waited a period of nearly four years to lodge an objection resulted in a delay that has been inordinate.

19.3 Thirdly, counsel submitted, that the MEC's decision in considering an application for condonation is discretionary and that his decision to refuse the condonation was not irrational. The MEC in his affidavit sets out that the negotiation process between the council and the Applicant is distinguishable

from applying for condonation and when the first-mentioned became abortive, the Applicant nonetheless failed to apply for condonation at the time.⁹ Furthermore, that in reaching his decision, he considered submissions made by the Applicant, and representations made by the City and came to the conclusion that there were no reasonable prospects of success in regard to the proposed objections and that the Applicant had failed to provide a reasonable explanation for its failure to file an objection in time. The MEC contended that several opportunities existed for the Applicant to bring a condonation application but that it failed to do so.

[20] This Court (per Vally J) in *Spies v MEC for the Department of Local Government & Housing of Gauteng Province*¹⁰ said the following when seized with the question as to whether the decision of the MEC to refuse condonation should be reviewed:

'Finally, focus must not be lost to 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 was significantly expanded over the years, is nevertheless, narrower than that of an appeal. An appellate court or tribunal 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, nonetheless, not interfere with it if it was a decision that a reasonable person in the position of a 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,

⁹ AA First Respondent p 248 para 10

¹⁰ Unreported Judgment 2015 JDR 0098

but focus must not be lost of the fact that the court is sitting in review and not in an appeal of the decision.”¹¹

[21] As regards the explanation provided by the Head of Department in his letter dated 17 October 2014, no reasons were furnished by the MEC, except to refer to the 2008 Valuation roll which had ceased to exist and the inordinate delay in bringing the condonation application, for which he found that no reasonable satisfactory explanation was given.

[22] In terms of the Notice of Motion dated 2 March 2015 ¹² the first respondent was called upon to provide reasons which by law he is required to do or may desire to give or make. Despite being called upon to do so, he had failed to give any such reasons.

[23] In addition to the reasons referred to in the letter by the Head of Department, the First Respondent in his Answering affidavit provides further extensive reasons for his decision to refuse to grant the condonation application; such as the prejudice the Municipality would suffer if condonation was granted and that the Applicant's objection had no reasonable prospects of success. ¹³

[24] As these additional reasons were not alluded to in the letter by the Head of Department, nor were they given as reasons when he was served with this notice of

¹¹ Refer to para 21 of the judgement, where reference was made to *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others* 2004 (4) SA 490 (CC) at para 44-45

¹² Notice of Motion p 3

¹³ First Respondent's Answering Affidavit par 39-40 and 46-47 p 254 & 256

motion, I do not consider it to be reasons considered by him, when the condonation application was placed before him.

[25] It is apparent from the reasons set out in the letter by his Head of Department, that the primary consideration when refusing condonation was the inordinate delay in applying for condonation. Even if this was to be accepted, the letter clearly indicates that the MEC failed to also have regard for the Applicant's prospects of success. If this indeed was considered by him, he would have alluded to same when he tabulated his reasons for refusal in the said letter.

[26] By him failing to have regard to the Applicant's prospects of success, which the recalculated value assigned to the property directly points to; the MEC failed to apply the test for condonation correctly when he considered the condonation application.

ORDER

[27] Given the totality of the reasons listed above, I consider it prudent and proper to remit the decision back to the MEC for reconsideration and as a result I make the following order:

27.1 The First Respondent's decision dated 17 October 2014, wherein the Applicant's condonation application dated 10 October 2013 in terms of section 80(1) of the Local Government: Municipal Property Rates Act 6 of 2004, was refused; is hereby reviewed and set aside;

27.2 The Applicant's condonation application is referred back to the First Respondent for the First Respondent to duly consider the merits thereof before making a decision on the Applicant's condonation application.

27.3 The said decision must be communicated in writing to the Applicant's attorney at the address set out in the condonation application, within 30 (thirty) days of date of this order.

27.4 The First, Second and Third Respondents are ordered to pay the Applicant's costs, jointly and severally the one paying the other to be absolved, which costs are to include the costs consequent upon the employment of counsel.



C. J. COLLIS

ACTING JUDGE GAUTENG LOCAL DIVISION JOHANNESBURG

APPEARANCES:

COUNSEL FOR APPLICANT: C.F. Van Der Merwe SC

INSTRUCTED BY: Le Roux Vivier Attorneys

COUNSEL FOR FIRST, SECOND &

THIRD RESPONDENTS: B. L. Makola

INSTRUCTED BY: Mogaswa Incorporated

DATE OF HEARING: 02 August 2016

DATE OF JUDGMENT: 29 November 2016