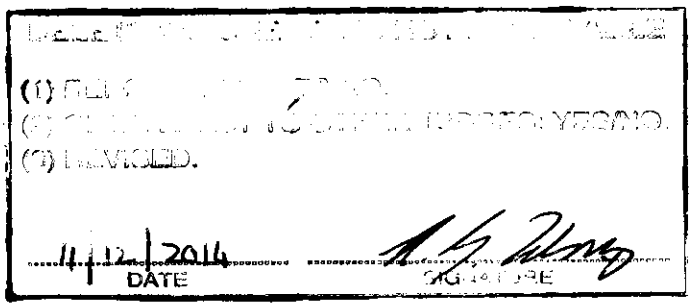
IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

Case No: 71699/13

11/12/2014



In the application between:

CHOOSE LIFE CHURCH NPC	First Applicant
THE GOVERNING BODY OF THE GLEN HIGH SCHOOL	Second Applicant
THE GOVERNING BODY OF ST ALBAN'S COLLEGE	Third Applicant
THE GOVERNING BODY OF HATFIELD CHRISTIAN SCHOOL	Fourth Applicant
HATFIELD CHRISTIAN CHURCH	Fifth Applicant
THE GOVERNING BODY OF ST MARY'S DIOCESAN FOR GIRLS	Sixth Applicant
WESLEYAN CHURCH	Seventh Applicant
DERICK PRINCE MINISTRIES SA	Eighth Applicant
IMPACT RADIO	Ninth Applicant
SERENE PARK RETIREMENT VILLAGE	Tenth Applicant
STADTMISSION PRETORIA	Eleventh Applicant
THE SCHOOL GOVERNING BODY OF GLENSTANTIA PRIMARY SCHOOL	Twelfth Applicant
PRETORIA CENTRAL BAPTIST CHURCH WELFARE ASSOCIATION	Thirteenth Applicant
INDEPENDENT INSTITUTE OF EDUCATION – VARSITY COLLEGE	Fourteenth Applicant

and

THE CHAIRMAN OF THE STRATEGIC LAND

DEVELOPMENT TRIBUNAL OF THE CITY OF TSHWANE METROPOLITAN MUNICIPALITY	First Respondent
THE CITY OF TSHWANE METROPOLITAN MUNICIPALITY	Second Respondent
SUN INTERNATIONAL MANAGEMENT LTD	Third Respondent
MENLYN MAINE INVESTMENT HOLDINGS (PTY) LTD	Fourth Respondent
THE PRACTICE GROUP (PTY) LTD	Fifth Respondent

JUDGMENT

TOLMAY, J:

INTRODUCTION

[1] In this application, the Applicants seek to review and set aside a decision taken by the Strategic Land Development Tribunal ("the SLDT") of the City of Tshwane Metropolitan Municipality ("the City") on 24 June 2013, granting approval for the removal of various title conditions from the deeds of transfer relating to various identified properties and the simultaneous amendment of the Tshwane Town Planning Scheme, 2008 ("the decision") by rezoning the properties concerned. These properties are situated within the so called Menlyn Maine Precinct in Pretoria (the "Menlyn Precinct").

[2] The various rights attaching to the properties concerned were collectively rezoned for "Business 1" including "Places of Amusement". One of the uses which the properties concerned is now clothed with, is a primary land use

right as a place of amusement which *inter alia* allows for the establishment of a casino.

[3] The rationale for the application is the Applicants submission that the public notices published by the Fourth Respondent in respect of the Southern Precinct of the Menlyn Precinct dated 20 and 27 March 2013 did not expressly disclose the intention of the Fourth Respondent to operate a casino. The Applicants are opposed to the development and operation of a casino in the Southern Precinct of the Menlyn Precinct.

[4] The Applicants' main contention is that due to the inadequacy of public notification the Applicants' right to public participation was thwarted. The Applicants complain that the intended development of a casino was not expressly disclosed in such notices which rendered same inadequate for purposes of the prescribed statutory public participation process.

[5] The applicants are a cross section of civil society consisting of churches, schools, and educational institutions etc, who invoke their right to public participation in decision-making processes affecting the use of land at local government level and who feel aggrieved by the potential development of and operation of a casino in the Menlyn Precinct. It is common cause that the Applicants' only objection is the development of a casino at the Southern Precinct of the Menlyn Precinct and not the rest of the development. The

Applicants however seek to set aside the whole of the decision First and Second Respondents took on 24 June 2013, which, if granted, will affect the whole of the Southern Precinct where 108 000m² mixed use floor area has been approved and consequently will not only impact on the development and operation of a casino but will impact on the whole development at the Southern Precinct.

[6] It should be emphasised at the outset that the application and granting of a gambling licence to facilitate the operation of a casino is a process which is separate from the process to obtain land use rights to enable the development of a casino. The issueing of gambling licences is the prerogative of the Gambling Board. It is thus not for this Court to consider the question of the desirability of the issueing of a gambling licence.

BACKGROUND

[7] The Menlyn Precinct and the development thereof have a long and protracted history that is relevant to this application. The Fourth Respondent is the registered land owner of approximately 104 erven and street portions which constitutes the Menlyn Precinct. The Menlyn Precinct developments were initiated by way of several applications for land development by the Fourth Respondent. The Fourth Respondent since 2008 and until October 2011 initiated development within the Menlyn Precinct by way of several applications for land development in terms of the Development Facilitation

Act of 1995 (DFA). The application in terms of the DFA envisaged at least 4 development phases incorporating several land use components which required consolidation of erven and street portions, removal of restrictive conditions of title and subdivision of certain development pockets. This was done by way of a single Land Use Change Application submitted to the Gauteng Development Tribunal in terms of sec 32 and the Regulations of the DFA.

[8] The DFA Applications, according to the Fourth Respondent and due to the diversity of different land uses involved and the vast consolidated areas to be developed over a long future development period, all made provision for a so-called "basket of land use rights", restricted to a maximum gross floor area of 301 530m². The term "basket of land use rights" is apparently used to describe a conglomerate of different land use rights, which unless specifically capped or restricted, can be exercised by the holder of such rights in accordance with ever changing market demand tendencies, affording a developer some flexibility regarding the land use components which it, over time, can on a sustainable manner, exercise to accommodate tenant demands. The initial Menlyn Precinct development which formed the subject matter of the DFA application was planned to be completed in phases.

[9] In terms of the aforesaid basket of land use rights principle a diversity of land use zonings varying from "Special", "Business 1", "Business 3", "Special for business buildings" and "Business 4" as defined in the prevailing Town

Planning Scheme of the Second Respondent have been approved by the Gauteng Development Tribunal, the aggregate of which was not to exceed 301,530m² gross floor area and which land use rights could be exercised by way of buildings or structures with a height of 24 (twenty four) storeys.

[10] Some of the land use rights which formed the subject matter of the approved DFA Applications, have after approval, been proclaimed in terms of Section 33(4) of the DFA and, therefore formally vested in the land which constitutes a particular development phase and has already partially been exercised by way of the erection of buildings currently occupied by tenants. Other approved phased land use rights were due to interim acquisition of additional land and prevailing market trends, not formally promulgated as yet and therefore, despite approval by the Gauteng Development Tribunal, did not vest in such land immediately after approval.

[11] The unproclaimed but approved land use rights became problematic because of the demise of Chapters V and VI of the DFA in terms of which such land development applications have been approved, due to a Constitutional Court judgment to the effect that such Chapters were unconstitutional and therefore invalid, with effect from 12 June 2012[1]. The situation was, according to Fourth Respondent, exacerbated by the stance adopted by Local Authorities in response to the aforesaid decision not to further administratively process or give effect to the approved but unproclaimed land use rights granted in terms

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1 **Johannesburg Metropolitan Municipality v Gauteng Development Tribunal & Others** 2010(2) SA 554(SCA); **Johannesburg Metropolitan Municipality v Gauteng Development Tribunal & Others** 2010(6) SA 182 (CC)

of the DFA. Consequently Fourth Respondent could either resubmit the DFA applications in terms of alternative prevailing Town Planning legislation or had to wait for the proclamation of substituting legislation in terms of which the Local Authorities are authorised from a statutory point of view, to simply further process and give effect to the approved DFA applications. The Fourth Respondent elected the first option.

[12] The Fourth Respondent states that the election in respect of the aforementioned alternatives available was informed by cost and time constraint considerations, especially in view of the fact that the Special Planning and Land Use Management Act 2013, ("SPLUMA"), which would have authorised Local Authorities to process and give effect to the approved DFA applications has in the interim been promulgated but was not as yet operational. The operational date has been postponed several times and SPLUMA was at the time of the hearing still not operational.

[13] The Fourth Respondent, in respect of the Southern Precinct of the Menlyn Precinct, which consists of certain properties in respect of which the Gauteng Development Tribunal has already, in terms of the DFA approved of 108,000m² mixed use gross floor area, including places of amusement, in the interim, and pending the operational date of SPLUMA, re-approached the Second Respondent as authorized Planning Authority in terms of the Gauteng Removal of Restrictions Act 1996 (GRRA), to reconfirm and promulgate such approved land use rights in respect of the properties.

[14] The Fourth Respondent contended that the resubmission of the Land Use Change Application in terms of GRRA envisaged the same land use rights, and the same gross floor area in respect of the same properties in these circumstances therefore, so the argument goes, although submitted to the Planning Authority instead of the erstwhile Gauteng Development Tribunal, was, from a Town Planning perspective, a mere formality. Especially in view of the fact that the new Planning Authority in terms of GRRA, was the Second Respondent who formed part of and actively participated in the earlier DFA proceedings before the Gauteng Development Tribunal and who attended all the hearings before such Tribunal, during which the land use rights in respect of the Southern Precinct were approved. These proceedings also included public participation proceedings.

[15] The Land Use Change Application was consequently submitted by the Fourth Respondent in terms of Section 5 of GRRA. This Section of GRRA finds application where an owner of private land intends to remove restrictions in respect of land contained in the relevant title deeds and also allows for the simultaneous rezoning of the properties, which zoning at the time, due to the fact that the approved DFA land use rights have not as yet been promulgated and did not vest in the properties, were still, in terms of the prevailing Town Planning Scheme, reflected as "Residential 1", "Special" and "Existing Street".

[16] The Fourth Respondent's instructions to its Town Planners for purposes of submission of the Land Use Change Application therefore were to procure the same diversity of land use rights for a mixed use "basket of rights" not

exceeding the restricted floor area of 108,000m² already approved by the Gauteng Development Tribunal in respect of the properties. The casino is only one of 145 land uses listed and permissible in terms of the Town Planning Scheme. The proposed casino development will constitute ± 9 000m² of the 108 000m². The Fourth Respondent contends that it constitutes only 3% or 8% of the permissible developable floor areas involved.

[17] The Fourth Respondent contended that the aforesaid decision, by including "place of amusement" has, in the circumstances clothed the properties concerned with primary land use rights *inter alia* for use as a casino. It is the development and operation of a casino which prompted the Applicants to bring this application, as they submit that the public notices did not alert the public to the fact that a casino forms part of the proposed development.

POINTS IN LIMINE

[18] Fourth Respondent raised several points *in limine* due to the conclusion I came to I deal only with one of them, namely that there was an undue delay in the bringing of the application.

UNDUE DELAY

[19] The Applicants launched the review application on 22 November 2013. The relief sought exclusively pertains to a decision of the First and Second Respondents of 24 June 2013, of which the Applicants, on their version, were

informed or became aware of on 10 July 2013 but not later than mid-August 2013. There was, accordingly a delay of 3 months before the application was launched. The Application was ultimately heard more than a year after the Applicants became aware of the decision. Pending the hearing of the application the decision stood and the parties acted on it. The Applicants did not approach the Court for any interim remedy to prevent the Respondents from acting on the decision in the interim.

[20] The Respondents took the point that there was an undue delay by the Applicants in bringing the application. It was submitted that for that reason alone the application should be dismissed. The Applicants did not ask for condonation nor did they give reasons for the delay in their papers. Only in argument did the Applicants' counsel state that it was a cumbersome process to draft the application due to the large number of Applicants involved.

[21] The Fourth Respondent raised the issue that the delay was unreasonable in circumstances where the decision sanctioned a development which equates to some R3 billion in value. The Third and Fourth Respondents states that they concluded transactions worth many millions of rands and embarked on authorisation applications *inter alia* for a gambling licence, the legal costs of which amounted to hundreds of thousands of rands. The decision, so Fourth Respondent argued had immediate consequences which required some prompt certainty as to its validity. In this context one should also consider the fact that a setting aside of the decision will impact on the

whole of the decision taken on 24 June 2013 and not only on the development and operation of a casino.

[22] It is required of Applicants to explain in their founding affidavit the failure to mount their attack earlier if they fail to do that they run the risk that a court may find that the delay is of such a magnitude that it called for an explanation in the founding papers and dismiss the application[2]. In this instance I did not have the advantage of considering a proper explanation for the delay, as the Applicants did not give any reasons for the delay nor did they seek condonation for it. Applicants who fail to bring applications within a reasonable time may, unless there are grounds on which condonation could be granted, lose the right to complain of irregularities that may have occurred[3].

[23] Due to considerations of practicality, courts ordinarily give consideration to the question of unreasonable delay prior to dealing with the merits of the matter and in fact are compelled to deal therewith first and are not authorised to enter into the merits of a review application if condonation or an extension cannot be granted. Consequently I need to deal with this issue before

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2 **Lion Match Co Ltd v Paper Printing Wood & Allied Workers Union & Others** 2001(4) SA 149, 156 par 25 – p 157 par 29

3 **Lion Match**, *supra*, p 156 par 25; **Mamabolo v Rustenburg Regional Local Council** 2001(1) SA 135 (SCA)

proceeding to the merits[4].

[24] Section 7 of PAJA determines that a review application should be brought without undue delay and not later than 180 days after the Applicants became aware of the administrative action. Section 9(1)(b) of PAJA provides that the period of 180 days may be extended on application where the interests of justice so requires.

[25] The Applicants did not approach the Court for any interim remedy to prevent the Respondents from acting on the decision of 24 June 2013. No interim relief was sought to suspend the validity and executability of the land use rights approved by way of the decision. Consequently the decision stood and had legal consequences as set out above. The result of this is that the approved land use rights could immediately be acted upon by those entitled to do so and others having obtained an interest therein. On the facts set out by Fourth Respondent it would seem this is what happened and inter alia the application before the Gambling Board followed. This issue is important, as prejudice is one of the aspects that I will have to consider when I decide the question of a possible undue delay.

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4 **Bengwenyama Minerals (Pty) Ltd and Others V Genorah Resources (Pty) Ltd and Others** 2011(4) SA 113 (CC) 136 B – 137 E; **Beweging vir Christelike Volkseie Onderwys and Others v Minister of Education and Others** [2012] 2 All SA 462 (SCA0 475 pa 42 – 44; **Camps Bay Rate Payers' and Residents' Association and Another v Harrison and Another** 2011(4) SA 42 (CC); **Opposition to Urban Tolling Alliance v South African National Roads Agency Limited** 2013 [4] All SA 639 (SCA) 648, p 654 par 42 – par 43

[26] A Court has a discretion to determine whether an administrative decision should be set aside due to an undue delay. This discretion must be exercised with due consideration of all the relevant facts, which will include the possibility of prejudice. In **Oudekraal Estates (Pty) Ltd v City of Cape Town**[5] the following was said:

"*In reviewing and considering whether to set aside an administrative decision, courts are imbued with a discretion, in the exercise of which relief may be withheld on the basis of an undue and unreasonable delay causing prejudice to other parties, notwithstanding substantive grounds being present for the setting aside of the decision. The application of the delay rule would in a sense 'validate' a nullity. This rule evolved because, prior to the Promotion of Administrative Justice Act 3 of 2000 (PAJA), no statutorily prescribed time limits existed within which review proceedings had to be brought. The rationale was an acknowledgment of prejudice to interested parties that might flow from an unreasonable delay as well as the public interest in the finality of administrative decisions and acts*".

[27] The approach that needs to be followed when determining whether there was an undue delay was set out in **Opposition to Urban Tolling Alliance v SANRAL**[6] where the following was said:

"*[26] At common law application of the undue delay rule required a two stage*

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5 **Oudekraal Estates (Pty) Ltd v City of Cape Town & Others** 2010(1) SA 333 (SCA), p 343 par 33

6 *Supra* 639 par [26]

enquiry. First, whether there was an unreasonable delay and, second, if so, whether the delay should in all the circumstances be condoned (see eg Associated Institutions Pension Fund and others v Van Zyl and others 2005 (2) SA 302 (SCA) para 47). Up to a point, I think, s 7(1) of PAJA requires the same two stage approach. The difference lies, as I see it, in the legislature's determination of a delay exceeding 180 days as per se unreasonable. Before the effluxion of 180 days, the first enquiry in applying s 7(1) is still whether the delay (if any) was unreasonable. But after the 180 day period the issue of unreasonableness is pre-determined by the legislature; it is unreasonable per se. It follows that the court is only empowered to entertain the review application if the interest of justice dictates an extension in terms of s 9. Absent such extension the court has no authority to entertain the review application at all. Whether or not the decision was unlawful no longer matters. The decision has been validated by the delay (see eg Associated Institutions Pension Fund para 46). That of course does not mean that, after the 180 day period, an enquiry into the reasonableness of the applicants conduct becomes entirely irrelevant. Whether or not the delay was unreasonable and, if so, the extent of that unreasonableness is still a factor to be taken into account in determining whether an extension should be granted or not (see eg Camps Bay Ratepayers' and Residents' Association v Harrison [2010] 2 All SA 519 (SCA) para 54)".

[28] Whether a delay is undue will be determined by way of a value judgment taking into consideration all the facts of a particular case. In **Gqwetha v Transkei Development Corporation Ltd and Others**[7] the following was said:

"[22] It is important for the efficient functioning of public bodies (I include the first respondent) that a challenge to the validity of their decisions by proceedings for judicial review should be initiated without undue delay. The rationale for that longstanding rule – reiterated most recently by Brand JA in Associated Institutions Pension Fund v Van Zyl 2005 (2) SA 302 (SCA) at 321 – is twofold: First, the failure to bring a review within a reasonable time may cause prejudice to the respondent. Secondly, and in my view more important, there is a public interest element in the finality of administrative decisions and the exercise of administrative functions. As pointed out by Miller JA in Wolgroeiers Afslaers (Edms) Bpk v Munisipaliteit van Kaapstad 1978 (1) SA 13 (A) at 41 E-F (my translation):

'It is desirable and important that finality should be arrived at within a reasonable time in relation to judicial and administrative decisions or acts. It can be contrary to the administration of justice and the public interest to allow such decisions or acts to be set aside after an unreasonably long period of time has elapsed - interest reipublicae ut sit finis litium ... Considerations of this kind undoubtedly constitute part of the underlying reasons for the existence of this rule.'

[23]Underlying that latter aspect of the rationale is the inherent potential for prejudice, both to the efficient functioning of the public body, and to those who

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7 2006(2) SA 603 at p 613 par [22] – [24], See Also **Oudekraal Estates (Pty) Ltd v City of Cape Town & Others** 2004(6) 222 (SCA) 241 G- 242 C, 247 A

rely upon its decisions, if the validity of its decisions remains uncertain. It is for that reason in particular that proof of actual prejudice to the respondent is not a precondition for refusing to entertain review proceedings by reason of undue delay, although the extent to which prejudice has been shown is a relevant consideration that might even be decisive where the delay has been relatively slight (Wolgroeiers Afslaers, above, at 42C).

[24] Whether there has been undue delay entails a factual enquiry upon which a value judgment is called for in the light of all the relevant circumstances including any explanation that is offered for the delay (Setsokosane Busdiens (Edms) Bpk v Voorsitter, Nasionale Vervoerkommissie 1986 (2) SA 57 (A) at 86D-F and 86I-87A). A material fact to be taken into account in making that value judgment – bearing in mind the rationale for the rule – is the nature of the challenged decision. Not all decisions have the same potential for prejudice to result from their being set aside".

[29] In the light of the aforesaid I must first consider whether the delay was undue and if it was I must proceed to determine whether it should be condoned in the light of all the circumstances of the case.

[30] I am of the view that even though the initial 3 months delay to bring the Application may not be that long, that the specific facts and circumstances of this case indeed point to an undue delay. This was exacerbated by the fact that the Application was heard more than a year after the decision was taken.

Applicants could have approached the Court for interim relief in order to prevent that actions were taken on strength of the decision. This would have prevented or at least have limited the possibility of prejudice.

[31] Furthermore, as already stated the Applicants' only complaint is the development of a casino, which relates to 9 000m² of a ± 108 000m² development. A setting aside of the decision will impact the whole development most of which has no bearing on the erection of a casino and with which the Applicants on their own version have no problem.

[32] In the exercise of the value judgment that I am required to make I also take into consideration that the land use rights do not in itself provide for a gambling licence to be issued. The issueing of a gambling license must be determined by the Gambling Board. The Applicants did oppose that application and may still appeal that decision. The Applicants' public interest complaint is actually something that must be determined by the Gambling Board. This application therefor does not deal with the question of whether a casino is desirable or not, and even if this Application is dismissed Applicants still have another remedy available to them. I am of the view that the prejudice that the Respondents may suffer outweighs any possible prejudice that the Applicants may suffer if the application is dismissed on the basis of undue delay. I am therefor of the view that condonation of the delay will not be appropriate.

[33] Consideration must also be given to the history of the case and the fact that the relevant land use rights were actually already approved under the DFA Application, and but for the demise of the relevant chapters of the DFA the Applicants would not have been required to submit further applications. Furthermore if SPLUMA came into operation, as it should, a further application would also not have been required.

[34] If all the facts already referred to are considered the delay in the bringing of this application must be regarded as undue and can't be condoned. Consequently the Application should be dismissed.

[35] I am however of the view that the Applicants brought the application in the public interest and should consequently not be burdened with a cost order.

[36] As a result I make the following order:

36.1 **The application is dismissed**

36.2 Each party is to pay its own costs.

R G TOLMAY

JUDGE OF THE HIGH COURT

PARTIES:	CHOOSE LIFE CHURCH NPC & 13 OTHERS v CHAIRMAN OF THE STRATEGIC LAND DEVELOPMENT & 4 OTHERS
CASE NO:	71699/2013
DATE OF HEARING:	27 OCTOBER 2014
DATE OF JUDGEMENT:	11 DECEMBER 2014
JUDGES:	TOLMAY J
ATTORNEY FOR APPLICANTS:	MOTLA CONRADIE INC PRETORIA
ADVOCATE FOR APPLICANTS:	ADV E C LABUSCHAGNE (SC)
ATTORNEY FOR 1ST AND 2ND RESPONDENT:	DLAMINI ATTORNEYS SANDTON
ADVOCATE FOR 1ST AND 2ND RESPONDENT:	ADV VR NGALWAMA (SC) ADV F KARACHI
ATTORNEY FOR 4TH AND 5TH RESPONDENTS:	ADRIAAN VENTER ATTORNEYS & ASS PRETORIA
ADVOCATE FOR 4TH AND 5 TH RESPONDENTS:	ADV J H DREYER (SC) ADV J VAN HEERDEN