IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

CASE NUMBER: 15849/2015

DATE: 19 NOVEMBER 2015

In the matter between:

LANGEBAAN RATESPAYERS &

RESIDENTS ASSOCIATION Applicant

and

BERRYDUST 69 CC 1st Respondent

SALDANHA BAY MUNICIPALITY 2nd Respondent

EX TEMPORE JUDGMENT

ROGERS J:

[1] This is an application in which the applicant, a ratepayers and residents association ('the LRRA'), seeks a declaration that a rezoning granted in respect of property owned by the first respondent on 12 July 2012 lapsed two years later, so that with effect from 13 July 2014 the zoning of the property was restored to its original zoning, being Residential Zone 2 rather than the zoning granted on 12 July 2012, namely, Business Zone 1.

[2] The application is opposed by the first respondent but not by the second respondent which is the municipality. Mr van der Meer appears for the applicant and Mr Kulemkampf for the first respondent. There are three points raised in this case, firstly whether the application has been duly authorised; secondly, the date from which the two year lapsing period is to be reckoned; and thirdly whether, assuming the applicant's view of the two year period is right, the first respondent actually utilised the property within the two year period in a way which prevented the lapsing from coming about.

[3] I deal firstly with the question of authority. Initially the first respondent challenged the authority of the applicant's deponent, Mr Kotze, by way of notice in terms of rule 35(12) and then in the answering affidavit. In the heads of argument which were filed on the applicant's behalf on 22 October 2015, the point was made that the first respondent's remedy, if it considered the application not to be authorised, was to issue a notice in terms of rule 7(1). That view appears to me to be correct and to be in accordance with the two leading authorities on the matter, being Ganes v Telecon Namibia Limited 2004 (3) SA 615 (SCA) and Unlawful Occupiers School Site v City of Johannesburg 2005 (4) SA 199 (SCA) paras 14 to 16.

[4] No doubt alerted to the point, the first respondent belatedly served a notice in terms of rule 7 disputing the authority of the applicant's attorney to act on behalf of the applicant. This notice was served out of time but the applicant, instead of objecting to the notice, chose to reply to it, attaching a resolution of the applicant dated 18 April 2015. Mr Kulemkampf for the first respondent submitted that the resolution did not authorise these proceedings and that Mr Kotze in the circumstances was not authorised to instruct the applicant's attorneys to institute the application.

[5] The resolution confirms and ratifies an earlier resolution of the applicant dated 12 April 2014 which was in the following terms: that the LRRA declares that it shall institute legal proceedings against the Saldanha Bay Municipality and the owner of Erf 442 Langebaan on behalf of the surrounding owners to overturn the rezoning of Erf 442 Langebaan from Residential to Business Zone 1. The resolution also recorded that Mr Kotze would handle the matter and had authority to sign all necessary documentation.

[6] Mr Kulemkampf pointed out that the resolution to this effect, which was repeated on 14 February 2015, was one directed at review proceedings to set aside the rezoning of the property. As at 12 April 2014, when the initial resolution was

taken, the two year period which the first respondent had to utilise the rezoning had on reckoning not expired. This confirms that at that stage the applicant must have had in mind a review application rather than any proceedings relating to the supposed lapsing of the rezoning.

[7] When the resolution was confirmed on 14 February 2015, it still seems to have been the case that the applicant was intent on a review. The evidence does not show that as at 14 February 2015 the applicant had yet come to the view that the rezoning had lapsed. I say this because as late as 23 April 2015 the applicant's attorney wrote to auctioneers who had been mandated to sell the property, advising that the applicant intended to institute review proceedings to overturn the rezoning. The applicant's attorney put the auctioneers on notice that, if the review succeeded, both the seller and potential purchaser of the property would be at risk. Accordingly when the resolution I have mentioned was confirmed on a further occasion, namely 18 April 2015, the applicant still appears to have had in mind review proceedings.

[8] The conclusion is thus inescapable that it was only subsequent to the most recent resolution that the applicant, no doubt after receiving legal advice, came to the view that a review was not necessary because the rezoning had lapsed.

While I can understand that Mr Kotze may have felt that he still had authority to proceed with a declaration to establish the lapsing, the resolution he had did not in fact cover this. One cannot be certain that the governing body of the LRRA would have held the same view as Mr Kotze regarding the lapsing of the rezoning.

[9] While one does not wish to be unduly technical on a question of authority, the applicant seems to me to have had sufficient time to put its house in order. As I have said, a challenge to Mr Kotze's authority was already foreshadowed when a rule 35(12) notice was delivered on 31 August 2015.

[10] I thus consider that I am bound to conclude that the present application is not duly authorised by the resolution which the applicant has put up in response to the rule 7(1) notice. If that is so, if follows that Mr Kotze did not have authority to instruct the applicant's present attorneys to institute the proceedings on behalf of the LRRA.

[11] However I would not wish to decide the matter solely on a technical point and, since I have reached a conclusion on the other two issues, I intend to state my opinion on them.

[12] I deal firstly with the question of the computation of the

two year period. The following very brief background is necessary to understand the point. The municipality granted the first respondent's application for rezoning on 12 July 2012. The applicant and other interested parties had objected to the rezoning and subsequently pursued an appeal to the MEC in terms of s 44 of the Land Use Planning Ordinance 15 of 1985 ('LUPO'). On 24 October 2013 the MEC dismissed the appeal. The appeal outcome was notified to the applicant in a letter dated 8 November 2013. On 13 November 2013 and pursuant to the appeal outcome the municipality issued a zoning certificate confirming the new zoning of the property.

[13] Section 16(2) of LUPO provides that a rezoning granted in terms of s 16(1) shall lapse *inter alia* if the land is not, within a period of two years after the date on which the application for rezoning was granted, utilised as permitted in terms of the zoning granted, unless the administrator (ie the MEC) or council extends the said period of two years. The competing arguments in this case are (i) that the two year period runs from 12 July 2012, being the date on which the municipality granted the rezoning (that is the applicant's argument) and that would take one to 12 July 2014;.(ii) that the two year period runs from the date on which the MEC dismissed the appeal, namely 24 October 2013, which would take one to 24 October 2015 (the first respondent's argument).

The municipality in correspondence took the view that the two year period ran from the notification of the outcome, namely 8 November 2013, which would take one to 8 November 2015. Nothing turns for present purposes on whether the two year period would run from 24 October 2013 or 8 November 2013. The critical question is whether the trigger date is the date of the municipality's original decision or the date of the appeal decision.

[14] Reading section 16 on its own, one might conclude that the relevant period is the date on which the council granted the rezoning, namely 12 July 2012. However LUPO must be read as a whole. Section 44 makes provision for appeals *inter alia* in respect of rezoning decisions. Section 44 was declared unconstitutional in the case of Minister of Local Government Environmental Affairs and Development Planning Western Cape v Habitat Council and Others 2014 (4) SA 437 (CC). This was on the basis that the conferring of an appellate power on the provincial sphere of government was an unconstitutional intrusion into a municipal competence. However the said order of invalidity was not made retrospective and thus did not affect appeals which had been lodged prior to 14 April 2014, being the date of the Constitutional Court's order. Accordingly the present case is governed *inter alia* by s 44 of LUPO.

[15] In terms of s 44(1)(a) an applicant for rezoning may appeal the refusal of a rezoning and a person who has objected to the granting of a rezoning may appeal against the granting of the rezoning. Section 44(2) provides that the administrator, which can now be taken as a reference to the relevant MEC, may, after consultation with the council concerned, in his discretion dismiss an appeal contemplated *inter alia* in s 44(1)(a) or uphold it wholly or in part or make a decision in relation thereto which the council concerned could have made.

[16] Sections 44(3)(a) and (c) are relevant. They provide that, for purposes of LUPO:

> "(a) an application referred to in subsection 1(a) shall be deemed to have been granted or conditionally granted or refused by the council concerned in accordance with action taken by the administrator under the provisions of subsection 2; and
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> (c) a decision made by the administrator under the provisions of subsection 2 shall be deemed to have been made by the council concerned."

[17] The argument by Mr Kulemkampf for the first respondent is that the MEC's decision, whatever it is, becomes a deemed decision of the council and that the deemed council decision, having the same date as the date of the MEC's appeal

decision, fixes the date from which the two year period referred to in s 16(2) runs. Mr van der Meer argued against this that, while this argument might be correct where the MEC replaces a negative decision with a positive one, it cannot apply where all he does is dismiss an appeal, which is what he did in the present case.

[18] When interpreting s 44(3) it is legitimate to take into account the implications of the one interpretation over the other. Section 16(2) is clearly intended to give the successful applicant an effective period of two years to start using the property in accordance with the rezoning. If there is an appeal against the rezoning, one would not expect the successful applicant to be permitted to start utilising his rights until the appeal has been determined, since otherwise by the time the appeal is decided one might be faced with a *fait accompli* which cannot be reversed.

[19] To allow an applicant to start using his rights in the face of an appeal would thus be to render the appeal process largely nugatory. This is confirmed by regulation 20 of the regulations made in terms of s 47(1) of LUPO governing appeals. Regulation 20 reads as follows:

"Where a council grants an application in respect of which

> objections have been received, it shall point out to the applicant not to act on the said approval until such time as it is confirmed in writing that no appeal has been received, provided that where an appeal is received the said approval shall be suspended."

[20] This means that where there is an appeal the applicant cannot act on the approval he has received. There was some suggestion from Mr van der Meer in argument that regulation 20 could not override LUPO. However the regulations stand. There has been no review directed at regulation 20. Accordingly I cannot proceed on the supposition that regulation 20 is *ultra vires*. The regulations stand until set aside on review.

[21] In any event I do not doubt that the regulation I have quoted is within the MEC's powers under s 47(1) of LUPO. One knows that s 44 makes provision for appeals against rezoning decisions. Section 47(1) empowers the MEC to make regulations on matters which shall or may be prescribed in terms of the ordinance and "generally relating to all matters which he deems necessary or expedient to prescribe in order to achieve the purposes of this Ordinance". For the reasons I have already indicated, it is necessary or at least expedient, in order to give effect both to the two year period in s 16 and the

rights of appeal conferred by s 44, that the entitlement of a successful applicant to give effect to a rezoning should be suspended until the appeal outcome is known.

[22] Accordingly, and subject to one matter I shall mention presently, the effect of Mr van der Meer's suggested interpretation of s 44 might, where a successful rezoning is unsuccessfully appealed against by an objector, leave the applicant with considerably less than two years in which to act on the rezoning. Indeed, in the present case, if the rezoning were to have lapsed on 13 July 2014, the applicant would have had just under nine months from the date of the appeal decision in October 2013 to act on the rezoning before it lapsed. One knows from experience that appeals against more controversial and substantial rezoning decisions can take even longer than two years.

[23] Mr van der Meer argued that the absurdities or injustice which might arise, if the two year period were in circumstances such as the present case to run from the date of the council's decision, were sufficiently ameliorated by the power given to the council in s 16(2) to extend the two year period. He submitted that if there was a pending appeal the council could exercise the power to extend the two year period and there would be little reason for the council not to do so.

[24] I do not think, however, that the power of extension was intended to deal with a situation where an applicant's rights have been suspended by virtue of a pending appeal. A s 16(2) extension is intended to give the recipient an effective period during which he may exercise his rights. Yet if the matter were subject to a pending appeal, the extension would inevitably involve at least some future period in which the applicant would still not be able to exercise his rights.

[25] I find the reliance on the right of extension unpalatable for two further reasons: (i) The first is that it would require a council to consider an extension application in circumstances where it might prove to be academic, for example because the MEC eventually upholds an appeal and reverses the rezoning. (ii) Secondly, in order to reach a rational view on a period of extension the council would need to know what further time the applicant needs in order to utilise his rights. However the council, on Mr van der Meer's hypothesis, would not know when the appeal would be decided and therefore could not rationally fix the period of extension.

[26] In my view, therefore, the preferable interpretation of s 44 is that it is intended to give the character of the MEC's appeal decision, whatever it is, the deeming effect of being a

decision by the council, and that deemed decision by the council then triggers the two year period referred to in s 16(2).

[27] In that regard it appears to me that s 44(3) does not justify a distinction between cases where the MEC upholds an appeal and where he dismisses it. On the contrary, s 44(2) describes one of the decisions which the MEC may take as being to dismiss an appeal, as would be the case for example where an appeal by an objector is dismissed. Section 44(3)(a) then provides in general terms, and not only in specific cases, that an application referred to in s 44(1)(a) shall be deemed to have been granted or conditionally granted or refused by the council in accordance with the action taken by the MEC. An application referred to in s 44(1)(a) includes an application which was initially granted by the council itself but in respect of which there has been an appeal by an objector. Such an application, too, is deemed to have been granted by the council in accordance with the action taken by the MEC. I have no difficulty in saying that, where the MEC dismisses an appeal by an objector, the action is consistent with confirming the rezoning so that that is then deemed to be an application granted by the council. Similarly in ss 44(3)(c) there is a general provision, without distinction as to the nature of the appeal, that a decision by the MEC under s 44(2) shall be deemed to have been made by the council concerned. In one

of the cases covered by s 44(2), namely the dismissal of an appeal by an objector, the decision which must be deemed to have been made by the council can only mean a deemed decision to grant the rezoning.

[28] For those reasons I consider that the two year period in the circumstances of this case ran either from 24 October 2013 or from 8 November 2013. On either of those views it is common cause that on 17 August 2015 the first respondent applied for an extension of the two year period and that this extension was granted on 26 August 2015. All of this, on my interpretation of s 44, occurred prior to the lapsing of the initial two year period (which would only have occurred in October or November 2015).

[29] That conclusion makes it strictly unnecessary to decide the third point in the case, namely whether – if the applicant's view had been correct – there was actual use of the property by the first respondent within the two year period but I shall deal briefly with it. Section 16(2) ordains a certain result, namely lapsing, in the absence of utilisation. It thus appears to me that it is necessary for the successful applicant, if it is placed in dispute, to allege facts and discharge the burden of proving that there was utilisation in terms of the zoning.

[30] In the present case the rezoning included as a condition that it was restricted to use for “professional offices only”. In terms of the Municipality’s zoning scheme, the term “professional usage” is defined as meaning

> “such type of use as is normally and reasonably associated with professional people such as doctors, dentists, architects, engineers and town planners where the rendering of a service as against carrying on of a business is one of the distinguishing factors.

[31] The first respondent’s deponent, Dr Hoffman, is also the chief executive officer of an entity called Sheppard Medical CC which is engaged, according to its website, in the manufacture and distribution of surgical products. A letter written by Dr Hoffman indicates that the business premises of Sheppard Medical are located in Bellville. He made a very terse statement in paragraph 30 of the answering affidavit that Sheppard Medical utilised a portion of the Langebaan premises as from June 2014, in proof of which he attached a photograph showing a small sign containing the words “Sheppard Medical” attached to the wall of the property. Although Dr Hoffman is an ear, nose and throat specialist, he apparently does not currently conduct a medical practice, his business being conducted through Sheppard Medical.

[32] I do not see how the business of manufacturing and distributing surgical products can be regarded as a professional service of the kind contemplated in the Langebaan zoning scheme, even if it be supposed that from time to time Dr Hoffman finds himself in Langebaan and there speaks telephonically to customers, giving ancillary advice relating to the products distributed by Sheppard Medical. That would not constitute the rendering of professional services or the conduct of a professional practice of the kind that is contemplated by the rezoning.

[33] I should simply add that I am extremely sceptical about the extent of any such use, which seems rather contrived, as is apparent from the extremely brief evidence given in that regard in the answering affidavit. If it had been necessary to decide the point, I would have found that the first respondent had altogether failed to show that it had utilised the property in accordance with the rezoning. However for the other two reasons I have already given, my conclusion is that the application must fail.

[34] In regard to the costs reserved on 7 September 2015, the date on which this matter was originally set down in Third Division, it appears to me that those must be costs in the cause and I think both sides were agreed that that would be

the correct order. On 7 September 2015 the matter was postponed to 5 November 2015 for hearing on the semi-urgent roll. On that date the matter came before Van Staden AJ but he was not able to hear it because he knew Dr Hoffman. The matter was then postponed to today. Mr van der Meer submitted that in those circumstances the parties should bear their own costs while Mr Kulemkampf argued that costs were incurred and should be costs in the cause. It seems to me that there could not have been much by way of wasted costs on 5 November 2015. Both sides have been represented, and very ably represented if I may say, by attorneys. They would not have had to pay fees for reserving counsel. Given that the further postponement was not attributable to any fault on either side, I think justice would be better served by ordering that the parties bear their own costs in respect of that date.

[35] I therefore make the following order:

THE APPLICATION IS DISMISSED WITH COSTS, INCLUDING THE COSTS OF THE POSTPONEMENT OF 7 SEPTEMBER 2015 BUT EXCLUDING THE COSTS OF 5 NOVEMBER 2015 IN RESPECT WHEREOF THE PARTIES SHALL BEAR THEIR OWN COSTS.

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ROGERS J