IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case No: **15274/2021**

In the matter between:

DB PROPERTY DEVELOPMENT COMPANY (PTY) LTD	Applicant
and	
EXECUTIVE MAYOR: STELLENBOSCH MUNICIPALITY	First Respondent
DIRECTOR: PLANNING AND ECONOMIC DEVELOPMENT	Second Respondent
STELLENBOSCH MUNICIPALITY	Third Respondent

Coram: Justice J Cloete

Heard: 24 and 25 July 2023

Delivered electronically: 10 August 2023

JUDGMENT

CLOETE J:

Introduction

[1] The applicant ("DB") is a property development company. In its final amended relief DB seeks the review and setting aside of a decision taken by the first

respondent ("Executive Mayor") on 24 May 2023 dismissing an appeal against two conditions of the land use approval decision of the second respondent ("Director") of 22 June 2021. In the event it is successful, DB asks that the appeal be referred back to the Executive Mayor for reconsideration. The respondents agree that if the review succeeds a referral back (or remittal) is the appropriate remedy, but differ from DB in respect of the direction it seeks as part of that remittal.

[2] DB's attack on the lawfulness of certain provisions in the 2020/21 Development Charges Policy ("MDC Policy") of the third respondent ("Municipality") has fallen away, since it was premised on a finding by the court that the MDC Policy is a binding legislative instrument. In light of the Supreme Court of Appeal decision in *Sasol*,[1] cited with approval by the Constitutional Court in *Rivonia Primary School*,[2] there is no longer any dispute that *'a policy serves as a guide to decision-making and cannot bind the decision-maker inflexibly'.*

The two disputed conditions

[3] These relate to development charges imposed on the approval of DB's land development application. DB accepts that its planned development will have an impact on municipal bulk infrastructure and that it is obliged to contribute

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1 *MEC for Agriculture, Conservation, Environment and Land Affairs v Sasol Oil (Pty) Ltd and Another* 2006 (5) SA 483 (SCA) at para [19].

2 *MEC for Education, Gauteng Province and Others v Governing Body, Rivonia Primary School and Others* 2013 (6) SA 582 (CC) at para [54]; see also *Akani Garden Route (Pty) Ltd v Pinnacle Point Casino (Pty) Ltd* 2001 (4) SA 501 (SCA) at para [7].

towards that infrastructure, which includes water, sewerage, stormwater, solid-waste, roads and community services.

[4] The first condition challenged is the amount imposed as a development charge for municipal road infrastructure. It is common cause that DB's property, Portion 43 of Farm No.65, Stellenbosch Division ("the Property") is situated in the Koelenhof area of the Municipality approximately 7km northwest of Stellenbosch Town. The surrounding road network, namely Bottelary Road (M23) and the R304, are provincial roads in which the development is embedded. As determined by DB's road engineers, it will effectively be a secondary user of the municipal (as opposed to the provincial) road infrastructure. In a nutshell, DB takes issue with the conclusion by the Director, and subsequently by the Executive Mayor, that all the trips to be generated by its development will distribute to the Stellenbosch Town (municipal) impact zone.

[5] DB's main contention is that contrary to the applicable statutory framework, what it is being asked to pay as a development charge for municipal roads has not properly taken into account the demand (or impact) which its proposed development will have on the municipal road infrastructure, given the development's location within the provincial road infrastructure. DB contends that the MDC Policy and Municipality's Development Charges Tariff Tables, which together determine the approach and quantification of development charges, constitute a policy and a guideline, not a rigid statutory framework to be applied inflexibly.

[6] It submits that when making their decisions at first instance and on appeal, both decision-makers however fettered their discretion, and mechanically calculated the development charges for municipal roads according to the approved land uses by using the tariff tables for the Stellenbosch Town impact zone, which includes Koelenhof, despite the development's traffic only having a secondary impact on the municipal road infrastructure. DB submits that in doing so, the decision-makers failed to apply their minds properly to its reduced utilisation of municipal roads, which required them to deviate from the MDC Policy and adjust the development charge accordingly.

[7] In the answering affidavit the respondents contended that the MDC Policy has the status of subordinate legislation and cannot be deviated from by decision-makers without violating the principle of legality (as mentioned above they no longer maintain this stance). The respondents however persist in their contention that neither decision-maker had an "unfettered" discretion to circumvent the formula prescribed by the MDC Policy; and that to the extent the aforementioned policy does *'impose'* a discretion on them, it is limited and in the particular circumstances such discretion *'was not activated'.*

[8] The second condition challenged is that in the approval the Municipality made a very substantial reduction in the amount of the development charges credit granted to DB as a condition of a previous approval ("the 2018 approval") from R25 490 015.44 (15% of the total development charges imposed pursuant to the 2018 approval) to R1 447 158.39 (2% of the total development charges of R81 708 331.11 imposed). DB maintains that the Municipality's previously

granted credit remains valid until set aside, and the current credit should have been calculated inclusive of DB's vested rights. The respondents dispute the previously granted credit should have been taken into account.

The statutory context of development charges

[9] The approval of a land development application ordinarily results in new development that increases the demand on municipal external engineering services. An applicant for land development is responsible for the provision and installation of internal engineering services whereas a municipality is responsible for the provision of external engineering services such as water, sewerage, electricity and municipal roads. Development charges are a once-off capital contribution an applicant pays to a municipality towards the capital costs of the municipal external engineering services needed to service an applicant's increased demand on these services.

[10] The Spatial Planning and Land Use Management Act[3] ("SPLUMA") authorises the promulgation of provincial legislation to regulate the provision of engineering services and the imposition of development charges including the calculation thereof. In turn s 40 of the provincial legislation, namely the Western Cape Land Use Planning Act[4] ("LUPA") provides for the imposition of conditions on approvals, the following provisions being relevant to the matter at hand:

[3] No. 16 of 2013.
[4] No 3 of 2014.

*'**40 Conditions***

(1) When a municipality approves a land use application subject to conditions, the conditions must be reasonable conditions and must arise from the approval of the proposed utilisation of land.

(2) Conditions imposed in accordance with subsection (1) may include, but are not limited to, conditions relating to-

(a) the provision of engineering services and infrastructure;

(b) the … payment of money;…

(3) Subject to subsection (12), a condition contemplated in subsection (2)(b) may require a proportional contribution to municipal public expenditure according to the normal need therefor arising from the approval, as determined by the municipality in accordance with norms and standards as may be prescribed…

(5) When determining the contribution contemplated in subsection… (3)…, a municipality must have regard to at least-

(a) the municipal service infrastructure and amenities for the land concerned that are needed for the approved land use;

(b) the public expenditure on that infrastructure and amenities for the land concerned that are needed for the approved land use;

(c) the public expenditure on that infrastructure and those amenities that may arise from the approved land use;

(d) money in respect of contributions contemplated in subsection (3) paid in the past by the owner of the land concerned; and

(e) money in respect of contributions contemplated in subsection (3) to be paid in the future by the owner of the land concerned…

(12) A municipality may, if appropriate, depart from contributions determined in accordance with subsections (3) and (5).'

(Emphasis supplied).

[11] It is common cause there are no prescribed *'norms and standards'* as envisaged in s 40(3). What is apparent on a plain reading of s 40 is that the focus of any development charge to be imposed is municipal expenditure (both on the municipal service infrastructure and the amenities arising from the land use approval); and the Municipality has an overriding discretion to deviate from contributions determined in accordance with s 40(3) and (5) if it considers this appropriate.

[12] On 20 October 2015 the Municipality promulgated its Land Use Planning By-Law ("the Planning By-Law")[5] implementing SPLUMA and LUPA to regulate the use and development of land within its jurisdiction. The relevant sections of the Planning By-Law are s 66 and s 83, and the pertinent subsections essentially replicate s 40 of LUPA.

[13] Section 83(2) of the Planning By-Law prescribes that external engineering services for which development charges are payable must be set out in a policy and reviewed annually by the Municipality; and s 83(3) stipulates that the amount of development charges payable by an applicant must be calculated in accordance with that policy.

[14] The Municipality duly adopted the MDC Policy. It is revised and implemented annually on 1 July each year. In making the first instance decision the Director applied the 2019/20 policy, and in dismissing the appeal the Executive Mayor applied the 2020/21 policy. The parties are now *ad idem* that it is only the

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[5] Provincial Gazette 7512 of 20 October 2015.

Executive Mayor's decision which is the subject of review, and that she correctly had regard to the 2020/21 policy when making her decision.

The impugned decision

[15] It is not necessary to consider any explanations given by the respondents in the answering affidavit which are at variance with, or attempt to amplify, the reasons for the Executive Mayor's decision, since this would amount to an impermissible *ex post facto* justification therefor: *Nersa v PG Group.*[6] For convenience I will refer to the formulation of the grounds of appeal as they appear in the Executive Mayor's decision.

The first ground: The discretion in the policy was not applied in calculating the roads development contributions.

[16] The Executive Mayor reasoned as follows:

> *'The Appellant argued that the discretion in Clause 9 of the… Policy has not been exercised when calculating the Development Charges for this development. However clause 14 should be read in conjunction with clause 9. Clause 14.1 reads as follows: "Development Charges will be applied based on the impact of services by the increase in land use rights and/or intensification of land use leading to increased demand, irrespective of the geographical location of the development. For example, the traffic generated by a development located along a provincial road, will ultimately end up on the Municipality's road network that link to the provincial roads. The same applies to the additional stormwater runoff that ends up in downstream municipal*

[6] 2020 (1) SA 450 (CC) at para [39]; see also *National Lotteries Board and Others v South African Education and Environment Project* 2012 (4) SA 504 (SCA) at paras [27] to [28].

networks and river courses, increase in demand and the bulk supply of water, and sewer and solid waste disposal."

This clause specifically guides officials as to how to deal with applications for developments along provincial roads to ensure that the principles of consistency in decision making and administrative justice can be better complied with…

The Developer argued that only 30% of trips have an impact on Stellenbosch Municipality roads and DCs should therefore only be 30% of the Roads DC calculated. The traffic impact assessment was done during the covid pandemic and it's not clear if the traffic patterns during this period reflect the true usage of the roads. Even without taking this into account, clause 14.1 of the Development Contribution Policy already deals with this issue.

Furthermore: 6% of trips come to/from Klapmuts, which means this traffic also impacts on the Stellenbosch municipal road network (Stellengate Boulevard and the future Potbelly road that intersects with the R44 are municipal roads). This illustrates that their argument of 30% cannot be substantiated and nullifies the argument that clause 9, was not taken into account.'

[17] Given that the 2020/21 MDC Policy refers to "paragraphs" and not "clauses" I adopt the same terminology. Paragraph 8.3 obliges the Municipality, for purposes of calculation of the bulk services component of a development charge, to (a) determine a unit cost for each municipal infrastructure service; and (b) (i) apply a formula aimed at determining the impact of the proposed land use on those services; and (ii) calculate the amount payable by multiplying the unit cost by the estimated proportion of the municipal infrastructure services that will be utilised by that proposed development.

[18] Paragraph 9 provides that notwithstanding paragraph 8.3 the Municipality may at its own instance or on request of a developer, increase or reduce the amount

of the bulk services component of a development charge to reflect the actual cost of installation in four specified instances. One of these (paragraph 9.1.3) is where the actual usage of a particular land development varies significantly from the approved tariff tables, and where the actual usage is motivated by a professional engineer and can be justified by means of recognised guidelines and/or industry norms and standards. In the present matter it is common cause that two such reports by a professional engineer appointed by DB were before the Executive Mayor when she made her decision.

[19] As reflected in the Executive Mayor's decision, paragraph 14.1 stipulates that development charges will be applied based on the impact on services by the increase in land use rights and/or intensification of land use leading to increased demand irrespective of the geographical location of the development. It appears that in reaching her decision the Executive Mayor not only considered paragraph 14.1 to be an overriding provision, but also that it removed the discretion explicitly conferred on a decision-maker in land use approvals, not only in terms of binding legislative instruments (s 40(12) of LUPA and s 66(4) of the Planning By-Law) but also in paragraph 9 of the MDC Policy itself.

[20] As is evident from her reasoning she took the view that the purpose of paragraph 14.1 is to guide officials in dealing with applications for developments along provincial roads, and that the motivation provided by DB was a side issue of little, if any, significance (the parties accept that in any event the traffic impact assessment was not performed during the Covid-19 pandemic). However

paragraph 14.1 only refers to a development along a provincial road as an example, and that example assumes that in all instances – i.e. without exception – traffic generated by every such development will *'ultimately end up'* on the municipal road network linking the provincial roads, irrespective of a development's geographical location. This might be so, but it ignores the underlying principle of proportionality, which in turn may be departed from to reflect the actual cost in an appropriate case.

[21] Interpreting paragraph 14.1 as the Executive Mayor appears to have done renders paragraph 9.1.3 nugatory. In addition paragraph 9 makes no mention that the discretion conferred therein is subject to paragraph 14.1; the heading of paragraph 14 itself reads *'Other Principles to be Applied'* from which it is evident that a "balancing act" is required; and indeed the Executive Mayor herself acknowledged that paragraph 14.1 *'should be read in conjunction with'* paragraph 9. Accordingly, and having regard to the settled principles of interpretation,[7] it follows that the Executive Mayor impermissibly fettered her discretion in reaching her decision.

[22] I accept of course that it is the Municipality's prerogative to adopt a policy which, in the words of the Executive Mayor, is aimed at ensuring *'that the principles of consistency in decision-making and administrative justice can be better complied with'.* But in doing so the Municipality has itself stipulated that the

[7] *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) at para [18].

approach to the calculation of development charges is informed, amongst others, by the guiding principles in clause 4 of the MDC Policy:

22.1 Equity and fairness which require that *'(d)evelopment charges should be reasonable, balanced and practical so as to be equitable to all stakeholders. The key function of a system of development charges is to ensure that those who benefit from new infrastructure investment, or who cause off-site impacts, pay their fair share of the associated costs'*; and

22.2 Spatial and economic neutrality which implies that *'(d)evelopment charges should be calculated where possible on a sectoral or geographic scale to more accurately approximate costs within a specific impact zone'.*

[23] At the risk of repetition it is not for the court to prescribe to the Municipality how it should achieve these goals, or how its decision-makers should properly exercise their discretion. But what cannot be sanctioned is an impermissible fettering of that discretion. Accordingly the first review challenge must succeed.

The second ground: 2018 DC credit based on 5.8ha Industrial zoning vs 2019 DC credit based only on the GLA of the existing buildings

[24] The Executive Mayor reasoned as follows:

'1. The Development Charges credit determined during 2018 was based on the 5.8ha industrial zoning that was then in place. This stems from the application for an extension of validity of the 2014 approval (in terms of LUPO)…

2. At the time, the Development Charges applied in terms of LUPO was determined and based on the existing rights, and not on actual payment received for Development Charges. No payments were ever made in this regard.

3. The subsequent application for approval in 2019, was in terms of SPLUMA, in terms of which, the Municipality only gives credit for actual payments received or for approved buildings already constructed of which the impact has already been absorbed in the municipal infrastructure… The relevant sections of SPLUMA are listed below.

4. The principles as contained in paragraph (b) (i) (v), (c) (i) and (ii), needs to be taken into account…'

[25] SPLUMA came into effect on 1 July 2015. Prior thereto land use planning applications in the Western Cape were governed by the Land Use Planning Ordinance ("LUPO").[8] For present purposes it is not necessary to determine whether the Executive Mayor was correct in stating that development charges applied in terms of LUPO were determined and based on existing rights and not on actual payment received for development charges. What is relevant is the Executive Mayor's reliance on s 7(b)(i), (v), (c) (i) and (ii) of SPLUMA which read as follows:

*'**Development principles:***
7. The following principles apply to spatial planning, land development and land use management…

[8] No 15 of 1985.

(b) the principle of spatial sustainability, whereby spatial planning and land use management systems must---

(i) promote land development that is within the fiscal, institutional and administrative means of the Republic…

(v) consider all current and future costs to all parties for the provision of infrastructure and social services in land developments…

(c) the principle of efficiency, whereby---

(i) land development optimises the use of existing resources and infrastructure;

(ii) decision-making procedures are designed to minimise negative financial, social, economic or environmental impacts…'

[26] During argument counsel for the respondents fairly conceded that one searches in vain in the subsections of SPLUMA relied upon by the Executive Mayor for any reference to a statutory limitation imposed upon the Municipality to determine a development charges credit based only on actual payments received or approved buildings already constructed; and that trying to place some sort of interpretation on the word *'fiscal'* in s 7(b)(i) is at best speculation. Put simply, the decision by the Executive Mayor on this score was materially influenced by an error of law and on this ground alone it must be reviewed and set aside.

[27] I accordingly do not intend dealing with DB's argument that the calculation of the 2020 development charges credit must take into account the 2018 credit, since on the Executive Mayor's own reasoning this did not inform her decision. It is open to DB to renew this argument when the matter is reconsidered.

Conclusion and costs

[28] For sake of completeness it should be mentioned that in their answering affidavit the respondents challenged the attack on the lawfulness of certain provisions in the MDC Policy as being moot, given that it has since been superseded by subsequent versions. It is no longer necessary to consider this since that declaratory relief sought by DB has, as previously stated, fallen away.

[29] Given my conclusion that the decision of the Executive Mayor dismissing the appeal falls to be reviewed and set aside a remittal must follow. DB seeks a direction that she must appoint, in terms of s 81(10) of the By-Law, an independent registered professional road engineer who is not employed by the State, with no less than 10 years' experience in practice and the calculation of development charges, for purposes of assisting her in reconsidering her decision. However as pointed out by counsel for the respondents this is something which lies only within the authority of the Executive Mayor since s 81(10) reads that *'(t)he Appeal Authority may appoint a technical advisor to advise or assist it with regard to a matter forming part of the appeal'.* He submitted that DB should, in the circumstances, make application to the Executive Mayor to invoke s 81(10) in due course.

[30] DB has been substantially successful and in the circumstances costs should follow the result.

[31] **The following order is made:**

1. **The decision of the first respondent of 24 May 2021 dismissing the applicant's appeal against the following incorporated in condition 2.3.26 of the second respondent's decision of 22 June 2021 is reviewed and set aside:**

   1.1 **the condition set out in the memorandum of the Directorate: Infrastructure Services (Mr T King) dated 17 February 2020 ("the Infrastructure Memorandum") and in Annexure DC to the Infrastructure Memorandum, determining the extent of the development charges payable by the applicant in respect of municipal road infrastructure; and**

   1.2 **the condition determining the extent of the development charges credit, as recorded in the covering page of the Infrastructure Memorandum, which credit translated into the amount of R1 447 158.39;**

2. **The appeal referred to in paragraph 1 above is remitted to the first respondent for reconsideration; and**

3. **The respondents shall pay the costs of this application, including the costs of two counsel, save for the wasted costs incurred by the**

postponement on 20 February 2023 occasioned by the registrar, in respect of which each party shall bear their own costs.

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J I CLOETE

For applicant: Adv S Rosenberg SC with Adv A Erasmus
Instructed by: Stadler & Swart Inc. (Ms A Vosloo)

For respondents: Adv A Montzinger
Instructed by: TNK Attorneys (Ms J Barnes)