CONSTITUTIONAL COURT OF SOUTH AFRICA

Albert Dykema v Arthur Pule Malebane and Another

CCT 332/18

Date of hearing: 28 May 2019
Date of judgment: 10 September 2019

MEDIA SUMMARY

The following explanatory note is provided to assist the media in reporting this case and is not binding on the Constitutional Court or any member of the Court.

On Tuesday, 10 September 2019 at 10h00, the Constitutional Court handed down judgment in an application for leave to appeal against the judgment and order of the Supreme Court of Appeal (SCA). This matter concerned the proper interpretation of the Constitutional Court's decision in *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal* in which the Court declared Chapters V and VI of the Development Facilitation Act (DFA) to be constitutionally invalid. The Court suspended the declaration of invalidity for 24 months until 17 June 2012 (expiry date), to allow Parliament time to rectify the defects. Until the expiry date, the Provincial Development Tribunals established under the DFA could continue to accept new applications and decide pending applications.

Though a draft bill was in progress, Parliament did not pass remedial legislation before the expiry date. The Spatial Planning and Land Use Management Act (SPLUMA) was subsequently enacted, but only came into effect on 1 July 2015. During the three-year legislative vacuum, the Department of Rural Development and Land Reform (Department) advised that pending applications should continue to be determined by Provincial Development Tribunals.

On 12 February 2012, the applicant, Mr Dykema, lodged an application with the Limpopo Development Tribunal (Tribunal) for planning permission under Chapter V of the DFA to set up a fuel station on his property, which falls within the jurisdiction of the second respondent, the Bela-Bela Municipality (Municipality). Although substantial progress was made in processing Mr Dykema's application before the expiry date of 17 June 2012, the Tribunal only issued its decision approving the application on 1 November 2012. The

Bela-Bela Municipality was unwilling to give effect to this decision and instead advised Mr Dykema to bring an application under alternative planning legislation. During this time, the first respondent, Mr Malebane, decided to undertake a similar development on his property which was situated near Mr Dykema's property, and accordingly lodged an application for permission to undertake this development in terms of Transvaal's Town-Planning and Townships Ordinance 15 of 1986.

In November 2015, Mr Dykema approached the High Court of South Africa, Gauteng Division, Pretoria (High Court) seeking to compel the Municipality to give effect to the decision by the Tribunal made in November 2012. The High Court declined to grant this relief holding that the Tribunal's decision was invalid because it had no decision-making power after the expiry date of 17 June 2012. The High Court did, however, grant a declaratory order to the effect that Mr Dykema has a pending application which must be dealt with in terms of section 60(2)(a) of SPLUMA.

Mr Malebane appealed to the SCA against the declaratory order and Mr Dykema cross-appealed against the adverse costs order. The SCA majority upheld the appeal and dismissed the cross-appeal. The SCA majority found that the Tribunal's approval was invalid because it no longer had any decision-making power. In addition to this, the majority found that Mr Dykema no longer had a valid application after the expiry date in the absence of a competent decision-maker. A dissenting judgment of the SCA held that applications submitted, but not finalised, before the expiry date were either still pending or were "resuscitated" by the coming into effect of SPLUMA. Thus, the dissent held that Mr Dykema's application fell to be decided in terms of section 60(2)(a) of SPLUMA.

Appealing to the Constitutional Court, Mr Dykema argued that the SCA erred in finding that applications submitted, but not finalised, before the expiry date were invalidated on the expiry date. He contended that this does not accord with the rationale for the suspension to prevent a detrimental effect on rights or interests that would otherwise flow from a declaration of invalidity. He persisted with his argument that the November 2012 decision by the Tribunal is valid but argued that, even if it was not a valid decision, his application remained pending and falls to be determined in terms of section 60(2)(a) of SPLUMA. Opposing the appeal, Mr Malebane relied on the reasoning advanced by the majority of the SCA that the Tribunal's lack of decision-making power rendered both its decision and Mr Dykema's application invalid. The South African Association of Consulting Professional Planners (SAACPP), admitted as amicus curiae, argued that the drafting process of section 60(2)(a) of SPLUMA reveals that this provision was enacted to preserve the validity of anything done in terms of the DFA in spite of its repeal and to ensure the continuation of all applications still pending when SPLUMA came into effect.

In a unanimous judgment penned by Froneman J (with Mogoeng CJ, Cameron J, Jafta J, Khampepe J, Ledwaba AJ, Madlanga J, Mhlantla J, Nicholls AJ and Theron J concurring), the Constitutional Court clarified the rationale and legal consequences of its order in *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal.* The Court held that, taken together, the rights-preserving rationale of the suspension and the constitutional imperative of remedial legislation support the view that applications

submitted, but not finalised, before the expiry date remained valid as pending applications when the suspension period ended on 17 June 2012. The Court further held that these applications are capable of being treated as "pending" for purposes of section 60(2)(a) because it is not a logical necessity to tie the fate of an application to the continued competence of the same decision-maker. This approach accords with a purposive interpretation of section 60 which recognises that Parliament knew about the legislative gap and would have sought to address its consequences through the subsequent enactment of SPLUMA. Finally, the Court held that the textual formulation of section 60(2)(a) is amenable to the interpretation that Mr Dykema's application is "pending" and must be disposed of in terms of SPLUMA. In the result, the Constitutional Court upheld Mr Dykema's appeal, declaring his application to be "pending" and ordering it to be disposed of in the manner prescribed by section 60 of SPLUMA.