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

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

SIGNATURE [redacted] DATE: 21 August 2023

Case No. 23/075060

In the matter between:

**DEXALINX (PTY) LTD** Applicant

and

**THE MUNICIPAL MANAGER C/O CITY OF TSHWANE METROPOLITAN MUNICIPALITY** Respondent

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**JUDGMENT**

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**DE VOS AJ:**

1 Administrative decisions may not simply be ignored without recourse to a court of law.[1] Even when the state is acting on the side of angels and wishes to correct its own error, it cannot take a short-cut. It must apply to Court to review

[1] MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd (CCT 77/13) [2014] ZACC 6; 2014 (5) BCLR 547 (CC); 2014 (3) SA 481 (CC) (25 March 2014) ("Kirland")

the decision – after having followed a fair procedure. This principle is clear and longstanding.[2]

2 The reasons for this, as identified by the Constitutional Court in *Kirland*, "spring from deep within the Constitution's scrutiny of power".[3] The Constitution regulates all public power. Perhaps the most important power it controls is the power the state exercises over its subjects. If the government wishes to undo a decision, the affected subject is entitled to proper notice and to be afforded a proper hearing on whether the decision should be set aside:

> "Government should not be allowed to take short-cuts. Generally, this means that government must apply formally to set aside the decision. Once the subject has relied on a decision, government cannot, barring specific statutory authority, simply ignore what it has done." [4]

3 If an organ of state wishes to undo its own administrative actions, it must self-review its decision in a court of law. It cannot unilaterally backtrack. If it does so, absent an empowering statutory provision, its conduct amounts to self-help.

4 In this case, that is exactly what happened. The applicant is a developer. It sought several approvals in the lengthy township planning process. The City, all along, approved the various applications. As part of this process, the City issued four certificates. The certificates were issued in terms of section 16(10)

[2] Oudekraal Estates (Pty) Ltd v The City of Cape Town and others (25/08) [2009] ZASCA 85; Department of Transport v Tasima I(Pty) Limited [2016] ZACC 39; 2017 (2) SA 622 (CC); 2017 (1) BCLR 1 (CC) ("Tasima I"); Khumalo v Member of the Executive Council for Education, KwaZulu Natal [2013] ZACC 49; 2014 (5) SA 579 (CC); 2014 (3) BCLR 333 (CC) ("Khumalo"); Member of the Executive Council for Health, Eastern Cape v Kirland Investments (Pty) Limited t/a Eye and Lazer Institute [2014] ZACC 6; 2014 (3) SA 481 (CC); 2014 (5) BCLR 547 (CC) ("Kirland"); City of Cape Town v Aurecon South Africa (Pty) Limited [2017] ZACC 5; 2017 (4) SA 223 (CC); 2017 (6) BCLR 730 (CC) ("Aurecon"); State Information Technology Agency SOC Limited v Gijima Holdings (Pty) Limited [2017] ZACC 40; 2018 (2) SA 23 (CC); 2018 (2) BCLR 240 (CC) ("Gijima")
[3] Kirland (above) para 65.
[4] Id.

of the Tshwane Land Use Management By-law, 2016 (“the certificates”). The certificates confirm that, from the City’s side, the development is approved for the stage of submitting the final building plans. Section 16(10) requires the City must be satisfied of a host of technical and engineering aspects of the development. The City’s decision in terms of section 16(10), with the certificates, was conveyed to the applicant in December 2022, subsequent to the required promulgation in the government gazette approving the townships.

5 The City then unilaterally decided the certificates were no longer valid. It did so without an application for self-review of its original decision to issue the certificates. It did so eight months after it had conveyed the decision to the applicant. By which stage, subsequent steps had been taken. In particular, the applicant registered the titles of deeds, notarial ties and submitted the final building plans. All these steps, founded on these certificates, were perfected.

6 The City took further steps based on the validity of these certificates. The City required the application to apply for a correction and an exemption based on sections 13, 24 and 28 of the By-law. These steps come into play subsequent to the granting of the certificates. Both the applicant and the City had relied on these certificates, and both had taken subsequent steps premised on their lawfulness.

7 The City's position is legally impermissible. Its decision to issue the certificates stands until reviewed and set aside by a court of law. Unless then, they exist, in fact, and cannot simply be overlooked.

8 The City contends that the wrong Department issued the certificates. The Legal Department issued the certificates. The City submits the Land Planning Department ought to have issued the certificates.

9 The City's answering affidavit contains only the conclusion that the wrong Department issued the certificate and failed to lay a factual foundation for this point. The highest the City places the debate is a one-liner where it states – "that function resides with City Planning Department, and it had not issued" the certificates. The Court is provided with nothing on which it can make this factual finding other than the City's say-so. On the contrary, the certificates issued themselves contain more of a factual foundation that it is the Legal Department that has the requisite authority to issue the certificates. The certificates are signed by Advocate DM Motseo on behalf of the Council of the City in her capacity as the Acting Group Head: Group Legal and Secretarial Service. The authorisation of the Legal Department to issue the certificate appears from the certificate, which states that the issuance is "duly authorised in terms of a Council Delegation dated 11 September 2020".

10 But in this case, it does not truly matter if the City can prove the wrong Department issued the certificates. I have not been provided with the evidence to sustain such a finding. But even if I had such facts, the outcome would not alter. In principle, in *Kirland* is clear: even where the decision is defective – as the evidence suggested in *Kirland* – government should generally not be exempt from the forms and processes of review. It should "be held to the pain and duty of proper process".[5] It must apply formally for a court to set aside the

[5] Kirland (above) para 64.

defective decision so that the Court can properly consider its effects on those subject to it. The Court in *Kirland* held that the decision, despite being defective, may have consequences that make it undesirable or even impossible to set it aside. That demands a proper process in which all factors for and against are properly weighed. This did not happen in this case.

11 In *Kirland*, the Court held that this requirement originates in the principle of legality and applies even if PAJA does not. The purpose is not to stymie government in "senseless formality". Rather, the requirement that the state must generally self-review is an insistence on due process, from which there is “no reason to exempt government”. As the state is the “Constitution’s primary agent. It must do right, and it must do it properly”.[6]

12 The Court, therefore, concludes that the City improperly disregarded its own decision, and the decision stands until reviewed and set aside. On this basis, the applicant is entitled to a declarator that the decision to grant the certificates is valid and stands until reviewed and set aside.

13 The applicant asks for relief consequential on a finding that the certificates are valid. If the decision to grant the certificates stand, then the applicant contends it is entitled to demand the City consider its subsequent applications. The City halted the consideration of all subsequent decisions on the premise that the certificates could be ignored. As this is legally impermissible, the applicant asks the Court to compel the City to consider the subsequent applications.

[6] Kirland (above) para 82.

14 From this relief, the applicant seeks the processing of the subsequent approvals. The subsequent applications relate to sections 13, 24 and 28 of the By-laws. They follow a section 16(10) certificate. In particular, the applicant seeks to review and set aside the City's failure to make a decision on the applications in terms of sections 13 and 23 pertaining to the proposed Township of Peach Tree Extensions 21- 24 and to consider the applicant's section 28(9) application for the registration of a new Sectional Title Scheme.

15 Prior to its reversal on the certificates, the City informed the applicant that certain of its buildings were built across boundary lines. This required an application to be considered by the City in terms of sections 13 and 23 of the By-laws. The applicant delivered these applications. On 26 May 2023, the City's Planning Department confirmed that the City had approved the applications. It appears that the City has already approved the applications in terms of sections 13 and 23 but is refusing to process these applications.

16 Lastly, the applicant requests that the Land Use Department of the respondent be compelled to update the respondent's computerised system by virtue of initiating the linking process between them and the Building Plans Department to enable the ensuing process of obtaining approved Building Plans by the applicant.

17 The City has provided no basis to oppose this relief other than seeking impermissibly to reverse the section 16(10) certificates. This is, for reasons set out above, unlawful. The basis on which the City has refused to process these applications is unlawful. The applicant is entitled to mandamus in this regard. The City must process these applications within a reasonable time. No

argument has been presented to the Court that the time periods presented by the applicant are unreasonable.

18 The applicant has approached this Court on an urgent basis. The City contends that the urgency was self-created. The facts indicate differently. The City's about-turn came about in mid-July 2023. Until 17 July 2023, the applicant and the City both acted in accordance with an understanding that the certificates were valid and even took subsequent steps based on this understanding. Until 17 July 2023, things were going swimmingly. It was in an email of 17 July 2023 the City informed the applicant it would disregard the certificates. The applicant wrote back on the same day, explaining the situation. The City’s response the following day, 18 July 2023, was intractable: it viewed the certificates as invalid. This was the moment the applicant knew it would have to approach the courts for assistance. The following day the applicant approached its lawyer, and the application was launched within a week and set down within two – permitting the City time to respond. The urgency was not self-created.

19 The applicant presents three factual foundations for its claim for urgency. First, it is suffering significant financial harm. Four tenants have exercised options for the properties to be built. They are entitled to a reduction in the purchase price for delays suffered in the finalisation of the development. The current damages the applicant has suffered, to date, in this regard, is an amount of about R 7 million. These damages, of course, compound daily. There is also no end in sight to these damages as the City's intractable position means that the process must start afresh, and the applicant must re-apply for its

certificates. There is no clear basis on which it will be able to claim this damage from a court of law at a subsequent date, particularly in light of the limited scope of damages based on the inappropriate exercise of administrative power.

20 Second, there is the danger of the development in its entirety collapsing. The City contends that this danger is not real. However, the Court has an email from the Gauteng Growth and Development Agency expressing alarm that the investor for this development has not only expressed its intention to withdraw but has also indicated it is looking for an alternative site for this development outside the province. The Gauteng Growth and Development Agency is concerned with the loss of development that might result from the withdrawal from the investor. The Agency says three important things. First, the "project is KEY in unlocking investments in the northern corridor". Second, the investor is seeking to take its money outside the province. Three, the Agency views the issue as serious enough to escalate it to the National Agency. The Agency states that the withdrawal is caused by the delay and the failure to resolve the matter speedily. The timing of this letter fits with the applicant's chronology, and it would appear it was sent the same day the City took its position that it would not move the application along and require the reconsideration of the entire application in relation to the section 16(10) certificate.

21 In essence, the applicant contends that its development and the economic advantages, including job creation, that flow from such a big development, are at risk. These rights are not easily vindicated in the ordinary course, and the harm is not quantifiable in a measure that can result in legal relief.

22 Three, the development is stagnant. It cannot move forward whilst the City refuses to consider any subsequent approvals – premised on its disregard of the certificates. In this regard, as well, the applicant is suffering harm.

23 The Court considers the fact that the core of the application concerns the vindication of the rule of law and a defence against self-help. The principle which has been departed from is one of the cornerstones of the Constitution. The City's reason for its departure is weak. This presses on the scale in favour of urgency. The reason for the City's about-turn is, on the City's explanation, a result of the two departments, the Legal Department and the Planning Department, not communicating with each other. This was acknowledged in oral submissions. It also appears from the City's answering affidavit. In the answering affidavit, the City's Planning Department states that it has not received any "real correspondence" from the Legal Department. The explanation for the City not complying with its constitutional obligations is not, as in *Kirland*, an attempt to correct an error but rather a lack of communication between two departments. This is unfortunate and, more importantly, not legally defensible.

24 None of these considerations, individually, create the conditions necessary to sustain a claim of urgency. However, when viewed cumulatively rather than individually, the Court is satisfied that the requirement of urgency is satisfied.

25 The Court considers the issue of costs. The applicant has had to approach the Court to vindicate fundamental rights. It has been substantially successful. It is entitled to its costs on the principle that the costs follow the result and on the premise that it was asserting the fundamental right to fair administrative

action. The matter involved multiple town planning applications and was brought under pressure. It is appropriate that the applicant enlisted the assistance of two counsel in this matter and that the City be ordered to pay these costs. The applicant has requested that costs be granted on a punitive scale. I find no basis, in the manner the matter was prosecuted, to grant costs on a punitive scale.

**Order**

26 The Court dispenses with the forms and services provided for in the Uniform Rules of Court and allows the matter to be heard as one of urgency under Uniform Rule 6(12).

27 The Court declares that the respondent's decision, dated 7 December 2022, as contemplated in section 16(12)(i) read with section 16(10)(b) of the Tshwane Land Use Management By-law, 2016 (“the By-law”) pertaining to the proposed townships of Peach Tree Extensions 21- 25 (“the properties”) are valid and binding.

28 The respondent is ordered to process the applicant’s approved/issued applications for the properties, in terms of sections 13 and 23 of the By-law, within two weeks of this order.

29 The respondent is to update its computer system in accordance with this order and to initiate the linking process between the Land Use Scheme Department and the Building Plans and Inspection Management Department, to enable the ensuing process of obtaining approved Building Plans, contemplated in section 28(11) of the By-law within a month of this order.

30 The respondent is ordered to take all administrative steps necessary to process the remaining Town Planning Process.

31 The respondent is to pay the costs of the application, including the costs of two counsel.

**I DE VOS**
Acting Judge of the High Court

This judgment was prepared by Acting Judge, Irene de Vos. It is handed down electronically by circulation to the parties or their legal representatives by email, by uploading it to the electronic file of this matter on Caselines, and by publication of the judgment to the South African Legal Information Institute. The date for hand-down is deemed to be 15 August 2023.

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| HEARD ON: | 16 August 2023 |
| DECIDED ON: | 21 August 2023 |
| For the Applicant: | MC Erasmus SC with DJ van Heerden<br>Instructed by DP Du Plessis Inc |
| For the Respondent: | M Ka-Siboto<br>Instructed by Mothle Jooma Sabdia |