REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 82434/2019
DATE: 12/01/2022

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: YES/NO

12-01-2022 **PD. PHAHLANE**

DATE SIGNATURE

In the matter between:

RAINBOW JUNCTION DEVELOPMENT	**1ST APPLICANT**
MAGAUTA TRADING 121 (PTY) LTD	**2ND APPLICANT**

and

CITY OF TSHWANE METROPOLITAN MUNICIPALITY	**1ST RESPONDENT**
THE MUNICIPAL PLANNING TRIBUNAL: CITY OF TSHWANE METROPOLITAN MUNICIPALITY	**2ND RESPONDENT**
EXECUTIVE MAYOR OF THE CITY OF TSHWANE	**3RD RESPONDENT**
MUNICIPAL APPEAL TRIBUNAL: CITY OF TSHWANE	**4TH RESPONDENT**
PIVOTAL FUND LIMITED	**5TH RESPONDENT**

JUDGMENT

PHAHLANE, J

[1] This is a review application in terms of the Promotion of Administrative Justice Act[1] ("PAJA") in which the applicants seek the review and setting aside of the decision of the third respondent ("the Mayor") taken on 12 July 2019, dismissing the internal appeal noted by the applicants in terms of section 51 of the Spatial Planning and Land-use Management Act[2] ("SPLUMA") read with section 20 of the City of Tshwane Spatial Planning and Land-use Management By-Law 2016[3] (the By-law). The appeal was lodged against the decision of the second respondent to approve the application for the establishment of the township to be known as Annlin West Extension 48.

[2] In the consolidated practice note which all parties agreed to, the issue for determination by this court as formulated in paragraph 4.1 thereof is "whether upon proper interpretation, section 51 of SPLUMA read with section 20 of the By-Laws grant the right to appeal to parties who did not participate in the township planning hearing from which the right to establish a township was granted".

[3] The relevant background for this review application can briefly be summarised as follows:

3.1 A township application for the establishment of Annlin West Extension 48 was submitted on or about 8 June 2009 in terms of section 96 of the Town-Planning and Townships Ordinance 15 of 1986. As required by the Ordinance, a notice of that township application was published on or about 10 June 2009 in the Provincial Gazette as well as in a local newspaper. In terms of section 96(3) read with section 69(7) of the Ordinance, any person

[1] Act 2 of 2000
[2] Act 16 of 2013
[3] Published in the Provincial Gazette of 2 March 2016

may within a period of 28 days from the date of the first publication of the said notice, lodge an objection or make representations in writing to the Municipality in respect of the township application.

3.2 The applicants did not lodge any objection or make any written representations in respect of the township application within the time period allowed for by the Ordinance.

3.3 It appears that during November/December 2014, the applicants apparently became aware that the township application was being further pursued by the fifth respondent. It is important to note that the applicants stated and conceded in their founding affidavit having had knowledge of the township application made by the fifth respondent and opted not lodge an objection or make representations as required by the Ordinance. In this regard, they specifically stated in the Founding affidavit that *"the applicants took a conscious decision not to object to the application"*.

3.4 The township application was approved by the first respondent on 25 August 2017 and no notice to that effect was given to the applicants. Consequently, on 15 September 2017, the applicants noted an internal appeal in terms of section 51 of SPLUMA read with section 20 of the By-Law to the Municipal Appeal Tribunal. However, this internal appeal was referred to the Mayor being the appeal authority in terms of SPLUMA, who on 12 July 2019 took a decision to dismiss the internal appeal lodged by the applicants, and resolved that the applicants did not have a right to appeal in terms of section 51 of SPLUMA, against the decision to approve the township application, for among other reasons that:

(a) "The applicants were not objectors or interveners as contemplated by legislation.

(b) The appellants did not procure the right to directly or indirectly participate in the application proceedings, and as such, did not have *locus standi* in the subject application proceedings.

(c) A person who is able to appeal is a person who initially participated in the decision of the municipality as an objector.

[4] It is the applicant's contention that the Mayor had in deciding upon the admissibility of the applicant's appeal, incorrectly interpreted section 51 of SPLUMA and section 20 of the Bylaws. In this regard, advocate Grobler appearing for the applicants argued that since both sections are concerned with the right of appeal, their procedural interpretation is subject to constitutional scrutiny and that constitutional imperative must be used when looking at both sections because they both deal with the fundamental right of access to justice through a Tribunal and a fair administrative justice.

[5] It was argued that the exclusion of the applicants as interested persons who have missed the 28-days period from participation in the procedure or a subsequent appeal does not conform with the spirit of section 33[4] and 34[5] of the Constitution[6] and therefore harsh and unfair. Further that in interpreting both SPLUMA and the By-laws, it is necessary to look at the shackles of the history of the old Transvaal or pre-constitutional legislation in order to identify the

[4] Section 33(1): Everyone has the right to administrative action that is lawful, reasonable and procedurally fair
(2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.
(3) National legislation must be enacted to give effect to these rights, and must –
(a) provide for the review of administrative action by a court, or where appropriate, and independent and impartial tribunal.
(b) impose a duty on the state to give effect to the rights in subsection (1) and (2) and
(c) promote an efficient administration.

[5] Section 34: Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court, or where appropriate another independent and impartial tribunal or form.

[6] Act 108 of 1996

problems which the new legislation seek to cure, and to have regard to the scheme of the new legislation to see whether these ills infused by the pre-constitutional ordinance have been addressed. Put differently, that it is important to look at the historical issues to identify the problems that has to be addressed, -- being the exclusion of an interested party who missed the 28-days deadline period from any participation in the procedure or a subsequent appeal which is harsh and unfair, and did not conform with the provisions of section 33 of the constitution, - having regard to the fact that the applicants have the right in terms of section 34 of the constitution. To this end, counsel insisted that on the facts of this matter, it would be wrong to conclude that the second respondent's opinion that the applicants did not have an interest in the decision was correct.

[6] I interpose to state that the applicant's submissions were mostly a reliance upon the facts of this case. What is however important is that in terms of paragraph 5 of the consolidated practice note, the parties have agreed that there are no factual disputes. It follows that the factual matrix is not relevant for the legal issue of interpretation[7]. On the other hand, save for the factual background of this matter, no basis has been laid upon which this court should deviate from the agreement of all parties made in the consolidated practice note and confirmed by all counsels in court, to consider the alleged historical difficulty or pre-constitutional ills which the applicants allege serves to govern the purpose of

[7] In Desert Palace Hotel Resort 2007 (3) SA 187 (SCA) at para 7, the court categorically stated that: "when interpreting a statute, the factual circumstances of a case have no bearing on the analysis. The reason for this is that the same words in a legislative instrument cannot be interpreted differently under different circumstances. In other words, the interpretation of dissections does not take place within the factual matrix of a specific case"; See also: KMPG 2009 (2) ALL SA 823 (SCA) at para 39, where the court stated that: "interpretation is a matter of law, and not of fact, and accordingly, an interpretation is a matter for the court and not for the witness".

SPLUMA or the By-laws, and which advocate Grobler submitted are a harsh and unfair treatment to the applicants.

[7] With regards to submission that the procedure set out by both section 51 of SPLUMA and section 20 of the By-laws do not conform with the spirit and purport of section 33 and 34 of the constitution in as far as it relates to denying the applicants access to participate and appeal, I am inclined to agree with advocate Oosthuizen's submissions that the merits of a township application do not fall within the scope and ambit of section 34 because a justiciable dispute dealing with the planning tribunal and access to the planning tribunal is not a dispute that is justiciable by law under PAJA.

[8] Turning to the crux of the issues before this court, I have already indicated that the Mayor dismissed the internal appeal lodged by the applicants on the basis that the applicants never qualified as objectors or interveners as contemplated by legislation, and therefore did not have *locus standi* or rights in the internal appeal.

[9] Section 104(1) of the Ordinance dealing with appeals in respect of Township applications affords the right of internal appeal to the applicant or an "objector" who is aggrieved by the decision in question. An objector is identified by the Ordinance as any person who has within a period of 28 days from the date of the first publication of the said notice[8], lodged an objection in writing with the municipality in respect of the township application, in terms of section 96(3) read with section 69(7) of the Ordinance.

[8] The objector must have been notified in writing by the local authority of the decision taken.

[10] It was argued on behalf of the applicants that even though the applicants did not previously participate in the town planning process, they nevertheless had a right of appeal because section 20 of the By-laws does not take away their right to appeal because an interested person for purposes of section 51(4)(c)[9] of the Act and section 20(4)(c)[10] of the By-law is a person having pecuniary or proprietary interest and who is able to demonstrate that he/she will be adversely affected by the decision of the land development application.

[11] Advocate Grobler further argued that the applicants qualified as interested persons who have passed the test in terms of section 45(3)[11], irrespective of whether they have received a notice or not, because their right of appeal still stands as they had pecuniary interest in the town planning process and were affected by the decision taken. He insisted that this was a way in which the legislature was creating an internal remedy for the applicants, even where they were not a part of an internal decision-making procedure and as such, a notice of the decision should have been sent to the applicants because the municipality was aware that the applicants had an interest in the decision regarding the township application.

[12] The fundamental principle of statutory interpretation is that the words in a statute must be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention

[9] Section 51(4)(c) of the Act provides: A person whose rights are affected within the provisions of subsection 1 includes – an interested person who may reasonably be expected to be affected by the outcome of the land development application proceedings.

[10] Section 20(4)(c) of the By-law provides: A person whose rights are affected as contemplated in subsection (1) read with section 51(4) of the Act includes – an interested person who may reasonably be expected to be affected by the outcome of the land development application proceedings.

[11] Parties to a land development application includes a person claiming to be an interested person in a land development application or an appeal and has the burden of establishing his or her status as an interested person.

of the legislature. The leading case on the interpretation of statutes is ***Natal Joint Municipal Pension Fund v Endumeni Municipality***[12]in which the court articulated the following:

> *"Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whale and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation…..The inevitable point of departure is the language of the provision itself, read in context and having regard to the purpose of the provision and the background to the preparation and production of the document".*

[12] 2012 (4) SA 593 (SCA)

[13] In pointing out that a contextual or purposive reading of a statute must remain faithful to the actual wording of the statute, the constitutional court in ***Bertie Van Zyl (Pty) Ltd and Another v Minister for Safety and Security and Others***[13] also highlighted the correct approach to statutory interpretation and stated that *"The purpose of a statute plays an important role in establishing a context that clarifies the scope and intended effect of a law"*.

See also: Cool Ideas 1186 CC v Hubbard and Another[14] and

Provincial Minister for Local Government, Environmental Affairs and Development Planning, Western Cape v Municipal Council of the Oudtshoorn Municipality and Others[15]

[14] The starting point in any appeal proceedings is that a person will only be entitled to be heard on appeal provided that he/she was a party to the initial proceedings leading to an appeal. It is worth noting that before SPLUMA was enacted, it was settled that only an objector who had participated in the proceedings had the right to appeal. The word "appeal" implicitly restricts this category to people that have participated in the previous process. The principle was applied by the Supreme Court of Appeal in ***City of Cape Town v Reader & others***[16] and confirmed in the matter of ***JDJ Property CC v Umngeni Local Municipality***[17] where the court stated that:

> *"It appears to me that there are two reasons why s 9(1)(c) does not apply to the appellants. The first flows from the reasoning in Reader. How can a person appeal against a decision taken in proceedings in*

[13] [2009] ZACC 11; 2010 (2) SA 181 (CC); 2009 (10) BCLR 978 (CC) at para 21.
[14] [2014] ZACC 16; 2014 (4) SA 474 (CC); 2014 (8) BCLR 869 (CC) at para 28.
[15] (CCT05/15) [2015] ZACC 24; 2015 (6) SA 115 (CC); 2015 (10) BCLR 1187 (CC) (18 August 2015).
[16] In City of Cape Town v Reader & others City of Cape Town v Reader & others [2008] ZASCA 130; 2009 (1) SA 555 (SCA), the court stated that an appeal is only available to an unsuccessful applicant for planning permission, and not to a person who was not party to an application for planning permission.
[17] 2013 (2) SA 395 (SCA) par 43.

which he or she was not a party? The essence of an appeal is a rehearing (whether wide or narrow) by a court or tribunal of second instance. Implicit in this is that the rehearing is at the instance of an unsuccessful participant in a process. Persons in the position of the appellants cannot be described as unsuccessful participants in the process at first instance and do not even have the right to be notified of the decision".

[15] Both section 51(1) of SPLUMA and section 20(1)(a) and (b) of the By-law makes it very clear that that the statutory right of appeal is given to those persons who have given written notice of the appeal and the reasons thereof within 21 days of the date of notification of the decision to the municipal manager. The sections provide as follows:

Section 51 of SPLUMA

(1) A person whose rights are affected by a decision taken by a Municipal Planning Tribunal may appeal against that decision by giving written notice of the appeal and reasons to the municipal manager within 21 days of the date of notification of the decision.

Section 20 of the By-law

(1) A person whose rights are affected by a decision of a Municipal Planning Tribunal or Authorised Official, may appeal against that decision by:

(a) delivering a notice of the appeal and reasons for the appeal to the Municipal Manager;

(b) within 21 days of the date of delivery of written notification of the decision on the land development application as contemplated in the provisions of this By-law or any other relevant legislation

[16] There can be no doubt that the legislative intention from abovementioned provisions was to limit the right to appeal to only those who had initially participated in the proceedings and have delivered their written notice within 21 days. It is on this basis that advocate Oosthuizen submitted, and correctly so, that the person who is given a right of appeal in terms of section 51 is, on a proper contextual interpretation thereof, a person who was party to the proceedings before the Municipal Planning Tribunal.

[17] With regards to the argument that the applicants are interested persons for purposes of section 51(4)(c) of the Act and section 20(4)(c) of the By-law having interest and should have been sent notice of the decision because the municipality was aware that the applicants had an interest in the decision regarding the township application, advocate Oosthuizen argued that there is no logical reason why the third person, described in section 51(4)(c) of SPLUMA as an interested person who may reasonably be expected to be affected by the outcome of the land development application proceedings, should not also be constrained to a person who has participated in the initial application proceedings. He submitted that any contrary or wide interpretation of section 51 of SPLUMA will have serious ramifications and absurd consequences in practice in that a contrary interpretation will open the door for an abuse of the right of an internal appeal as provided for in section 51 of SPLUMA.

[18] Advocate Maritz shared the same sentiments and further argued that outsiders who had not properly objected and had not participated in the proceedings, are not entitled to be notified of the decision because it does not appear in any of the provisions of SPLUMA and the By-law that the legislature intended to give the right to appeal to persons such as the applicants who had taken a conscious decision not to object and thus not to participate, as this will lead to an abuse of

the procedures prescribed in terms of SPLUMA and the statutory time periods attached thereto. Further that if that were to be the case, it will lead to an obstructive conduct that would be manifestly contrary to the clear statutory purpose and contrary, in terms of SPLUMA.

[19] The provisions of section 45 and 51 of SPLUMA, as well as section 20 of the By-laws demonstrate the continuous link in the application before the municipal planning tribunal and the related appeal before the appeal authority because all relates to the procedure which the applicants should have complied with, but neglected to follow after taking a conscious decision not to object as required by statute. The common factor between these section is that while a person claiming to be an interested person in a land development application or an appeal has the burden of establishing his or her status as an interested person as contemplated in section 45(3), section 51 and section 20 dealing with appeals places the burden on a person whose rights are affected, including an interested person in terms of section 51(4)(c) of SPLUMA to comply with the rules and procedure, by first giving notice of the appeal and the reasons thereto in writing within the prescribed period. Consequently, an interested person for purposes of section 45 must comply with the same requirements mentioned in sections 51 of SPLUMA and 20 of the By-laws respectively.

[20] The applicants had the alternative process available to them in terms of section 45, to apply to intervene so that they can join in the application proceedings, and this was not done. Of course, if applicants who had taken a conscious decision not to object and not to participate, and who had not applied for leave to intervene could be allowed to belatedly appeal as of right, it would render the provisions of section 45 completely meaningless. I therefore agree with the respondents' submission that it would be irrational for a person to simply ignore

the public participation procedures prescribed in terms of SPLUMA and the statutory time periods attached thereto, and file a belated appeal demanding a hearing because if that were to be allowed, it would have been completely unnecessary to have prescribed a public participation process and a process for the granting of intervener status.

[21] I am of the view that the applicants' contention that they are interested persons who may reasonably be expected to be affected by the outcome of the land development application proceedings as described in section 51(4)(c) of SPLUMA and therefore entitled to a statutory right of appeal, is misplaced and fatally flawed. In my view, such an interpretation would result in absurdity which would in law not be permissible because when applying a purposive approach to section 51 of SPLUMA, the interpretation contended by the applicants is not supported. On the other hand, the interpretation would render redundant the entire participation process prescribed in SPLUMA and in the By-law.

[22] In any event, if the legislature, by enacting SPLUMA, had intended to change the existing legal position, it would have explicitly stated its intentions in a clear and unambiguous language, - and one would have expected an unequivocal provision to that effect. In the absence of such, it must be assumed that the legislature did not intend to change the existing legal position. I am of the view that the apparent purpose to which the statutory right to appeal in section 51(1) of SPLUMA and section 20(1)(c) of the By-laws is directed, must be considered and adhered to.

[23] I have seriously considered the circumstances of this case, as well as the arguments and submissions made by all parties. The fact that the applicants did

not have the right to appeal in terms of section 51 of the SPLUMA and section 20 of the By-laws, it is my considered view that their purported appeal was correctly dismissed. Accordingly, the present application falls to be dismissed.

[24] In the circumstance, the following order is made:

1. The review application is dismissed with costs, including the costs consequent upon the employment of counsels, some of whom are senior counsels.

PD. PHAHLANE
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

APPEARANCES

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