IN THE HIGH COURT OF SOUTH AFRICA

{GAUTENG DIVISION, PRETORIA}

Case Number: 27542/2013
DATE:5 MAY 2016

In the matter between:

ACORNHOEK PLAZA SHARE BLOCK (PTY) LTD	APPLICANT
And	
THE MEC: DEPARTMENT AGRICULTURE, RURAL DEVELOPMENT & LAND ADMINISTRATION, MPUMALANGA PROVINCIAL GOVERNMENT	1st RESPONDENT
THE CHAIRPERSON: THE MPUMALANGA DEVELOPMENT TRIBUNAL	2nd RESPONDENT
THE MUNICIPAL MANAGER: BUSHBUCKRIDGE LOCAL MUNICIPALITY	3rd RESPONDENT
MAMOKHUTHU GROUP DEVELOPMENT CC	4th RESPONDENT
THE MINISTER OF LAND AFFAIRS	5th RESPONDENT

NAD PROPERTY INCOME FUND (PTY) LTD	6th RESPONDENT
THE REGISTRAR OF DEEDS	7th RESPONDENT
THE SURVEYOR GENERAL	8th RESPONDENT

JUDGMENT

Fabricius J,

1.

Before me is a review application the record of which, including all relevant affidavits and annexures, consists of some 3000 pages. The proceedings before me were confined to argument relating to two points *in limine* which I need to decide. The first one relates to the quest_ion whether or not the Applicant has *locus standi* in these proceedings, and the second one relates to the question whether or not the proceedings were brought within a reasonable time having regard to the provisions of s. 7 of the Promotion of Administrative Justice Act 3 of 2000, hereinafter

referred to as "PAJA". The relevant review application was lodged on 9 May 2013 in this Court and the prayers read as follows: "

1. That the decision of the Third Respondent dated May 2012, referred to in Annexure A hereto, and by virtue of which the utilization of the property known as [Portion .. of the Farm Greenvalley 2.., Registration Division KU], in terms of an existing Land Availability Agreement or otherwise, has been changed from a _middle income housing project consisting of 53 7 erven to inter alia that of a regional Shopping Centre, be reviewed and set aside.

2. That any subsequent amendment of the Land Availability Agreement concluded between the Third Respondent and the Fourth Respondent which Agreement is dated 8 June 2009, and which is attached hereto as Annexure B, in accordance with the decision mentioned in Prayer 1 hereof, be declared *null and void* with no further force or effect.

3. That the decision of the Second Respondent, by way of which the objection received from Umsebe Development Planners, dated 2 3 April 2012, against the Application for amendment lodged by the Fourth Respondent, in terms of

Section 3 5 read with Regulation 3 2 (3) (a) of the Development Facilitation Act 19 9 5, and which objection is annexed hereto as Annexure C, has been disqualified as a valid and timeous objection and such Application has been processed and approved on an unopposed basis, be reviewed and set aside.

4. That the decision of the Second Respondent dated 11 May 2012 and attached hereto as Annexure D, by virtue of which the Application for amendment referred to in prayer 3, was accepted as an "amendment" of an existing decision, was processed and was, in terms of such decision, approved in terms of the statutory provisions mentioned, subject to certain conditions, be reviewed and set aside.

5. That any subsequent actions, decisions and/ or authorizations of the First Respondent, Second Respondent and Third Respondent, by virtue of which any of the decisions referred to in Prayers 1, 3 and 4 hereof, have been given effect or have been executed in the form of publications, proclamations, approval of site development plans or building plans in terms of the National Building Regulations and Building Standards Act 1977 or any

prevailing Town Planning Scheme or any alternative statutory provision, be declared null and void with no further force or effect."

2.

The Annexure A referred to in prayer 1 in turn reads as follows:

"The above-mentioned matter which was presented before the Mpumalanga Development Tribunal on 2 6 March 2012 refers.

In response to your letter dated 2 6 March 2012 with regard to the above-mentioned application, the Bushbuckridge Local Municipality wishes to inform you that the proposed development has been presented to the Portfolio Committee for Finance, Supply Chain, Economic Development, Planning and Environment and was supported by the Committee on 24 April 2012.

The Bushbuckridge Municipal Council would not be able to sit prior to the Hearing scheduled for 21 May 2012. We therefore request that the Development Tribunal consider the application as submitted and that the Municipal Council Resolution will be submitted to the Department immediately after the sitting of the Council.

We trust that the above is in order and the points raised will be attended to. Should you require any further information please do not hesitate to contact our office."

I may just add at this stage that having regard to the content of this annexure, it is not exactly clear what "decision of the Third Respondent" the Applicant has in mind in the context of Prayer 1.

Prayer 2 refers to Annexure B. This agreement is dated 8 June 2009. It is clear from the terms of the agreement that it was intended to develop the relevant property and to provide for residential erven. I may also add at this stage that it is certainly not clear at all from the terms of Prayer 2 what "any subsequent amendment" to this agreement the Applicant has or had in mind. In the same way, it is not clear from Prayer 5 which "subsequent actions, decisions and/ or authorizations" are referred to.

3.

The Sixth, Seventh and Eighth Respondents were joined later in the proceedings. On 18 July 2013, Applicant filed an urgent interim application, which application was

granted by way of an order dated 17 October 2013. The Supreme Court of Appeal refused leave to appeal against the order made, clearly on the basis that it was of an interim nature. That is also the reason why I do not regard the previous interim order granted as being conclusive in these proceedings on the basis that the brief argument relating to *res iudicata* has no merit at all.

4.

On 31 March 2014, Applicant filed a lengthy Supplementary affidavit which amongst others dealt with the joinder of the Sixth, Seventh and Eighth Respondents and also referred to an amendment of the original relief sought in the Notice of Motion. It is necessary to refer to the relief sought in terms thereof and it is as follows:

1. "That the Land Availability Agreement concluded between the Third Respondent and the Fourth Respondent by virtue of Resolution number 30/ 2007 dated 2 2 March *2007* page 490 and 613 of the record and any subsequent amendment thereof including the document dated 8 June 2009, which is to be found on pages 52 to 60 of the Record, in respect of a

property known as [Portion .. of the Farm Greenvalley 2..], Registration Division KU, be declared null and void, and with no force or effect.

2. That the Engineering Services Agreement concluded between the Third Respondent and the Fourth Respondent on or about 2 3 August 2000 in respect of the development of the property mentioned in paragraph 1 above and which Agreement is to be found on pages 145 up to 154 of the Record be declared null and void and with no force or effect.

3. That the "Agreement" concluded between the Fourth Respondent and the Sixth Respondent in respect of a portion of approximately 15 hectares of the property referred to in paragraph 1 above apparently on or about July 2011 and of which an unsigned copy is attached as pages 6 3 3 up to 6 50 of the Record, be declared null and void and with no force or effect.

4. That the transfer of the portion of the property mentioned in paragraph 3 above from the Third respondent to the Sixth Respondent by virtue of either of the Agreements referred to in paragraphs 1 and 3 above, or any other Agreements between the Third and the Sixth Respondents in respect of such

property, be declared null and void and with no further force or effect.

5. That the Seventh Respondent be directed to reverse the transfer of the property referred to in paragraph 3 above, from the name of the Sixth Respondent, in terms of the provisions of the Deeds Registries Act 47 of 1937 to the effect that ownership thereof shall re-vest in the Third Respondent.

6. That the decisions of the Third Respondent dated 24 April 2012 and 5 July 2012 respectively to be found on pages 467 – 471 and page 476 of the Record, and confirmed to the Second Respondent by way of correspondence to be found on pages 662 and 667 of the Record, by virtue of which the utilization of the property referred to in paragraph 1 hereof, has been changed from a middle income housing project consisting of 537 erven to inter alia that of predominantly a regional Shopping Centre, be reviewed and set aside.

7. That the decision of the Second Respondent dated 11 May 2012, to be found on pages 470 to 471 of the Record, by way of which the Application for

Amendment lodged by the Fourth Respondent in terms of Section 3 5 read with Regulation 3 2 (3) (a) or any other provision of the Development Facilitation Act 19 9 5, was accepted as an "amendment" of an existing decision, was processed and approved, subject to certain conditions, be reviewed and set aside.

8. That the approval of the conditions of Approval of the land development area known as [Greenvalley Extention ..] and the Development Plans for the approved and amended land development application referred to in paragraph 7 above and which land development areas are known as [Greenvalley Ext ..and Greenvalley Ext ..] by the Second Respondent, on 19 April 2013 , in terms of the invalid provisions of Chapters V and VI of the Development Facilitation Act 19 9 5 and which approvals are to be found on pages 728 up to 730 and 73 3 up to 740 of the Record, be reviewed and set aside.

9. That the subsequent approval of the General Plans of the land development areas referred to in paragraph 8 above, by the Eighth Respondent on 20

June 2013, which approvals are reflected on pages *771* up to *776* of the Record be reviewed and set aside and that the Eighth Respondent be directed to amend its Records accordingly in terms of the Land Survey Act 8 of 19 9 7.

10. That the Resolution of the Third Respondent dated 2 9 May 2013 which is to be found on page 744 up to 754 of the Record and which Resolution was apparently relied upon by the Third respondent to effect transfer of the property mentioned in paragraph 3 above to the sixth Respondent, be reviewed and set aside.

11. That the Resolution of the Third respondent dated 10 July 2013 and which is to be found on page *7* 6 3 of the Record by virtue of which the Third Respondent has in terms of Section *7* (6) of the National Building Regulations and Building Standards Act 19 77 approved the commencement of construction activities on the property mentioned in paragraph 3 above by the Sixth Respondent be reviewed and set aside.

12. That any subsequent actions, decisions and/or authorizations of the First

Respondent, Second Respondent and Third Respondent, by virtue of which any of the agreements or decisions referred to in paragraphs 1, 2, 3, 6, 7, 8, 9, 10 and 11 hereof, have been given effect to or have been executed in the form of publications, proclamations, approval of site development plans or building plans in terms of the National Building Regulations and Building Standards Act 19 77 or in terms of any alternative statutory provision, be declared null and void with no further force or effect." This page is the same as Prayer 5 in the original Notice of Motion and during argument it was abandoned by Applicant's Counsel.

5.

Applicant's locus standi:

In the Founding Affidavit Applicant said that it "is the legal possessor, occupant and owner of a property known as a portion of the Farm Greenvalley". This property was in extent some 7.3 hectares, located adjacent to the R40 main access road to Acornhoek, on which a commercial retail facility and shopping centre development of

2 9 806m2 has been developed in five phases over the last 20 years, and which shopping centre is known as the Acorn Plaza. This will be referred to as "Applicant's development". Applicant said further in the context of locus standi that it "has vested rights and interests in immovable property, is an occupant of such property, pays assessment rates in respect of such property and therefore has locus standi to approach this Court. The relevant relief claimed in the Notice of Motion pertains to the approval of land use rights on the property adjacent to the same road within the same catchment area of applicant' s development, serving the same threshold population intended on land approximately 600m from Applicant's development". The Fifth Respondent was cited due to him being the current registered owner of the subject property which "apparently is to be made available to the Third Respondent for development purposes".

Under the heading "ESSENCE OF THE APPLICATION", Applicant says that it approaches this Court in accordance with the provisions of ***PAJA*** to procure an order by virtue of which the decisions of the Second and Third Respondents by way of which commercial land use rights in respect of the subject property have been

approved, are reviewed and set aside. Applicant continues to say in the Founding Affidavit that the basis for such an approach to the Court stems from the fact that: "

8.2.1 The land use change process followed by the Fourth Respondent, and allowed by the Second Respondent, in order to procure such approved commercial land uses, is inappropriate and irregular in the circumstances and is not allowed by the authorising legislation, i. e. the DFA.

8.2.2 The land use change process followed by the Fourth Respondent is not authorised an.d the Application for amendment lodged does not comply with the mandatory and material procedures and requirements of the authorising legislation, i. e. the DFA.

8.2.3 The administrative procedures followed by the Second Respondent in its acceptance, processing and approval of the Amendment Application were procedurally unfair.

8.2.4 The Second Respondent was unduly influenced or on an unwarranted basis dictated to, which facts prevented the Second Respondent to responsibly act in accordance with the statutory Town Planning

obligations imposed upon it in terms of the authorising legislation, and which fact renders the decision to approve of the Amendment Application reviewable.

8.2.5 The Second Respondent was, due to an obvious lack of sufficient information which stems from non-compliance by the Fourth Respondent, with and neglect by the Second Respondent to enforce the provisions of the DFA, not in a position to duly apply its mind to the correct facts, and which situation, from a Town Planning perspective, renders the decision of the Second Respondent, in any language, arbitrary and capricious, and per se justifies the review and the setting aside thereof.

8.2.6 The decision of the Second Respondent, in respect of the Amendment Application, with due consideration of the circumstances which prevailed during processing of the Amendment Application, and the information available to the Second Respondent, at the time, is from a town Planning point of view so unreasonable that no responsible and competent Town Planning Tribunal or authority could reasonably have taken the same

decision.

8.2.7 The decision of the Third Respondent to, on request of the Fourth Respondent, on an unsubstantiated basis, amend the intended utilisation of the subject property from middle socio economic residential to "business", is in the circumstances not only arbitrary and capricious, but also unauthorised, not sanctioned in terms of the duly signed Land Availability Agreement, and same, similar to the decisions of the Second Respondent, are unreasonable, since there is no rationale between the facts available to the Second and Third Respondents at the time and their unconditional and irresponsible support for a regional shopping centre on the subject property."

6.

In the Supplementary Founding Affidavit dated 31 March 2014, the deponent to the Founding Affidavit, in the context of Prayer 1 of the Amended Notice of Motion, relies on the provisions of s. 6 (2) of ***PAJA.*** In the context of the relief sought in

Prayers 3, 4 and 10 of the Amended Notice of Motion Applicant says that it relies on the provisions of s. 6 of ***PAJA.*** The same section applies to Prayer 3, according to Applicant. As far as Prayer 10 is concerned, Applicant in the Founding Affidavit relies on the provisions of s. 6 (2) (e) (i) , (v), and 6 (2) (f) (ii). In respect of Prayer *7* , s. 6 (2) (a) and (e) and (f) of ***PAJA*** are relied upon. Furthermore, the approval of the Amendment Application stood to be reviewed and set aside in terms of s. 6 (2) (a) (i), 6 (2) (e) (i) and 6 (2) (f) (i) of ***PAJA.*** The Second Respondent's decision by virtue of which the said Amendment Application had been approved, was reviewable in terms of s. 6 (2) (a) (iii) of ***PAJA.*** The relevant approvals relating to Prayers 8 and 9 stood in turn to be reviewed and set aside in terms of s. 6 (2) (a) (i), 6 (2) (f) (i) and 6 (2) (i) of ***PAJA.***

7.

It is thus abundantly clear that Applicant relies on the provisions of ***PAJA*** – and in particular on a number of subsections of s. 6 thereof. Section 6 (1) is to the effect that any person may institute proceedings in a Court for the judicial review of an

administrative action. "Administrative action" has been defined in s. 1 of this *Act* and it means any decision taken or any failure to take a decision which adversely affects the rights of any person and which has a direct, external legal effect. It does however not include the executive powers or functions of a municipal council. In ***Grey's Marine Houtbay {Ply} Ltd & Others v Minister of Public Works & Others 2005 (6) SA 183 SCA,*** Nugent JA, in the context of this definition said that "administrative action is action that has a capacity to effect legal rights". It is also clear that administrative action must impact directly and immediately on individuals. Whether a particular conduct constitutes administrative action depends primarily on the nature of the power that is being exercised, rather than upon the identity of the person who does so. An administrative action does not extend to the exercise of legislative powers by a deliberative elected legislative body, nor to the formulation of policy or the formulation of legislation by the executive. Administrative action is rather, in general terms, the conduct of the bureaucracy in carrying out the daily functions of the State which necessarily involves the application policy, usually after its translation into law, with direct and immediate consequences for individuals or

group of individuals. There is of course also a difference between the formulation of a policy and its execution. It is therefore abundantly clear that before Applicant can rely on the provisions of ***PAJA,*** it must place itself within the ambit of the definition of "administrative action", and must show that any particular relevant decision has adversely affected its rights.

8.

In the Answering Affidavit of the Fourth and Sixth Respondents, the deponent thereto, D. M. Dry, who was a legal advisor to the Fourth and Sixth Respondents at relevant times, and in the context of Applicant's allegations relating to *locus standi,* states that it is significant that no documents were attached to either the Founding or the Supplementary Affidavits confirming Applicant's alleged "ownership", "possession" or "right" to occupy, or any form of zoning or land use rights that would entitle the Applicant to carry on the business retail shopping centre on the property concerned. He also disputes the size of Applicant's development and whether or not it is a regional retail facility. He also states that the real interest of the Applicant in

the outcome of the litigation is of a Competition Law nature. The whole application was based on this aspect and it should be dismissed for that reason inasmuch as the Applicant would be in wrong forum. Because of the Applicant's failure to attach documentation to the Founding Affidavits relating to that legal basis of Applicant's alleged ownership, or the right to occupy, it was difficult to deal meaningfully therewith in an answering affidavit. However, he then referred to Applicant's Replying Affidavit in the urgent application dated 8 August 2013 where it was then said that the Applicant had a 49 year occupation right in terms of a duly signed lease agreement. It was also pointed out that in such Replying Affidavit that Applicant changed its stance relating to the alleged ownership of the land without any explanation or apology for having stated a wrong premise.

It is not necessary to deal with all these detailed allegations and denials inasmuch as it became clear during argument that:

8.1

Applicant is not the owner of the relevant development;

8.2

No long term lease or any other right in favour of the Applicant was registered against the title deed of this development or property;

8.3

The Applicant is not a rate-payer in that area inasmuch as it is not the owner of the property;

8.4

Applicant only occupies the property in terms of a so-called "PTO" (Permission To Occupy) the terms of which can be found on the following basis: On 31 January 2014, the Department of Rural Development and Land Reform, wrote to the Municipal Manager of the Bushbuckridge Local Municipality and stated amongst others that the Acorn Plaza Share Block (Pty) Ltd was the holder of a valid Permission To Occupy for the property on which the Plaza was developed, measuring 7.3 hectares. The application for the formalisation of a long term lease between the Department and the Applicant was at an advanced stage. The Department then gave consent to the Municipality for the issuing of the occupational

certificate for the said extension to the property occupied by Applicant, as long as the building of the said extension was in line with the site development plan as well as the building plans as approved by the Bushbuckridge Local Municipality.

It is therefore clear that the allegations made by Applicant in the Founding Affidavit were substantially not true in the context of its *locus standi.* At best for the Applicant therefore it is in possession of a valid Permission To Occupy the said premises (though subject to conditions which had not yet been met). *Locus standi* must of course not be looked at in isolation, but must be seen in the light of the relief sought against the background of the relevant provisions of ***PAJA.***

9.

I must add that the Answering Affidavit of the Fourth and Sixth Respondents dispute that Applicant is the holder of a valid Permission To Occupy. It therefore stated that the Applicant had no lawful or legal interest in the relief claimed. The review application was merely an attempt to stifle or eliminate competition.

10.

In Third Respondent's Answering Affidavit, the Municipal Manager of Bushbuckridge Local Municipality sets out the long history of the relevant property. I deem this to be of relevance in considering whether or not the Applicant has any locus standi in these proceedings in the context of the relevant decisions taken either by the Limpopo Government, the relevant tribal authority, the National Government or the present Third Respondent. It is clear from this affidavit that the history goes back as far as 19 9 8 at the very least. Various decisions were taken thereafter which ultimately led to a decision to consolidate certain of the relevant erven and to provide for a regional shopping centre and a filling station. About 75% of the area of the property would still be set aside for the development of township erven. Municipal Council Resotutions and Decisions were taken on the basis that there existed limited retail facilities in the Bushbuckridge region. It was also stated that the local municipality had a duty to create an investor-friendly environment. It also stated that a successful review of the Mpumalanga Development Tribunal would have the effect that a remittal of the matter would be meaningless, since the

underlying legislation (parts of the ***Development Facilitation Act 67 of 199S)*** had been struck down by the Constitutional Court. A successful review would therefore essentially amount to the denial of land use rights, without further recourse. Regarding Prayer 1 of the Notice of Motion read with Annexure A thereto, Third Respondent said that Annexure A does not contain a "decision" within the meaning of the term ***PAJA.*** It also does not reflect that it is a decision which has a direct external effect on the Applicant. It also emphasizes that the municipality supports the establishment of a regional shopping centre in addition to the shopping centre of the Applicant. It however denied that its support for such development constitutes a "decision" which is reviewable in terms of ***PAJA.***

11.

In my view it is clear from both Notices of Motion that the application in essence revolves around the relevant Land Availability Agreement and its amendment, to allow for parts of the particular property being developed as a shopping centre together with the development of erven for a middle-income housing project. Policy

decisions to develop a certain property for the benefit of the community and to attract financial investment cannot, and should not, be reviewed on the basis the Applicant contends for, relying on vague allegations of a Competition Law nature. Policy decisions of this nature lie within the heartland of the exercise of executive authority. The provisions of ***PAJA*** generally do not allow a Court to intervene in such decisions, and particularly not on the present facts.

See: ***Tshwane City v Nambiti Technologies 2016 (2) SA 494 SCA at par. 43,*** although those views were expressed in a different context. Also, an executive decision of a municipality is not 'administrative action' as defined in ***PAJA.*** Applicant herein has in my view not established the necessary *locus standi* inasmuch as it has not shown that any decision of an administrative nature has adversely affected its rights. I may also add, as a final comment on this topic, that I could not find any decision by the Third Respondent to the effect that the utilisation of the relevant property has changed from a middle income housing project consisting of 53 7 erven to *inter alia* that of "predominantly regional Shopping Centre", as Prayer 6 would have it. It is clear from the Answering Affidavit of the Second and Fourth

Respondents that about 75% of the erven have been retained for a housing development, and this was not disputed in reply, nor could it be. A brief history of the saga is set out in the Agenda of a meeting of the Municipality held on 24 April 2012. This is the "decision" Applicant relies on in respect of Prayer 6. This Agenda is 'titled' "Amendment Of An Approved DFA Application To Allow For Development Of A Regional Shopping Centre In Greenvalley". Apart from the point raised that this does not reflect a "decision" in terms of PAJA, it provides significant information also relevant to the consideration of whether or not a condonation application should be granted. (If such were properly before me). The introduction provides a good factual background, which contradicts Applicant's allegation that only a (competing) Regional Shopping Centre is envisaged, unlawfully as it states. It reads as follows:

"The Bushbuckridge Local Municipality entered into a Land Availability Agreement with Mamokohutu Development for the Establishment of a township on [Portion .. of the Farm Greenvalley 2.. KU.] An application for the development Tribunal on 19 January 2001. The General Plan for the township was approved by the Surveyor General on March 2001.

Mamokhutu Developers, in an endeavour to implement and finalize the project, negotiated agreements with potential development specialist. The developers have agreed to finalise the project subject to a condition that a Regional Shopping Centre be developed first at the site to ensure that the proposed development of Middle income housing is successful.

It is therefore the request of Mamokhutu Development to amend the approved DFA application to allow for the proposed Regional Shopping Centre". Also, as far as the "Regional Implications" were concerned it was said that there was no proper retail facility. The people of Bushbuckridge have to drive or travel by public transport to reach retail facilities in either Hazyview, White River or Nelspruit. There was a need for such facilities to promote the concept of employment and residential opportunities in close proximity to each other. It was also said that the municipality would impose conditions for this development for the protection of the residential surrounding developments. The Council therefore recommended the amendment of an approved DFA application. I also note from the Introduction that Applicant wants me to set aside decisions taken in 2001! This is a relevant consideration when I consider the

question of condonation, prejudice, and appropriate relief.

12.

As I have said, Applicant has based its case on the provisions of ***PAJA.*** If the shoe pinches, it cannot then casually revert to a transgression of the principle of legality. See: ***Comair v Minister of Public Enterprises 2016 (1) SA 1 GP at par. 21 and 22*** and the discussion on this topic in ***Annual Survey of South African Law, 2014, at 46.*** As I have said, Third Respondent was of the view that its decision to develop the relevant property for middle-income housing projects and another shopping centre and filling station_, was a policy decision that it took for the benefit of the community. Policy decisions taken by executive organs and legislative organs are not subject to scrutiny and second-guessing by a Court in the absence of clear illegality. See: ***Comair supra at par. 45.*** Furthermore, as Mr N. Maritz SC, on behalf of Fourth and Sixth Respondents submitted, an Applicant in such an instance, and in the present instance, must be able to show at least that it has suffered loss or damage

by reason of relevant breaches of whatever statutory provisions it relies upon.

See for instance: ***Patz v Greene and Company 1907 TS 421,*** which lays down the relevant principle which has been followed by various Courts since then.

See: ***CD of Birnam (Suburban) (Pty) ltd and Others v Falcon Investments Ltd 1973 (3) SA 838 WLD, Herbst v Dittmar en 'n Andere 1970 (1) SA 238 T at 243F, Bedfordview Town Council and Another v Mansyn Seven (Pty) ltd and Others 1989 (4) SA 599 WLD*** and ***Jacobs and Another v Waks 1992 (1) SA 521 (AA).***

In ***Verstappen v Port Edward Town Board and Others 1994 (3) SA 569 (D and CLO) at 574 A,*** the Court said the following: "In order to determine whether a member of the public has *locus standi* to prevent the commission of an act prohibited by statute, the first enquiry is whether the legislature prohibited the doing of the act in the interest of any particular person or class of persons or whether it was merely prohibited in the general public interest. If the former, any person who belongs to the class of persons in whose interest the doing of the act was prohibited may interdict the act without proof of any special damage. If not, the Applicant must prove that he has suffered or will suffer such special damage as a result of the

doings of the act". In my view, Mr N. Maritz SC is correct in submitting that this principle applies to the present facts and in the context of the relief sought by way of Prayers 7 to 11.

It is clear from the Founding Affidavit and the Supplementary Founding Affidavit that there is not a single factual allegation by the Applicant herein to show that it either has, or will suffer real damage if the relevant development of the municipality continues. The few allegations that do exist in this context are in the nature of mere conclusions raised on Competition Law considerations, but even they do not contain any specific relevant facts.

I must add that Applicant did not approach this Court on the basis of any Human Right infringement as provided for in Chapter 1 of the Constitution of the Republic.

13.

There is in my view no evidence on the Affidavits that any rights of the Applicant have been adversely affected by any of the decisions that it relies on in these proceedings. On its own version, certain of the decisions are not of an administrative

nature, namely those referred to in Prayers 1, 2, 3, 4 and 5 of the Amended Notice of Motion and others are of a policy-laden nature, whilst as a whole the Applicant has not shown in any event that any of the particular decisions have caused it real damage. It is furthermore clear that the "decisions" of the Third Respondent that the Applicant refers to in Prayer 6 of the Amended Notice of Motion are in fact not a decision of the Third Respondent, but merely recommendations.

14.

I **accordingly hold that Applicant has not shown that it has *locus standi* in these proceedings and accordingly the point *in limine* in this context is upheld.**

15.

Unreasonable delay:

The provisions of s. 7 of ***PAJA*** are determinative. Any proceedings for judicial review must be instituted without unreasonable delay and not later than 180 days 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. In terms the provisions of s. 9 of the *Act,* the 180 day requirement may be extended on application. The Court may grant such an application where the interests of justice so require. In ***Aurecon SA (Pty) Ltd v City of Cape Town [2016] 1 All SA 313 (SCA),*** it was held that s_. *7* (1) does not mean that an application must be launched within 180 days after the party seeking a review became aware that any relevant administrative action was tainted by irregularity. An application must be decided within a reasonable time, but in any event within a period of 180 days. If this is not done, an extension as envisaged in s. 9 (1) (b) is required, failing which a Court is precluded from entertaining the review application.

An Applicant must make out a case for such an extension and whether or not it is in the interest of justice to condone a delay depends entirely on the facts and circumstances of each case. The relevant factors in that enquiry generally include the nature of the relief sought, the extent and cause of the delay, its effect on the administration of justice and other litigants, the reasonableness of the explanation of

the delay which must cover the whole period thereof, the importance of the issue to be raised, and the prospects of success.

16.

In Applicant' s Founding Affidavit, the following is said in this context: He was advised he said to "briefly" invite this Court's attention to the time frames referred to in s. 7 of ***PAJA*** and, "if necessary", request condonation for any possible non-compliance with such time frames. Several factual submissions were then made and Applicant says that certain rumours during July 2012 led him to write a letter to First Respondent. It then embarked upon an investigation and during December 2012 instructed its Attorney to assist in procuring information from the Second and the Third Respondents. Ultimately, after many attempts through various channels to obtain a copy of any relevant files, such were only made available to Applicant's Attorney on 17 February 2013.

17.

Many of the allegations made by Applicant in this regard were contested by the Respondents. On behalf of First and Second Respondents, it was contended that the allegation that Applicant spent a year searching for information on the Amendment Application that is relevant to the relief sought, could not be further from the truth. In fact, on 4 July 2012, a copy of the relevant application file was handed to a Mr R. Shabangu on behalf of the Applicant. On behalf of Third Respondent it was contended that the Applicant had not covered the full period of the delay from 4 July 2012. On behalf of the Fourth and Sixth Respondents it was submitted that the Applicant did not make out a case for justifying the grant of an order extending the prescribed time periods. Applicant's case was that it had to obtain the full record of the proceedings before the tribunal referred to in the relevant prayers before it could launch an explanation. This however loses sight of the purpose of ***Rule 53 of the Uniform Rules of Coult*** in terms of which Applicant could have obtained the record of the proceedings within 15 Court days. The process of a review under this Rule does not require an Applicant to fully plead and establish its intended case in its

Founding Affidavit, and expressly affords to an Applicant the right to supplement its founding papers on receipt of the record and the reasons given by the relent decision-maker. Applicant's contention that it first had to establish the grounds for illegality of the proceedings before it could launch the review application was untenable, and was in conflict with clear authority.

See in this context ***Associated Institutions Pension Fund and Others v Van Zyl and Others 2005 (2) SA 302 (SCA) par. 51 to 53.***

The Fourth and Sixth Respondents also allege that the Registrar of the Tribunal referred to in the Notice of Motion made copies of the entire Amendment Application and delivered it to Applicant via Mr Shabangu. They allege further that the MEC and other officials met with Mr Shabangu and other representatives of the Applicant on 3 August 2012 to discuss the Amendment Application. This meeting was attended by the MEC, Mr Kleynhans, of the Department of Rural Development and Land Administration, Ms Motaung from the Tribunal, Mr Shabangu, Mr Jason McCormick from the Applicant and his father John McCormick. At this meeting, Applicants said representatives were fully apprised of all relevant facts relating to the relating to the

Amendment Application and its approval by the Tribunal. Prior to that the entire Amendment Application had been handed to Mr R. Shabangu on behalf of Applicant. Ms Motaung confirmed this. She also stated that the Apllicants' representatives had confirmed to the MEC that they had indeed received all relevant information on 4 July 2012. She was emphatic that Applicants' allegation that its letter of 3 July 2012 had not even been granted the "courtesy of a reply" was false. Mr Kleynhans similarly confirmed these facts. Applicant, in its Replying Affidavit denied that Mr Shabangu had been its "representative", but admitted that he had been asked to facilitate a meeting with the MEC to discuss concerns raised in its letter of 3 July. The meeting itself was not denied, but merely that Applicant had been in possession of all relevant information. In the Replying Affidavit in the urgent application to the Fourth and Sixth Respondents' Answering affidavit, Mr Jason McCormick made a rather vague reference to such meeting and regarded the "discussion" with First Respondent as "unsatisfactory". An enquiry at the office of Mr Shabangu "only yielded an incomplete copy of the Amendment Application", so it was said. In my view it is significant and disturbing that Applicant did not refer to this meeting in the

Founding Affidavit. These Respondents further say that Applicant's adequate knowledge of the relevant facts appears from the correspondence sent by its Attorney to the Respondents and various State Departments after these dates in any event.

18.

Quite apart from the fact that I must apply the test formulated in ***Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A),*** which is so well-known that it does not have to be repeated again, there are certain objective facts that do not support Applicant's alleged ignorance of all relevant facts, and in fact detract from its innocent explanations. As I have said, the relevant review application was issued in this Court on 9 May 2013. On 3 July 2012, Acorn's Director John McCormick wrote to the office of the MEC Mpumalanga Provincial Government and it appears that this letter was delivered by hand to one of the Department's officials. The content of this letter is significant, and it is not properly explained in Applicant's affidavits. For this reason I deem it necessary to quote the contents:

"DEVELOPMENT FACILITATION ACT APPLICATION REGARDING A PORTION OF PORTIAN 3 OF THE FARM GREENVALLEY NO 213KV

In terms of any DFA application, one of the processes that should be undertaken and completed by the applicant for any change in zoning or proposed development is that such change or proposal be brought to the notice of affected parties.

In the case of the DFA hearing regarding a portion of [Portion .. of the farm Greenvalley No 2.. KV], it has come to our notice that a proposed development has been proposed with the concomitant change in zoning. We are Acornhoek Plaza Share Block (Pty) Ltd owners of the Acornhoek Plaza situated not more than 6 00 metres from this proposed development. We have never been approached or made aware of the DFA hearing such that we could object or make our side heard. In short, we, as the major neighbouring development were completely ignored.

We, in the most stringent terms stress that the findings of the DFA be rescinded and the entire process be allowed to start at the beginning whereby we, as the affected party, can make presentations. It is also our enquiry as to how the land referred to above could be transferred and sold by the Department of Agriculture without

resorting to a public auction.

Your urgent attention is requested on this matter."

It is obvious that certain factual allegations are made therein which clearly indicate that the Applicant had more knowledge of the relevant facts than the mere "rumours" that it referred to in the Founding Affidavit. Furthermore, another significant document was issued by Applicant's Attorneys on 10 December 2012. This is a covering letter to an application in terms of the ***Promotion of Access to Information Act 2 of 2000.*** Again, it is clear that Applicant had substantially more information at its disposal than the "rumours" that I have already referred to. Amongst others the following appears from this letter: "Our instructions are that recently, a similar Shopping Centre facility, has apparently been approved by the Mpumalanga Development Tribunal to an Applicant who alleges that his authority and power of Attorney to lodge such an application stems from a Land Availability Agreement concluded between your municipality and such Applicant, being the Mamokhuthu Group Development CC (the Fourth Respondent herein)". Furthermore Applicant then says the following: "From a preliminary enquiry executed by our client in this

regard, such authority has not been granted to the Applicant by either the South African Government, the Mpumalanga Provincial Government or your municipality by virtue of any Land Availability Agreement or any resolutions and/or powers of Attorney which should have formed an integral part of the application for the land development area when same was submitted". The form that is attached to this letter amongst others says the following: "Attorney of record for our client the detail of which is provided *infra.* Our client is a property owner, tax payer and business entity with vested interests in Bushbuckridge and within the jurisdictional area of your municipality and moreover the owner of a Shopping Centre + / - 600 metres from the property, which forms the subject matter of this enquiry and therefore has a direct and material interest in the development of – and dealing with such property". Apart from the fact that certain of these factual allegations are not true, the following then also appears in the context of the information sought: "Agreements concluded between your municipality, the applicable Provincial Government and/or the SA Government by virtue of which the original use of land for middle-income residential purposes has been changed to accommodate a Shopping Centre of magnitude".

Also, the following: "Municipal resolutions by virtue of which the original purpose of the allocation of land to Mamokhuthu Development Group CC i.e. for residential, has been changed to that of a commercial Shopping Mall". Furthermore the following: "Land Availability Agreements and amendments thereof by virtue of which such new intended commercial use of the subject property has been authorised to Mamokhuthu Development Group CC " It is quite clear from this letter and its Annexure that Applicant had been in possession of certain material facts and those were of a nature substantially more than the mere "rumours" that it put forward its Founding Affidavit. They were also of such a nature in my view that a review application could have been launched by 3 July 2012 and certainly by 3 August 2012 after the relevant meeting that I have mentioned, and which meeting the Applicant chose not to disclose in the Founding Affidavit. The delay has in my view not been properly explained by the Applicant, quite apart from the fact that many allegations made by it in this context do not appear to be factually correct on the one hand and have not been disclosed on the other hand. Furthermore, it is clear that the Amended Notice of Motion introduces relief way beyond what was originally

sought for. I will deal with this aspect in the context of the provisions of s. 9 of ***PAJA*** as well.

19.

Having regard to the relevant facts, the most important of which I have mentioned, it is my view that the review application was not brought within a reasonable time. Applicant therefore required an extension as envisaged in s. 9 (1) (b) of ***PAJA.*** There is no such condonation application before me, but if I do regard the rather hesitant and reluctant allegations in the Founding Affidavit as an application for condonation then I must consider the factors referred to in the ***Aurecon*** decision of the Supreme Court of Appeal. Having regard to the original relief sought and the amended relief sought, it is my view not in the interests of justice that condonation be granted. I agree with the argument of the First and Second Respondents that the consequences of the Applicant's delay are in fact drastic. The relevant conditions of approvals have already been met in the context of the particular development and services have been implemented. These steps are not reversible. They have been

implemented at a substantial cost and expense. They are for the benefit of the community according to the Municipality of Bushbuckridge and it is not for me to second-guess such policy decision. According to the relief sought in the amended Notice of Motion, Applicant wants me to undo resolutions taken in 2007 as per Prayer 1, an Engineering Services Agreement concluded in 2000 as per Prayer 2 amongst others. It is also sought that I review certain decisions made in 2012. This is not in the interests of justice and in the interests of all the individual persons that would most likely be affected by such an order. The cause of the delay has in my view not been satisfactorily explained herein and the explanation that is tendered is not reasonable having regard to the objective facts that I have mentioned. The whole period of the delay has also not been dealt with by the Applicant. Furthermore, the rights that the Applicant relied on initially and certainly did so in the interim urgent application more or less fell by the wayside as the case progressed, and the only right, if I can call it such, is that the Applicant is the holder of a Permission To Occupy the premises it seeks to protect against competition. I therefore do not deem it in the interests of justice to grant any application for

condonation for the unreasonable delay in this instance. I am also of the view that the public interest herein would demand that this long outstanding matter be brought to finality, for the benefit of the community in this area. I have already held in any event that the Applicant does not have *locus standi in iudicio* in these proceedings, and it is my overwhelming impression that it merely seeks to protect its own financial interests and avoid competition which may or may not arise.

20.

The result is that the objection in limine relating to an unreasonable delay as envisaged by the provisions of s. 7 of PAJA, is upheld.

21.

The application is accordingly dismissed with costs including the costs of two Counsel, where such was utilised and including the costs of Senior Counsel, where such Senior Counsel was utilised. The interim order granted by this Court on 17 October 2013, under case number 47634/2013 is discharged.

JUDGE H.J FABRICIUS

JUDGE OF THE GAUTENG HIGH COURT, PRETORIA

Case number: 27542/13

Counsel for the Applicant: Adv M. C. Erasmus SC

Adv J. A. Venter

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Instructed by: The State Attorney

Counsel for 3'd Respondent: Adv E. C. Labuscagne SC

Instructed by: Mculu Incorporated

Counsel for 4th & 6th Respondents: Adv N. G. D. Maritz SC

Adv C. F. Van der Merwe

Instructed by: Ivan Pauw & Partners Attorneys

Date of Hearing: 29 & 30 March 2016

Date of Judgment: 5 May 2016 at 10:00