HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Not reportable

Not of interest to other Judges

CASE NO: 79281/2014

In the matter between:

HENDRIK DIEDERICK PIETERSE N.O.	First Applicant
ELIZABETH BARINDINA PIETERSE N.O..	Second Applicant
and	
LEPHALALE LOCAL MUNICIPALITY	First Respondent
MEC FOR LOCAL GOVERNMENT AND HOUSING, LIMPOPO PROVINCE	Second Respondent
LIMPOPO TOWNSHIPS BOARD	Third Respondent
AT SOLD PROPERTIES CC	Fourth Respondent

Heard: 22 February 2016

Delivered: 25 May 2016

Coram: Makgoka J

Summary: Township Planning and Townships Ordinance 15 of 1986 –

Constitutionality of section 139 of the ordinance.

Local government competences – provincial government competences – section 155 of the Constitution – all zoning and planning lie within the competence of the municipality.

Administrative review — municipality refusing application for erection of contractors' camp – initial reasons for refusal allegedly inadequate – municipality *ex post facto* furnishing 'additional reasons' for its decision – whether it is open for an administrator to rely on additional reasons for its decision.

Promotion of Administrative Justice Act 3 of 2000 – extension of time limit pursuant to s 9(2) considered – 180 day time limit contemplated in s 7(1) of PAJA.

Section 8(1)(c)(ii)(aa) of PAJA - whether exceptional circumstances exist - whether decision of the administrator a foregone conclusion - whether substitution order warranted.

J U D G M E N T

MAKGOKA, J

[1] The first and second applicants act in their capacities as trustees of the Waterkloof Family Trust, registration number IT3757/1998 (the applicant). The applicant seeks an order declaring unconstitutional and invalid, s 139 of the Township-Planning and Townships Ordinance 15 of 1986. The applicant further seeks to review and set aside the decision of the first respondent, the municipality, on 12 March 2014, refusing its application to erect a temporary contractors' camp on a portion of a farm.

[2] Ancillary to that, the applicant requests this Court to substitute its own decision to that of the municipality and approve the erection of such a camp on certain conditions. Alternatively, the applicant seeks an order referring the matter back to the municipality for it to determine and impose the relevant conditions to which the approved application should be subject to. The relief sought by the applicant is opposed by the municipality. The main protagonists are the applicant and the municipality. The second to fourth respondents are not participants in these proceedings.

[3] The municipality, established in terms of the provisions of s 151 of the Constitution of the Republic of South Africa, 1996 (the Constitution) read with s 12 of the Local Government Municipal Structures Act 117 of 1998, is situated in Limpopo Province.

Declaration of unconstitutionality of section 139 of Ordinance 15 of 1986

[4] Ordinarily, the applicant would have been required to appeal against the decision of the municipality in terms of s 139 of the Town Planning and Township Ordinance 15 of 1986 (the ordinance). That appeal lies to the Limpopo Townships Board, the third respondent, who, in terms of the ordinance has the power to hear such an appeal. However, the applicant seeks to declare that section unconstitutional and invalid, to the extent it gives appellate power to the provincial government over municipalities' planning competence. The ordinance is a pre-Constitution legislation. It was assented to on 18 December 1986, and commenced on 10 June 1987. It was proclaimed for the former province of Transvaal. In terms of proclamation R161 of 31 October 1994, the administration of the ordinance was assigned to, among others, the province of Northern Transvaal, which was initially renamed Northern Province, and later, in 2003, Limpopo.

[5] Section 139(1) of the Ordinance reads:

'139. Appeals to Board

(1) An applicant or objector who is aggrieved by -

(a) a decision of a local authority-

(i) in terms of section 20(3)(b), 48(I)(b) or 63(I)(b);

(ii) on any application in terms of-

(aa) any provision of this Ordinance;

(bb) any town-planning scheme, may, within a period of 28 days from the date he has been notified in writing by such local authority of the decision, or within such further period, not exceeding 28 days, as the Board may allow:

(b) the refusal or unreasonable delay of a local authority to give a decision contemplated in paragraph (a) may, at any time,

If this Ordinance does not provide for an appeal to the Administrator, a compensation court or a services appeal board, appeal through the Director to the Board by lodging with the Director a notice of appeal setting out the grounds of appeal, and he shall at the same time provide the local authority with a copy of the notice.'

[6] The responsibility for the administration of the ordinance in Limpopo Province resides with the provincial government there. In terms of s 1 of the ordinance, 'Administrator' means the competent authority to whom the administration of the ordinance has been assigned by the Premier of Limpopo Province, namely the member of the executive council (MEC) for Local Government and Housing, the second respondent. The ordinance does not make provision for an appeal to the administrator, a compensation court or services appeal board in respect of the municipality's decision of 12 March 2014.

[7] As a result, in terms of s 139(1) of the ordinance, the applicant's remedy is an appeal through the 'Director to the Board'. Section 1 of the ordinance defines 'Director' to mean an officer in the provincial administration of that province designated to perform the functions entrusted by or under the ordinance to the Director. 'Board' with reference to a province is defined to mean the Board established for that province by s 3(1) of the ordinance. In the Limpopo Province, the relevant Board established for the province, is the third respondent. Therefore, the third respondent is the provincial authority with the power to decide appeals against municipalities' planning decisions and to replace them with its own. It is that power that the applicant contends is unconstitutional.

[8] Before I consider the constitutionality or otherwise of the section, a procedural issue must be noted. The necessary notice in terms of rule 16A of the Uniform Rules of Court was issued simultaneously with the application on 30 October 2014, and it is part of the papers before me, duly issued and stamped by the registrar of this Court. I have been assured by the registrar that the notice has been displayed on a notice board designated for that purpose in this court.

[9] In terms of s 156(1)(a) of the Constitution, municipalities have executive authority in respect of, and has the right to administer, 'the local government matters listed in Part B of schedule 4 and Part B of schedule 5'. In *City of Cape Town and*

Another v Robertson and Another[1] the Constitutional Court said the following about the division of governmental power:

'[t]he Constitution has moved away from a hierarchical division of governmental power and has ushered in a new vision of government in which the sphere of local government is interdependent, 'inviolable and possesses the constitutional latitude within which to define and express its unique character' subject to constraints permissible under our Constitution. A municipality under the Constitution is not a mere creature of statute, otherwise moribund, save if imbued with power by provincial or national legislation. A municipality enjoys 'original' and constitutionally entrenched powers, functions, rights and duties that may be qualified or constrained by law and only to the extent the Constitution permits."[2] (Footnotes omitted.)

[10] In *Minister of Local Government, Western Cape v Lagoonbay Lifestyle Estate*[3] the Constitutional Court expanded on its jurisprudence on municipal powers, and summarised the position thus:

'This Court's jurisprudence quite clearly establishes that: (a) barring exceptional circumstances, national and provincial spheres are not entitled to usurp the functions of local government; (b) the constitutional vision of autonomous spheres of government must be preserved; (c) while the Constitution confers planning responsibilities on each of the spheres of government, those are *different* planning responsibilities, based on 'what is appropriate to each sphere'; (d) '"planning" in the context of municipal affairs is a term which has assumed a particular, well-established meaning *which includes the zoning of land and the establishment of townships*' (emphasis added); and (e) the provincial competence for 'urban and rural development' is not wide enough to include powers that form part of 'municipal planning'."[4] (Footnotes omitted.)

[11] In *Minister of Local Government, Environmental Affairs and Development Planning, Western Cape v Habitat Council*[5] (*Habitat*) the Constitutional Court confirmed the declaration of invalidity of s 44 of the Land Use Planning Ordinance (LUPO), a provision similar to s 139 of the ordinance. Section 44 of LUPO also gave the Western Cape Provincial government the power to decide appeals against municipalities' planning decisions and to replace them with its own.

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[1] *City of Cape Town and Another v Robertson and Another* 2005 (2) SA 323 (CC).
[2] Para 60. See also *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* 1999 (1) SA 374 (CC) paras 26 and 38 and *CDA Boerdery (Edms) Bpk and Others v Nelson Mandela Metropolitan Municipality and Others* 2007 (4) SA 276 (SCA) paras 37-40.
[3] *Minister of Local Government, Western Cape v Lagoonbay Lifestyle Estate (Pty) Ltd and Others* 2014 (1) SA 521 (CC).
[4] Para 46.
[5] *Minister of Local Government, Environmental Affairs and Development Planning, Western Cape v Habitat Council and Others* 2014 (4) SA 437 (CC).

[12] On the authority of the jurisprudence of the Constitutional Court, it is clear that s 139 of the ordinance impermissibly usurps the powers afforded by the Constitution to the municipalities. To that extent, it is unconstitutional and invalid.

Remedy

[13] Section 172(1)(b) of the Constitution provides that when deciding a constitutional matter within its power, a court may make any order that is just and equitable, including an order limiting the retrospective effect of the declaration of invalidity and an order suspending the declaration of invalidity for any period to allow the competent authority to correct the defect.

[14] I must now consider the question of retrospectivity of the invalidation. Ordinarily, the consequence of a declaration of unconstitutionality of a legislative provision is that it is set aside with retrospective effect. In the case of the ordinance in issue, that would be to 31 October 1994, being the date on which the ordinance was assigned to the northern inland provinces, including Limpopo. The result would be that all decisions taken under the ordinance in the period from that date would be set aside, with, needless to say, far-reaching and chaotic consequences. For that reason, the declaration of invalidity would not be with retrospective effect. Obviously, an exception must be made to the non-retrospectivity of the order by reviewing and setting the decision of the municipality, provided a case is made out for that relief.

[15] With regard to the suspension of the declaration of invalidity to allow for the correction of the defect, I am bound by the approach of the Constitutional Court in *Habitat,* referred to in para 11 above. There, the Court declined to confirm an order of the High Court suspending the period of invalidity for a period of 24 months, pending legislation to correct the defect. Cameron J said:

'It follows that the reading in the High Court ordered, with the consent of both the Provincial Minister and the other parties before it, cannot be confirmed. That reading in gives the Province interim appellate powers that are incompatible with the competence the Constitution affords municipalities over "municipal planning". The Constitution grants the Province no direct decisional oversight over the exercise of these functions, and nothing in the evidence placed before us indicates that powers of this sort should be afforded as an interim measure.

For the same reasons, if we suspend the declaration of invalidity, we will temporarily preserve an appellate power that is unconstitutional in its entirety'.[6]

The facts

The first application

[16] The applicant is the registered owner of portion 3 of the farm Hanglip 508 LQ (the immovable property) situated in Lephalale, within the jurisdiction of the municipality. The immovable property is in excess of 500 hectares. On 4 May 2012 the applicant, through its appointed agent, applied to the municipality for permission to temporarily use five hectares of the immovable property for a contractors' residential camp. The application was made in terms of clause 11(2)(b)(iii) of the Lephalale Town-Planning Scheme, 2005 (the town-planning scheme) which provides:

'...(iii) subject to the provisions of clause 18 (advertisements and objections) the local authority may, upon written application of the owner of the land, subject to grant permission to the use of land which does not entail the erection of permanent buildings, or to the use of existing permanent buildings for any purpose subject to such conditions as it may deem fit: Provided that any such consent in terms of this clause shall be granted for a maximum continuous period of twelve (12) months after which the period may be extended by the local authority for further periods of twelve (12) months subject that the total of such periods does not exceed five (5) years...'

[17] On 9 November 2012 the municipality informed the applicant that the application had been approved subject to the following conditions:

'That accommodation area with a capacity for a maximum amount of 500 people be erected and that the accommodation will consist out of (sic) approximately 49 mobile residential units with built-in ablution facilities;

...

That the proposed development be in compliance with the density as prescribed and approved in terms of the Council resolution taken under item A176/2012[9] and limited to the overall density of development of the camp which should not exceed 100 people per hectare nor exceed 500 accommodation rooms'.

[18] Further and detailed conditions were set out in the municipality's approval letter, with regard to: design requirements and building materials; landscaping and

[6] *Habitat* paras 24 and 25.

aesthetics; site control; water supply and water treatment /filtration; storm water drainage; sewer treatment and management; electrical supply/power generation; effluent disposal and toilet facilities; laundry facilities; rubbish disposal; parking provisions; internal and external roads standards; road frontage standards; signage; public transport provisions; recreation and community facilities; telephones; emergency services, fire, first aid and health quality assurance; insurance; liquor licensing; catering and meal areas; compliance with relevant stakeholders' conditions; and removal of structure and rehabilitation of site.

[19] Pursuant to the approval of the municipality, the applicant erected a temporary camp with temporary buildings. The municipality issued the applicant with the required certificate of occupation, and occupation of the camp was taken.

The second application

[20] On 30 November 2012 the applicant submitted a new application in terms of clause 11(2)(b)(iii) of the town-planning scheme for a further temporary use of an additional five hectares of the immovable property to accommodate an additional number of 500 people. The application was titled to be for 'the extension of the temporary contractors' camp'. In paragraph 'B' of the memorandum of the application, titled 'Purpose of the application' it was stated that:

'The purpose of this application is to obtain the approval of the Lephalale Municipality to extent the existing approved 500 man contractor's camp to a 1000 man contractor's camp. The total area of the camp will be 5 hectares...'

[21] In a letter dated 26 February 2013 the municipality informed the applicant that its application was declined because it was considered to be inconsistent with the provisions of the development norms and standards of the municipality and the policy adopted by the municipality with regard to establishment of the contractors' camps. In that letter, the municipality also questioned whether a need existed either for extension of the initial approved period of 12 months, or for approval of the second application in respect of a further five hectares.

[22] On 24 April 2013 the applicant's agent responded to the municipality, seeking to clarify what he perceived to be a misunderstanding regarding the area of five hectares and the density of 100 people per hectare. He reiterated that the application was for (a) the extension of the camp to accommodate an additional number of 500 people, in addition to those in the existing camp, and (b) the total area of the camp as applied for, excluding the existing camp, was not to exceed five hectares. The agent emphasised that it was not the applicant's intention to provide all the facilities on the five hectares of the existing camp, but to extend the existing camp to provide for an additional 500 people on five hectares of land adjacent to, and west of, the existing camp. With regard to whether there was a need for extension of the period or new approval, the agent motivated for both.

[23] On 13 August 2013 the municipality requested the applicant to submit both its second application and the application for the extension of the period approved in the first application. The applicant complied with the request for extension of the period, on 30 August 2013, and pointed out, with regard to the second application, that the municipality was already in possession of the application.

The impugned decision

[24] On 12 March 2014 the municipality informed the applicant that its application for extension of the initial period to the existing establishment had been approved. However, the second application for a further camp was refused, for the following reasons:

'It was resolved under item B83/2013/[12] that the application...be not approved and the applicant be advised that:

1.1 the suitability and appropriateness of the particular location of the existing camp as approved subject to the conditions imposed under B49/2012[10] was at the discretion of the municipality;

1.2 the consenting to the establishment of the temporary contractor's camp/accommodation area with a capacity of 500 people by the municipality as per the outcomes of the council resolution taken under item B49/2012/[10] cannot be construed as precedence set to promote continuous establishment of similar development (sic) within the boundaries of the subject property.'

[25] The applicant took a view that the reasons furnished by the municipality were not cogent, and should be reconsidered. During the mid-April, the applicant's attorney arranged a meeting with the officials of the municipality to discuss the matter. A meeting was scheduled for 4 June 2014. During that meeting, the municipality's newly-appointed manager, requested an opportunity to familiarize herself with the matter, and requested the re-scheduling of the meeting to 18 June 2014. The re-scheduled meeting, however, did not take place as the municipal manager was not available.

[26] A further meeting was arranged for 7 July 2014. It was attended by the applicant's attorney and the applicant's agent, on the one hand, and the municipality's senior officials comprising the municipal manager; divisional head: land use; and executive manager: development planning, on the other. It was resolved during that meeting that a comprehensive report would be drafted on behalf of the municipality regarding the decision on the second application, and that the municipality would revert to the applicant's agent by no later than 11 July 2014. On 11 July 2014 the municipality informed the applicant's agent that its investigations had not been concluded, and that further communication would be made by no later than 18 July 2014.

[27] No report was furnished to the applicant by 18 July 2014 as undertaken, and on 22 July 2014, the applicant's attorney received a letter from the municipality informing him that 'the appeal date with relation to the matter... had lapsed' and the attorney was requested to put 'something in writing' for the matter to be taken back to the council of the municipality. The attorney complied with the request on 5 August 2014 in a form of a letter requesting the matter to be referred back to the council. There was no response to that letter and to two other letters which followed. The one is dated 18 September 2014 and the other, although undated, was received by the municipality on 13 October 2014. Although there was an acknowledgment of the latter correspondence, there was no response to the substantive issues raised there.

Application for review instituted and 'additional reasons' furnished

[28] The applicant instituted the present application on 30 October 2014 to review the impugned decision. The application was served on the municipality on 6 November 2014. On 27 January 2015 the council of the municipality convened a meeting to consider the application. It resolved that 'the following conditions be added to the stipulations contained in the council resolution (of 12 March 2014):

(a) the second application was deemed to be defeating the objects of the Town Planning and Townships Ordinance 15 of 1986 with reference to the initial approval;

(b) the required accommodation rooms and the population density applied for is against the provisions of the municipality which stipulates that the camp applied for should not exceed 500 accommodation rooms with the overall density not exceeding 100 people per hectare;

(c) the social accord signed in October 2012 between government, business and labour was aimed at revitalizing distressed mining towns such as Lephalale by providing quality housing for people residing and working in such towns;

(d) the applicant had failed to submit:

(i) documentary proof from the contractor who was to service the proposed development;

(ii) proof of the need for development of additional contractors' camp;

(e) a trend had developed within Lephalale to commercialize temporary accommodation /construction camps, thus defeating the purpose of the municipality's policy in this regard;

(f) the applicant had failed to submit proof of compliance with LED programmes as stipulated in the approval of the first application.

The filing of the record and the application to strike out

[29] On 28 January 2015 the municipality, in terms of rule 53 of the uniform rules, filed the record of the proceedings. On 16 February 2015 the applicant delivered its supplementary affidavit in terms of rule 53(4) of the uniform rules. On the same day, 16 February 2015, the municipality's attorneys furnished the applicant's attorneys with the resolution of the municipality's council taken on 27 January 2015, which was

attached to an email. The resolution was later filed on 9 April 2015. On the same day, 9 April 2015, the applicant launched an application in terms of rules 53(4) and 6(15) of the uniform rules. The purpose of that application was two-fold. First, to supplement its founding affidavit, and second, to strike out the email dated 16 February 2015 from the municipality's attorneys to the applicant's attorneys, to which was attached the municipality's resolution.

[30] During the hearing, the application to strike out was argued first. The applicant argued that the resolution of the municipality of 27 January 2015 was irrelevant. After hearing argument, I dismissed the application, for the simple reason that the resolution was relevant because it sought to furnish 'additional' reasons for refusal of the second application. I took a view that the applicant could still argue that the additional reasons be discounted when the review of the decision of 12 March 2014 is considered, but could not tenably argue for its striking out as irrelevant. On the other hand, the applicant's application to supplement its founding affidavit was also argued preliminarily. I granted it.

[31] That sums up the factual background. The applicant contends that the impugned decision falls to be reviewed and set aside because it fails to provide cogent reasons why its second application was refused. It is also argued that the municipality's 'additional reasons' furnished during its meeting of 27 January 2015 be ignored.

Promotion of Access to Justice Act

[32] Before I consider these arguments, I need to dispose of a preliminary point. It is common cause that the decision of the municipality is an administrative decision as envisaged in s 1 of the Promotion of Access to Justice Act 3 of 2000 (the PAJA). Section 6(2) of the PAJA provides the grounds of review of an administrative action. Section 7(1) of the PAJA provides:

(1) Any proceedings for judicial review in terms of section 6(1) must be instituted without unreasonable delay and not later than 180 days after the date-

(a) subject to subsection (2)(*c*), on which any proceedings instituted in terms of internal remedies as contemplated in subsection (2)(*a*) have been concluded; or

(b) where no such remedies exist, 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.'

[33] Section 9(1) provides, however, that the 180-day period 'may be extended for a fixed period, by agreement between the parties or, failing such agreement, by a court or tribunal on application by the person or administrator concerned'. Section 9(2) provides that such an application may be granted 'where the interests of justice so require'. In practice, the application in terms of s 9 is treated as a condonation provision.

[34] In the present case, there are no internal remedies as envisaged in s 7(1)(a) of the PAJA, following the declaration of invalidity and unconstitutionality of s139 of the ordinance. The applicant seeks 'condonation' for its non-compliance with the time period of 180 days laid down in s 7(1) of the PAJA within which it was required to apply for judicial review of the administrative decision. As stated earlier, the impugned decision was made on 12 March 2014. It is common cause that present the application was launched outside the 180 days after the date on which the decision was taken. The reason for the delay is said to be that the municipality failed to react timeously or ignored requests by the applicants to reconsider its reasons, despite undertakings by the functionaries of the municipality. A further contributing factor is said to be the uncertainty caused by the constitutionality of s 139 of the ordinance.

[35] It is now settled that in the application of ss 7 and 9 of the PAJA, the court must determine two questions. The first is whether the application was launched more than 180 days after internal remedies had been exhausted. The second question is whether, if the first question is answered in the affirmative, it is in the interests of justice that the 180-day period be extended.[7] As Brand JA explained in *OUTA v Sanral*:[8]

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[7] *Beweging van Christelik Volkeieskool Onderwys* (above) para 46.
[8] *OUTA and others v SANRAL Limited and others* [2013] 4 All SA 639 (SCA) para 26.

'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 e.g. *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 applicant's 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.'

[36] I now consider whether in all the circumstances it is in the interests of justice to extend the stipulated period of 180 days. That involves the exercise of a discretion, which, obviously, must be exercised judiciously. As stated earlier, the period of 180 days may be extended by the court 'where the interests of justice so require'. The concept 'interests of justice' has been considered by the Constitutional Court on a number of occasions in the context of applications for condonation.[9] The effect of those decisions is the following: whether it is in the interests of justice to grant condonation depends on the facts and circumstances of each case. Factors that are relevant to this enquiry include, but are not limited to, the nature of the relief sought, the extent and cause of the delay, the effect of the delay on the administration of justice and other litigants, the reasonableness of the explanation for the delay, the importance of the issue to be raised in the intended appeal and the prospects of success. With regard to the explanation for the delay, an applicant for condonation must give a full explanation for the delay, which explanation must cover the entire period of delay. And, what is more, the explanation given must be reasonable.

[37] In the present case, as already stated, there are no internal remedies. Therefore, the period of 180 days is to be calculated after the decision was made, which is 12 March 2014. It is clear that at all times the municipality, at the very least, created an impression to the applicant that it was prepared to reconsider its decision

[9] See *S v Mercer* 2004 (2) SA 598 (CC); 2004 (2) BCLR 109 (CC) at para 4; *Head of Department, Department of Education, Limpopo Province v Settlers Agricultural High School and Others* 2003 (11) BCLR 1212 (CC) at para 11 and *Brummer v Gorfil Brothers Investments (Pty) Ltd and Others* 2000 (2) SA 837 (CC); 2000 (5) BCLR 465 (CC) at para 3; *Van Wyk v Unitas Hospital & another* 2008 (2) SA 472 (CC) para 20.

to refuse the second application. The parties were both committed to find an amicable resolution to the problem without resorting to litigation. The applicant did not sit idle about the municipality's decision. The period of non-compliance of almost two months is, in my view, not inordinate in the circumstances of the case. I also take into consideration the applicant's prospects of success in the review application, as well as the constitutional issue raised by s 139 of the ordinance. In the result I have no difficulty in concluding that it is in the interests of justice to extend the 180-day period stipulated in s 7(1) of the PAJA, which I do.

The municipality's arguments in the review application

[38] Having arrived to the above conclusion, I turn now to the substantive application for review. I have already set out the relevant factual background. The answering affidavit on behalf of the municipality was deposed to by its acting municipal manager, Mr Noko Lekaka. The municipality's case is premised on the resolution of its council on 27 January 2015, in particular, the 'density', 'the extension' and 'the necessity' arguments. With regard to the density, it is argued that the density of the development is not compliant with the municipality's policy. To recap on that argument, it is asserted that the municipality's policy limits the density of the development of type 'B' camps to 500 accommodation rooms and overall density of development of the camp to 100 persons per hectare. It is also averred that the applicant's second application is not a new application but an extension of the existing approved 500 people contractor's camp to a 1000 people contractor's camp. The municipality also questioned whether there was a need for a contractors' camp which warranted consideration of a further application before the expiry of 12 months uninterrupted period granted in respect of the initial application.

The issues

[39] From the factual background and the positions adopted by the parties, two issues can be gleaned for determination. First, whether the reasons furnished by the municipality on 12 March 2014 for refusing the second application should be reviewed. Second, whether the municipality is entitled to rely on the new grounds for such refusal, as set out in in the council's resolution on 27 January 2015. If the answer to the first question is in the affirmative, and the second question is

answered in the negative, a further consideration would be whether to substitute this court's decision for that of the municipality and approve the second application, or refer the matter back to the municipality for reconsideration. I consider the above issues, in turn.

The reasons advanced for the municipality's decision of 12 March 2014

[40] There is no question that the municipality, as an administrative body, was obliged to give reasons for its decision. In *Bell Porto School Governing Body v Premier, Western Cape*[10] the Constitutional Court summed up this duty as follows:

'The duty to give reasons when rights or interests are affected has been stated to constitute an indispensable part of a sound system of judicial review. Unless the person affected can discover the reason behind the decision, he or she may be unable to tell whether it is reviewable or not and so may be deprived of the protection of the law.'[11]

[41] Not only was the municipality obliged to furnish reasons for its decision rejecting the applicant's second application, but such were supposed to be adequate reasons.[12] As to what constitute adequate reasons, depends on the circumstances of each case. In *Moletsane v Premier, Free State*[13] it was observed that the degree of seriousness of the administrative act should determine the particularity of the reasons furnished.

[42] To recap on the municipality's decision in the present case, it is based on two 'reasons'. The first is that the approval of the first application was at the discretion of the municipality. The second one is that the approval of the first application should not be construed as setting precedent for establishment of similar camps. That the municipality exercised a discretion in approving the first application was never in issue. As to the precedent-setting, this is irrelevant as each application should be considered on its own merits. It is clear therefore, that these amounted to no reasons at all, and point to the fact that the municipality failed to exercise its discretion

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[10] *Bell Porto School Governing Body v Premier, Western* Cape 2002 (3) SA 265 (CC).

[11] Para 159.

[12] *Judicial Service Commission and Another v Cape Bar Council and Another* 2013 (1) SA 170 (SCA) paras 43-53.

[13] *Moletsane v Premier, Free State* 1996 (2) SA 95 (O) at 98G-H.

properly or at all. This is fatal, and should, ordinarily, result in the review and setting aside of the municipality's decision.

Reliance on new, 'additional reasons'

[43] I shall consider whether the municipality is entitled to rely on the additional reasons forming part of its resolution on 27 January 2015. Counsel for the applicant argued that it is not open to the municipality to rely on the additional reasons, and that the application should be decided on the initial reasons furnished on 12 March 2014. For this proposition, counsel placed reliance on *Jicama v West Coast District Municipality*[14] and *National Lotteries Board v South African Education and Environment Project.*[15] In *Jicama*, Cleaver J cited with approval the following *dictum* in *R v Westminster City Council:*[16]

'... The cases emphasise that the purpose of reasons is to inform the parties why they have won or lost and enable them to assess whether they have any ground for challenging an adverse decision. To permit wholesale amendment or reversal of the stated reasons is inimical to this purpose. Moreover, not only does it encourage a sloppy approach by the decision-maker, but it gives rise to potential practical difficulties. In the present case it was not, but in many cases it might be, suggested that the alleged true reasons were in fact second thoughts designed to remedy an otherwise fatal error exposed by the judicial review proceedings. That would lead to applications to cross-examine and possibly for further discovery, both of which are, while permissible in judicial review proceedings, generally regarded as inappropriate. Hearings would be made longer and more expensive.'

[44] In *National Lotteries*, counsel relied on the remarks by Cachalia JA at para 27 that 'in truth the later reasons are not the true reasons for the decision, but rather an ex post facto rationalization of a bad decision.' However, those remarks were made with reference to English authorities. In fact, the Court expressly refrained from deciding the question whether the failure to give reasons for an administrative decision (which includes proper or adequate reasons) can be validated by different reasons given afterwards. The full paragraph reads:

'In England the courts have said that such a decision would ordinarily be void and cannot be validated by different reasons given afterwards – even if they show that the original decision may have been justified. For in truth the later reasons are not the true reasons for the

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[14] *Jicama 17 (Pty) Ltd v West Coast District Municipality* 2006 (1) SA 116 (C).
[15] *National Lotteries Board v South African Education and Environment Project* 2012 (4) SA 504 (SCA).
[16] *R v Westminster City Council, Ex Parte Ermakov* [1996] 2 All ER 302 (CA) at 316c-d.

decision, but rather an ex post facto rationalization of a bad decision. Whether or not our law also demands the same approach as the English courts do is not a matter I need strictly decide.'

(my underlining for emphasis)

[45] The upshot of the above is. The principle that a decision-maker is not permitted to rely on additional reasons in a review, is not without qualification. As correctly pointed out in *Bizstorm v Witzenberg Municipality*,[17] a court is bound by the principle of legality: regardless of the reason given initially, a court cannot make an order which has the effect of permitting a contravention of the law. Simply stated, if there is a valid, legal impediment prohibiting the municipality from approving the applicant's second application, it would be untenable to suggest that the municipality is tied to the initially inadequate reason, even if it later furnishes a valid and legally sound one, which should have been furnished initially.

[46] For the above reason, I proceed to consider the municipality's additional reasons stated in the resolution of the meeting of 27 January 2015. There are six of them, as already set out in para 28 above. Properly construed, one can distill essentially three out of the six additional reasons. As alluded earlier, those reasons are in respect of the population density; the fact that the second application is an extension of the first one; and the alleged failure to demonstrate necessity for a further development in addition to the first one. In my view, there is no merit in any of the above arguments. With regard to the density, it is clear that the applicant has applied for accommodation subject to a maximum of 500 people. In any event, this aspect can be monitored through various mechanisms, such as when the applicant submit building plans, a process that would afford the municipality's functionaries the opportunity to familiarise themselves with the number of units and prospective occupants.

[47] As to the assertion that the second application was an extension of the first application, this is disingenuous on the part of the municipality. From very early on, the applicant sought to clarify that the second application was a separate and

[17] *Bizstorm 51 CC t/a Global Force Security Services v Witzenberg Municipality and another* (137941/13) [2014] ZAWCHC 83 (30 May 2014) para 31.

substantive application, distinct from the first one. It is clear from all the available evidence that by the time the municipality considered the application, any ambiguity would have been cleared. The applicant's agent, in very clear terms, explained this in his letter to the municipality dated 24 April 2013. There would have been no room for confusion after reading that letter. The applicant's decision not to disclose the name of the contractor or client is a reasonable one under the circumstances where systemic corruption would likely lead to the leaking of information to the detriment of the business interests of the applicant.

Finding on the municipality's decision

[48] I conclude therefore, both on the initial reasoning of 12 March 2014, and on the additional reasons of 27 January 2015, there is no basis to sustain the decision of the municipality to refuse the applicant's second application. The municipality failed to properly exercise its discretion in considering the application. Its decision must therefore be reviewed and set aside. Having come to that conclusion, I must now consider appropriate relief. I may refer the matter back to the municipality to reconsider the applicant's second application. Alternatively, I can substitute the municipality's decision with an order approving the application. Counsel for the applicant urged me to adopt the latter approach. I turn to consider that aspect.

Substitution or referral back to the municipality?

[49] The law in this regard is well-settled. Courts will not lightly interfere with the exercise of a discretionary power of the executive or administration. In terms of s 8(1)(c)(ii)(aa) of the PAJA the court has the discretion to substitute the administrative action in 'exceptional cases'. What constitutes 'exceptional' was considered in *Gauteng Gambling Board v Silverstar Development*[18], where it was stated:

'Since the normal rule of common law is that an administrative organ on which a power is conferred is the appropriate entity to exercise that power, a case is exceptional when, upon a proper consideration of all the relevant facts, a court is persuaded that a decision to exercise a power should not be left to the designated functionary. How that conclusion is to be reached is not statutorily ordained and will depend on established principles informed by

[18] *Gauteng Gambling Board v Silverstar Development Ltd and others* 2005 (4) SA 67 SCA para 28.

the constitutional imperative that administrative action must be lawful, reasonable and procedurally fair'.

[50] In *Trencon Construction v IDC*[19] the Constitutional Court summarised the principles governing a consideration whether there are exceptional circumstances, and how a court should conduct such an enquiry, given the doctrine of separation of powers. The following factors should be considered: The first is whether a court is in as good a position as the administrator to make the decision. The second is whether the decision of an administrator is a foregone conclusion, which factors must be considered cumulatively. Thereafter, a court should still consider other relevant factors. These may include delay, bias or the incompetence of an administrator. A court will not be in as good a position as the administrator where the application of the administrator's expertise is still required and a court does not have all the pertinent information before it. Once a court has established that it is in as good a position as the administrator, it is competent to enquire into whether the decision of the administrator is a foregone conclusion. A foregone conclusion exists where there is only one proper outcome of the exercise of an administrator's discretion and 'it would merely be a waste of time to order the [administrator] to reconsider the matter'. There can never be a foregone conclusion unless a court is in as good a position as the administrator. A court must consider other relevant factors, including delay. Ultimately, the appropriateness of a substitution order must depend on the consideration of fairness to the implicated parties. If the administrator is found to have been biased or grossly incompetent, it may be unfair to ask a party to resubmit itself to the administrator's jurisdiction. In those instances, bias or incompetence would weigh heavily in favour of a substitution order. However, having regard to the notion of fairness, a court may still substitute even where there is no instance of bias or incompetence.[20]

[51] In the present case, it is contended on behalf of the applicant that exceptional circumstances exist for the court to substitute its own decision for that of the municipality. Exceptional circumstances are said to be constituted by the fact that the Court is in possession of all the relevant facts, and is therefore in as good the

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[19] *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa (Pty) Ltd and another* 2015 (5) SA 245 (CC).
[20] Paras 47-55.

position as the municipality to consider the application. I agree. The issue has been exhaustively ventilated in the affidavits as well as the annexures before Court, and the decision to be taken is not of a polycentric nature.

[52] I next enquire whether the decision of the municipality is a foregone conclusion. In this regard I also agree with counsel for the applicant that this is so, for the following reasons: the initial 'reasons' furnished were no reasons at all. What is more, instead of reconsidering the decision after being alerted of its defect, the municipality, *ex post facto*, 'manufactured' new reasons for the decision. I have considered them, and found none to have any merit. By its conduct, the municipality has clearly shown that it sought a particular outcome, and would go to great lengths to ensure that. I therefore conclude that the decision of the municipality is a foregone conclusion.

[53] I also take into account the delay. It took the municipality from April 2014 to January 2015 to take a final position on the matter, and only because the present application had been served on it. I agree with the submission on behalf of the applicant that given the non-cogent reasons initially provided, and the delay in rectifying the defective decision, serious doubt should be cast on the competence of the municipality and its functionaries. A referral back to the municipality is likely to result in further delays and waste of time. In my view, on a conspectus of factors, exceptional circumstances exist which warrant a substitution order. Considerations of fairness weigh in favour of that order. A substitution order constitutes a just, equitable and effective remedy under the circumstances.

[54] To sum up. Section 139 of the Town Planning and Townships Ordinance is unconstitutional and invalid. The declaration of invalidity is subject to the confirmation of the Constitutional Court in terms of s 172(2)(a) of the Constitution, and the registrar of this Court will be directed to transmit this judgment to the Constitutional Court for confirmation proceedings. The declaration of invalidity shall not be with retrospective effect. Retrospectivity shall be limited to the present case, as a natural and logical outcome of the case and to ensure that the applicant is granted effective relief following a finding of constitutional invalidity, as directed by

the Constitutional Court in *Fose v Minister of Safety and Security.*[21] As regards the decision of the municipality refusing the applicant's second application, it vitiated by an improper exercise of a discretion and should be set aside. Exceptional circumstances warrant the substitution of this Court's order, for the decision of the municipality.

Costs

[55] Finally, with regard to costs, there is no reason why the applicant, being the successful party, should not be entitled to costs. Costs should therefore follow the result.

Order

[56] In the result the following order is made:

1. Section 139 of the Town-Planning and Township Ordinance 15 of 1986 is declared unconstitutional and invalid;
2. The declaration of invalidity is not retrospective and does not apply to appeals pending in terms of section 139 of the ordinance;
3. The decision of the first respondent on 12 March 2014 refusing the applicant's application to erect a temporary contractors' camp, is reviewed and set aside. In its stead, the following is substituted:
    1. The applicant's application in terms of clause 11(2)(b)(ii) of the Lephalale Town Planning Scheme, 2005, dated 30 November 2013, for the erection of a temporary contractors' camp on 5 hectares on portion 3 of the farm Hanglip 508 LQ, is approved;
    2. The approval is subject to the same terms and conditions as contained in the first respondent's letter dated 9 November 2012.
4. The first respondent is ordered to pay the costs of the application.

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[21] *Fose v Minister of Safety and Security* 1997 (3) 786 (CC) para 69 and *Gory v Kolver N.O. and Others (Starke and Others Intervening)* 2007 (4) SA 97 (CC) para 40.

TM Makgoka
Judge of the High Court

Date of hearing: 22 February 2016

Judgment delivered: 25 May 2016

Appearances:

For the Applicants: Adv P.J. Vermeulen

Instructed by: Ettiene Rossouw Attorneys, Lephalale

Eben Griffiths Attorneys, Centurion, Pretoria

For the Respondent: Adv. M.S. Mphahlele

L.I. Phooko Attorneys, Centurion, Pretoria

No appearance for the Second, Third and Fourth Respondents.