IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

CASE No : 11557/2016P

In the matter between:

PIETERMARITZBURG PISTOL CLUB Applicant

and

MEMBER OF THE EXECUTIVE COUNCIL: DEPARTMENT OF ECONOMIC DEVELOPMENT, TOURISM & ENVIROMENTAL AFFAIRS FOR THE PROVINCE OF KWAZULU-NATAL First Respondent

MSUNDUZI MUNICIPALITY Second Respondent

JUDGMENT

VAN ZÿL, J.

[1] In its amended form this is an application for the review and the setting aside of the decision of 1 July 2015 of the now first respondent, namely the Member of the Executive Council: Department of Economic Development , Tourism and Environmental Affairs for the Province of KwaZulu-Natal, to approve the environmental authorisation for a low cost

housing project which the second respondent, the Msunduzi Municipality, wishes to embark upon on land owned by it, together with other relief. The application is opposed by both respondents, separately represented.

[2] The applicant described itself merely as the owner of a shooting range which conducts business as a tenant upon property of Natal Crushers (Pty) Limited, with whom it originally concluded an indefinite period lease which commenced with effect from 1 January 1969. The leased property is described as 3.318 acres in size forming part of "the Quarry Farm", described as the farm Natal Crushers No. 14772 situated in the County of Pietermaritzburg, KZN and where Natal Crushers, which is not a party to the present application, conducts a quarry and stone crushing business. Another portion of Quarry Farm is apparently let out and is used for growing sugar cane.

[3] The applicant alleged that in terms of its lease it became entitled to erect upon the leased property improvements, by building, for the sole purpose of "*conducting a pistol club or rifle range, or for allied purposes.*". It also claimed to be a duly approved facility meeting all safety requirements of the South African Police Services.

[4] The housing development envisaged by the second respondent is intended for municipal land adjacent to Quarry Farm and in particular to that portion leased by the applicant. As required by the provisions of the *National Environmental Management Act* 107 of 1998 (NEMA), the second respondent applied for and obtained, despite the sole objection of the applicant, conditional environmental approval for the proposed housing scheme.

[5] The applicant thereafter sought to appeal in terms of section 43(2) of NEMA to the first respondent against that decision, at the same time also seeking condonation of its failure to lodge its appeal timeously. In a written ruling dated 26 May 2016 the first respondent dismissed the appeal and upheld the authorisation as granted to the second respondent on 1 July 2015.

[6] The appeal decision is somewhat confusing because it appears that, having considered the application for condonation, condonation was refused. The first respondent however then proceeded to consider the merits of the appeal before ruling that the appeal be dismissed and that the authorization granted on 1 July 2015 "*is hereby upheld.".* As Mr Crampton, who appeared for the first respondent in the review application pointed out, the apparent refusal of condonation by the first respondent became irrelevant in view of the ruling based upon the merits of the appeal. I did not understand counsel for either the applicant of for the second respondent to contend otherwise and I will approach the review on that basis.

[7] The conditional environmental authorisation as granted on 1 July 2015 included the requirement for the imposition of a 200 meter buffer zone between the area leased by the applicant and the intended housing development, together with the construction of certain embankments and shielding walls. In describing the buffer zone as at a 200 meter "*radius*" from the applicant's site it appears that the authorisation differed from the recommendations of the "*RCMS report (dated 26 January 2012)*" which recommended a 200 meter wide buffer zone which extended along and area parallel to the border with the applicant's leased site and the unnamed (parallel) tar road, but much further beyond it in a northerly direction up to the Bishopstowe Road, as depicted in the sketch diagram forming annexure "A", as compared to annexure "I", to the applicant's founding affidavit. The

second respondent, whilst unhappy about this condition, is apparently prepared to abide by it.

[8] The applicant also put up a supporting affidavit by one A R Radloff, a member of RCMS Consultants CC and who authored the letter dated 26 January 2012 annexed marked "C" to the applicant's founding affidavit. It appears from its letterhead that the business of RCMS concerns risk control management systems. According to Mr Radloff it was appointed during March 2011 by Janet Edmonds Consulting CC, which in turn had been retained by the second respondent, to conduct a risk assessment and identify potential safety, health and environmental risks in relation to the situation of the proposed housing development adjacent to the premises occupied by the applicant. It recommended a 200 meter wide buffer zone between the unnamed tar road extending for about 2500 meters up to the Bishopstowe Road. Mr Radloff, in his affidavit, came to the conclusion that Janet Edmonds Consulting CC, as well as the first respondent, both misunderstood his report and as a result limited the buffer zone to a "*radius*" of 200 meters as depicted in annexure "I".

[9] Based upon the RCMS report applicant contended in its supplementary founding affidavit that the crux of its complaint was that the first respondent had failed to apply his mind properly to this aspect and as a result his decision was irrational. In this regard Mr Snyman SC, who appeared for the applicant, submitted that the decision fell foul of the provisions of sections 6(2)(e)(iii) and 6(2)(h) of the *Promotion of Administrative Justice Act* 39 of 2000 (PAJA). It was submitted that the first respondent's decision of 1 July 2015 was an administrative act based upon irrelevant considerations, or the failure properly to consider relevant considerations, as well as a decision which was so unreasonable that no reasonable person would so have exercised the power, or performed the function, so that it should be set aside upon review.

[10] Effectively the approach of the applicant was that the failure of the first respondent to approve the proposed development without making it subject to the RCMS recommendation for a 200 meter wide buffer zone extending some 2 500 meters up to the Bishopstowe Road, was unreasonable and irrational and should be set aside upon review. This was because the alleged lawful activities of the applicant upon its leased premises would create a danger to occupants of the adjoining municipal land intended for housing development by the second respondent.

[11] In elaborating upon the potential dangers flowing from the applicant's activities it pointed out that although its name signifies a "Pistol Club", it in fact operated as a shooting range and law enforcement tactical training centre "*approved and accredited by the SABS/SANS*" and that it also met all safety requirements of the South African Police Services. It alleged that the types of firearms used on the premises include, but are not limited to 9mm pistols, 12 bore shotguns, 0,223/0,308 rifles, 0,22 long rifles, R4 and R5 assault rifles, together with smoke grenades and teargas, used for training purposes. It claimed to have "*built extensively*" on the leased premises so that it could operate a professional shooting range in conjunction with a tactical training centre with full amenities.

[12] The applicant did not provide details of the terms and conditions relevant to its claimed lease. The first respondent, in its answering affidavit, alleged that the applicant's claimed activities were not authorised in terms of its lease and put up as annexure FR2 a copy of the applicant's lease agreement with Natal Crushers (Pty) Limited. It pointed out that in terms of Clause 6 the activities of the applicant as lessee were limited to conducting thereon "*a Pistol Club or rifle range, or allied purpose, and no other operations or any business whatsoever shall be conducted on the said property.*". It

alleged that conducting the businesses of a "*professional shooting range*" and "*tactical training centre*" were clearly in contravention of the terms of the lease. The applicant in reply sought to meet the challenge by advancing a bare denial amplified by the claim that the issues pertaining to its authority were entirely irrelevant.

[13] The second respondent alleged in its answering affidavit that the applicant, despite its claims to having been duly authorised to conduct its activities on the leased site, did not comply with its authority and was unlawfully creating a danger upon the second respondent's adjoining property earmarked for housing development. In this regard the second respondent also put up as annexure SH.5 a document headed "Compulsory Specifications for Small Arms Shooting Ranges" (the Compulsory Specifications) and alleged with reference thereto that applicant's conduct was not in compliance therewith. The Compulsory Specifications were originally promulgated in terms of the Standards Act 29 of 1993 by proclamation under government notice R643 of 28 May 2004 and remained in force by virtue of the provisions of section 34(2)(b) of the Standards Act 8 of 2008 which repealed to 1993 Act. They were amended by Government Notice R518, as contained in Government Gazette 38877 on 19 June 2015 and issued in terms of the National Regulator for Compulsory Specifications Act 5 of 2008.

[14] The Applicant, in reply, alleged *inter alia* that "*This review does not concern the safety of the applicant's rifle range, but the decision of the MEC to approve the housing project.*". It claimed that these considerations were irrelevant to the review application, an allegation which is difficult to understand since the review is based upon the allegation that the first respondent impermissibly ignored the recommendations by RCMS and Mr Radloff for a 2 500 metre long buffer zone required for safety reasons.

[15] In opposing the relief sought the respondents at the outset raised a number of issues *in limine.* By the time the matter was argued the real issue raised in *limine* was whether the applicant had demonstrated that it had the requisite *locus standi in judicio* to have brought the review application. The standing of the applicant was attacked on two fronts. Firstly on the basis that it sought to impose restrictions upon the use by the second applicant of its property in order to enable the applicant to continue pursuing its own unlawful activities. Secondly it was alleged that the applicant had not shown that it had a sufficient legal interest within the ambit of PAJA to succeed in an administrative review.

[16] The position of the applicant with regard to its permitted usage in terms of its lease of the premises have already been set out above. With regard to its claim to compliance with the legal requirements for the conduct of its shooting range the applicant in reply provided as annexure RA.4 what it claimed to be its certificate of compliance issued by the National Regulator during February 2017. It is interesting to note that annexure RA.4 is in fact a copy of an inspection record by Mr Joseph Lefifi, an inspector attached to the Office of the National Regulator for Compulsory Specifications and was issued on 15 February 2017 to "the Lamberti-Bhika Shooting Range". Assuming that this was a reference to the applicant operating under a different name, it is significant that it required the shooting range at all times to comply fully with the Compulsory Specifications contained under reference "VC9088:2015" as is also reflected annexure SH.5.

[17] The inspection record (RA.4) was put up by the applicant in response to a challenge from the second respondent who put up a series of email communications between inspector Lefifi and its consultant land surveyor Mr O Greene. In the supporting affidavit of Greene he confirmed that he had been in contact with Inspector Lefifi and had established that the inspection of 15 February 2017 had confirmed that the shooting range was licenced

under number AZC2005/350 and classified as an "*Outdoor no danger zone*" shooting range. Such a range is defined in paragraph 3.1(b) of the Compulsory Specifications "*Outdoor no danger area ranges (see Annex C)*" and is explained in paragraph 3.3 as being an outdoor range designed and constructed in such a way that no misdirected shot which could reasonably be expected to be fired towards the targets, would leave the range.

[18] In section C.5 of annexure C to the Compulsory Specifications and dealing with the requirements for shooting range boundaries in relation to "*no danger area*" ranges, it is required that the range should merely be fenced so that the fence passes not less than 5 metres behind the stop butt and that warning signs should be displayed along the fence.

[19] In the light of the above the respondents submitted that on the applicant's own version it had shown, at best, that it had authority to conduct a no danger area shooting range which presupposed no realistic danger to life beyond the perimeter of the range from any misdirected shots leaving the range. Also, on its own version and supported by its witness Mr Radloff, it was actually conducting activities which contravened its authority to operate and was therefore unlawful. Insofar as any factual dispute may be found to exist, the respondents drew attention to the fact that at the commencement of the proceedings the Court enquired from the applicant whether it wished any factual disputes to be referred for the hearing or oral evidence and that counsel for the applicant had indicated that no such referral would be sought. Accordingly the respondents submitted that in relation to any factual disputes their versions should be relied upon in deciding the issues.

[20] The respondents therefore submitted that it had been shown that the applicant in pursuing its activities at its leased property acted beyond the

scope permitted in terms of its lease and contravened the express requirements of the Compulsory Specifications as well. Its conduct, which it seeks to protect by the bringing of this review application, is therefore unlawful and by reason thereof it has no *locus standi* in the present proceedings.

[21] The second respondent in particular submitted that if the applicant operated strictly within the constraints of its lease and shooting range authority, then no need existed for any "*buffer zone"*, which detracted substantially from the area available for low cost housing, to be imposed. Alternatively, if a buffer zone was required between any shooting range conducted by the applicant and the second respondent's land earmarked for housing, then such buffer zone should be situated, not upon he property of the second respondent, but on the leased property itself.

[22] It was submitted that there was no justification for requiring the second respondent to sacrifice the use of some of its property in order to facilitate the activities of the applicant upon its leased land. In this sense the second respondent was in agreement, but for reasons different to those advanced by the applicant, that the buffer zone condition imposed by the first respondent upon the second respondent's proposed development was unjustified.

[23] The second ground for attack upon the applicant's *locus standi* was that the applicant had not shown that it had a sufficient legal interest, within the ambit of PAJA, to succeed in an administrative review of the first respondent's decision.

[24] PAJA defines "*administrative action*" as any decision taken by an organ of state, when exercising a public power or performing a public function in terms of any legislation and which adversely affects the rights of any person and which has a direct, external legal effect.

[25] In *Giant Concerts CC v Rinaldo Investments (Pty) Ltd and Ors* 2013 (3) BCLR 251 (CC) it was held at paragraph 43 that an own-interest litigant needs to demonstrate that its actual or potential interests are directly affected by the unlawfulness sought to be impugned upon review. In the present matter the applicant is clearly an own-interest litigant.

[26] The proper approach to determining the standing of an own-interest applicant requires that it be assumed at the outset that its challenge is justified because the issue of standing is divorced from the substance of the complaint. Standing needs to be decided *in limine* before the merits are considered. However, the interests of justice may require that the matter not be decided upon standing alone, such as where the interests of justice or the public interest might compel a broader investigation, even if the applicant's standing were questionable. Hence, where a litigant acts solely in its own interest, there is no broad or unqualified capacity to litigate against illegalities and something more needs to be shown (*Giant Concerts* (*supra*) at para 35).

[27] In *Roodepoort-Maraisburg Town Council v Eastern Properties (Pty) Limited* 1933 AD 87 at 101 Wessels, CJ held that "*.. by our law any person can bring an action to vindicate a right which he possesses (interesse) whatever that right may be and whether he suffers special damage or not, provided he can show that he has a direct interest in the matter and not merely the interest which all citizens have.*" The question arising in the

present matter is whether the applicant has shown a sufficient legal interest for the purposes of the present review application.

[28] As already indicated above, if the applicant kept it activities within the limits of its authority, both in terms of its lease as well as the Compulsory Specifications, then it would not be materially affected by the condition imposed upon the environmental authority granted to the second respondent and would have no cause for complaint. Certainly there would be no logical reason to require the imposition of a 2 500 metre long buffer zone between the unnamed road and the applicant's leased property extending all the way to the Bishopstowe Road.

[29] If the first respondent, as a matter of precaution, still required a buffer zone of 200 metres and decided instead of extending it all the way to the Bishopstowe Road, rather to curve it round to meet the quarry property 200 metres distant from the applicant's leased property, then the second respondent may have cause for complaint, but not the applicant. In fact, the applicant has no right at all to require the second respondent to sacrifice the use of its land, otherwise intended for the laudable public purpose of low cost housing, to serve as a buffer zone for the applicant's commercial activities, legal or otherwise.

[30] Both respondents submitted that, in any event, the environmental authority granted by the first applicant to the second applicant did not by itself entitle the second applicant to proceed with the intended low cost housing development. It merely represented a preliminary prerequisite for such a development and as such did not materially affect the rights of the applicant with regard to the use of its leased property. Such rights would only come into play, so it was submitted, at a later stage when, as counsel put it, it became a dispute between neighbours while the decision under

review related solely to environmental issues concerning the intended use to which the second respondent wished to put its property. Therefore, so it was submitted, the applicant had not shown that any of its direct external legal rights have been affected by the first respondent's decision which it sought to impugn. Differently put, at most it had shown only an interest which all citizens have, which did not confer the necessary *locus standi* upon it to succeed in the review.

[31] In any event, the respondents contended that the applicant had failed to show, upon a balance of probabilities that decision of the first respondent had been based upon irrelevant considerations, or the failure properly to consider relevant considerations, or that it was so unreasonable that no reasonable person could so have exercised the power, or performed the function, so that the decision should be set aside upon review.

[32] The first respondent was criticised for not adhering to the views and recommendations of Mr Radloff by limiting the buffer zone to 200 metres from the applicant's leased property, instead of extending it all the way to the Bishopstowe Road as recommended. Mr Radloff's expertise is not disclosed in the application papers, save for stating that the main business of his firm RCMS Consultants CC is occupational health, safety and environmental consulting. In assessing and evaluating the evidence, views or recommendations of an alleged expert it is necessary to determine whether and to what extent their views are founded upon logical reasoning (*Michael v Linksfield Park Clinic (Pty) Ltd* 2001 (3) SA 1188 (SCA) at para 36). In the present matter the nature, depth and detail of Mr Radloff's investigations are not readily apparent, nor the reasons for his recommendation of a buffer zone 200 metres wide, but some 2 500 metres in length. It also appears that the main source of Mr Radloff's information was the applicant's Mr Bhika, who deposed to its founding affidavit. Mr Radloff appears to have been unaware of the nature or limitations relevant

to the applicant's activities arising from its lease or from the Compulsory Specifications.

[33] On behalf of the first respondent it was contended that the decision was a well considered one. It is clear from the reasons contained in the appeal decision and the reference therein to the reported decision of *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal* 2010 (6) SA 182 (CC), that the first respondent was both aware of the constitutional constraints with regard to his powers, the fact that his decision concerned primarily environmental matters and that his decision should not intrude upon the second respondent's rights with regard to land use and land use management, including municipal planning.

[34] In this regard the first respondent's reasons in the appeal also referred to the decision in *Fuel Retailers Association of SA v Director-General: Environmental Management, Dept of Agriculture, Conservation & Environment, Mpumalanga Province and Others* 2007 (6) SA 4 (CC) at para 85 where the following passage from the judgment of Ngcobo, J was quoted, namely:-

> "*The local authority considers need and desirability from the perspective of town-planning, and an environmental authority considers whether a town-planning scheme is environmentally justifiable. A proposed development may satisfy the need and desirability criteria from a town-planning perspective and yet fail from an environmental perspective.*"

[35] Seeking to balance these constitutional imperatives, the first respondent nevertheless expressed concern, in the light of the allegations made by the applicant (as appellant) regarding the public safety and upheld

the decision to grant environmental authority in a form which contained the provision of a buffer zone, but extending for a lesser distance towards the Bishopstowe Road than recommended by Mr Radloff.

[36] Counsel for the applicant called in aid the decision in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs & Tourism* 2004 (4) SA 490 (CC) at paragraphs 44 to 45 in submitting that the first respondent's decision was so unreasonable that it showed no rational basis and should be set aside. But when reference is had to the judgment of O'Regan, J then it is apparent that the court qualified the approach to review by emphasising that a reasonable administrative decision would depend upon the circumstances of each case and that relevant considerations would include the nature of the decision, the identity and expertise of the decision-maker, the reasons given for the decision, the nature of the competing interests involved and the impact of the decision upon those affected thereby and concluded in paragraph 45 with the remark that "*The Court should take care not to usurp the functions of administrative agencies. Its task is to ensure that the decisions taken by administrative agencies fall within the bounds of reasonableness as required by the Constitution.*".

[37] In my view it cannot be said that the first respondent, in arriving at his decision, had based it upon any identifiable materially irrelevant considerations, or that the decision was motivated by a failure properly to consider relevant considerations as urged by the applicant. In my judgment the decision was also not unreasonable in the light of the information before the first respondent at the time. In short, in my view no sufficient grounds have been shown upon which the decision of the first respondent should be set aside upon review, even if the applicant had established its *locus standi* to bring and pursue the application for review.

[38] In my judgment the review application must inevitably fail. I see no reason to depart from the usual approach to costs. In the result I make the following order:-

a. The application for review is dismissed.

b. The applicant will pay the costs of the respondents, including any costs previously reserved and such costs to include the costs of senior counsel, where employed.

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VAN ZÿL, J.

REPRESENTATION OF THE PARTIES:

For the Applicant:

Adv C J Snyman SC

Instructed by Messrs Siva Chetty & Company
378 Langalibalele Street
PIETERMARITZBURG 3201
Tel No.: 033 342 9636
Fax No.: 033 342 9639
Email: sivachetty@mweb.co.za
(Ref: Mr S Chetty/Shalina/P1650)

For the First Respondent:

Adv D P Crampton

Instructed by Messrs PKX Attorneys
Suite 36
3 on Cascades Crescent
Montrose
PIETERMARITZBURG 3201
Tel No.: 033 347 5354
Fax No.: 033 347 3572
Email: mail@pkx.co.za
(Ref: Mr M Potgieter)

For the Second Respondent:

Adv A J Dickson SC

Instructed by Messrs Diedricks Attorneys Inc
90C Roberts Road
Clarendon
PIETERMARITZBURG 3201
Tel No.: 033 342 9808 / 079 054 1307
Fax No.: 086 219 1672
Email: admin@diedricksattorneys.co.za
(Ref: 1M4560/JD/CS)

Date Argued: 3 August 2018

Judgment delivered: 16 August 2018