IN THE HIGH COURT OF SOUTH AFRICA
(TRANSVAAL PROVINCIAL DIVISION)

REPORTABLE

CASE NO: 55329/2007

DATE: 4/7/2008

IN THE MATTER BETWEEN

LURCO TRADING 189 (PTY) LTD APPLICANT

versus

THE LOCAL MUNICIPALITY OF MADIBENG RESPONDENT

JUDGMENT

MAKHAFOLA. AJ:

INTRODUCTION:

[1] The Applicant has launched an application and has prayed for an order in the following terms:

1) That the normal rules relating to the time periods be dispensed with, and that the application be heard as one of urgency;

2) That the Respondent's decision of 27 September 2007 to rezone Erf 3472, Brits, Extension 72 Township, Registration Division JQ, Northwest Province, from 'general business' to 'residential', as more fully set out in the Respondent's resolution, Annexure "H" to the Applicant's founding affidavit, be reviewed and set aside;

3) That the Respondent's further decision to publish the aforesaid decision in the Provincial Gazette, be reviewed and set aside;

4) That the Respondent be ordered to pay the Applicant's costs of the application on the scale as between attorney and own client.

5) Further that alternative relief be granted to the Applicant.

THE APPLICANT'S CASE:

[2] The Applicant avers that the Erf in question was bought by it on 28 May 2007 from Golden Dividend Vennootskap at the price of R20 million as indicated on the Deed of Sale Annexure "A" attached to the founding papers. The Erf was registered in the name of the Applicant on 7 August 2007 and was zoned as a "general business" as it appears on page 9 paragraph 4.3 of the Extraordinary Provincial Gazette dated 18 May 2006 annexed to the founding papers marked "B".

[3] On 27 July 2007, Mr Fencham, a shareholder of the Applicant, informed on Mr Peter Machete, the head of the Respondent's Building Control Department, that the Applicant had bought Erf 3472. And further that the Applicant and Gerdora had agreed that the Applicant can use the site development plan of Gerdora which had been submitted to the Respondent by Gerdora for approval. Mr Machete further asked Mr Fencham to submit proof of change of ownership by submitting the Deed of Sale.

[4] Mr Fencham complied with the conditions put by Mr Machete. On 30 July 2007 the said site development plan of Gerdora was approved and Mr Machete sent a letter to the Applicant to notify it of such approval. The letter is dated 30 July 2007 and marked "C" and is attached to the founding papers.

[5] On 28 August 2007 the Respondent faxed a letter to the Applicant annexed to the launching papers marked "D" withdrawing site development approval on stand 3472 Brits X72. The Applicant avers that the withdrawal was unilateral, in that it was not afforded an opportunity to be heard before the decision was taken.

[7] As a result of the alleged unilateral withdrawal the Applicant replied with a letter advising the Respondent that the withdrawal was unlawful and demanded that it be withdrawn by 31 August 2007. The Respondent failed to do as requested.

[8] Consequent to that failure to withdraw the decision the Applicant launched an application on 27 September 2007 for an order reviewing and setting aside the Respondent's decision. The Court ruled in favour of the Applicant.

[9] The core of the present application is to review and set aside the Respondent's resolution of the 27 September 2007 embodied in Annexure "H" which involves the rezoning of the property from "business" to "residential" site. And reviewing and setting aside the Respondent's decision to publish the aforesaid decision in the Provincial Gazette.

[10] The Applicant states that the rezoning was not done at its request and instance but at the request of Gerdora CC whilst Gerdora CC was the owner of the said Erf. The Applicant further avers that at that meeting of rezoning it was not invited to be heard by the Respondent. Further that as the new owner, this fact also known to the Respondent, it was entitled in terms of Section 56(4)(b) of the Town Planning and Townships Ordinance 15 of 1986 to lodge objections or make representations for rezoning within 28 days of the copy of the application. This it states was not complied with.

[11] The Applicant mentions several non-compliances with the ordinance which appear as the following:

Sections 56(4)(b) cited above, Sections: 121,118, 63.

THE RESPONDENT'S CASE:

[12] The Respondent opposes the application on several grounds. The Respondent's case is that the Applicant having bought the property in question was aware that Gerdora CC had applied for rezoning of the Erf. The Respondent has complied with Section 56 of the Town Planning Ordinance. Gerdora's application for rezoning was duly and properly served before the Portfolio Committee No 3 of the Town Council of the Respondent and duly approved.

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[13] The Respondent challenges the Applicant to show that the Respondent or the Portfolio Committee No 3 or any of its officials have acted unlawfully or irregularly, in adjudicating over the rezoning.

[14] The Respondent further states that the approval of a site development plan of the property was erroneous but that it did not affect the rezoning application. The approval of the rezoning application, erroneous as it was, renders the approval of the site development plan nugatory.

[15] The Applicant did not directly or indirectly or by implication withdraw the rezoning application.

[16] Gerdora CC had waived its rights to develop Erf 3472 for business purposes. The Respondent relies on what it calls Annexure "DR2" which reads as follows:

"1. The first Respondent shall not develop or use Erf 3472 in the township Brits Extension 72 for general business purposes" which is an order of court.

[17] Respondent contends that the Applicant is bound by Gerdora's waiver to develop the Erf.

THE LAW:

[18] 1) PROMOTION OF ADMINISTRATIVE JUSTICE ACT NO: 3 OF 2000 (PAJA) states in:

Section 1 "Administrative action" means a decision taken, or any failure to take a decision, by

(a) an organ of State, when

(i) Exercising a power in terms of the Constitution or a provincial Constitution or

" '

(ii) Exercising a public power or performing a public function in terms of any legislation.

(b) (cc) the executive powers or functions of a municipal council.

"Administrator" means an organ of state or any nature or juristic person taking administrative action.

"Decision" means any decision of an administrative nature made, proposed to be made, or required to be made, as the case may be, under an empowering provision, including a decision relating to

(d) Imposing a condition or restriction.

Section 3(1) Administrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair.

Section 2(2)(b) in order to give effect to the right to procedurally fair administrative action, an administrator, subject to subsection (4), must give a person referred to in subsection (1) -

(i) Adequate notice of the nature and purpose of the proposed administrative action;

(ii) Reasonable opportunity to make representations.

Section 6(1) any person may institute proceedings in a court or a tribunal for the judicial review of an administrative action.

2) TOWN-PLANNING AND TOWNSHIPS ORDINANCE, 15 OF 1986

Section 56(1) = An owner of land who wishes to have a provision of a town-planning scheme, relating to his land amended may, in such a manner as may be prescribed, apply in writing to a local authority, and at the same time

Section 118(1) of the Ordinance provides that:

a) The Applicant shall be responsible for the installation and provision of internal engineering services.

b) local authority concerned shall be responsible for the installation and provision of external engineering services.

Section 60 of the Ordinance provides that:

Where an authorised local authority is of the opinion that any error or omission in an approved scheme relating to land situated within its area of jurisdiction, may be corrected without the necessity for preparing an amendment scheme, it may, by notice in the Provincial Gazette, correct such error or omission.

[19] *ESTATE GARLICK V COMMISSIONER FOR INLAND REVENUE* 1934 AD 499 at page 502 the court stated the following: "For instance, an order after having been pronounced may be amended or added to, where through some mistake it does not express the true intention and decision of the court."

[20] *TRANSAIR (PTY) LTD V NATIONAL TRANSPORT COMMISSION AND ANOTHER* 1977 (3) SA 784 [AID] at 793 D-E the court stated the following: "That the NTC is an administrative body with wide powers of supervision over air services, in the interests of the public and national security, it is clear from the provisions of the Act as a whole. In particular, the NTC is authorised to cancel or suspend a licence in view of certain conduct by the holder (sec 17) or, of its own motion, to vary the conditions of a licence."

ARGUMENTS ON BEHALF OF THE PARTIES:

[21] The Applicant's case is and remains the same as per its prayers in the notice of motion. It was argued on its behalf that the procedures used by the Respondent are administratively flawed and unfair to the Applicant. Further that a decision about rezoning was taken without inviting the Applicant to make submissions. That

the ***audi alteram partem*** rule was not complied with and therefore the decision is reviewable as not having complied thereto. It was also submitted that the Respondent's decision was influenced by an error of law as contemplated in Section 6(2)(d) of PAJA.

[22] On behalf of the Respondent the arguments centred on the fact that the Applicant had known about the rezoning and that it should have withdrawn it. That the Applicant is not a party to the agreement between Gerdora CC and Artio Investments (Pty) Ltd where Gerdora CC had waived its right to do business development on the erf. The Respondent argues that the crucial aspect of the argument for going against the Application is the fact that Gerdora CC waived its right emanating from its property ***ante omnia.***

[23] The argument continues that the sale of the property to the applicant does not extinguish the rezoning application by Gerdora CC for rezoning.

[24] The Respondent's arguments further relied on the doctrine of knowledge. It was submitted that the Applicant bought the property with the knowledge that the owner has abandoned its right to develop it. Quoting *BOTHA (NOW GRIESSEL) AND ANOTHER V FINANS - CREDIT (PTY) LTD* 1989 (3) SA 773 (AD) at 792C which quotes *MUTUAL LIFE INSURANCE CO OF NEW YORK V INGLE* 1910 TS 540 at 550 which intimates that a waiver is the renunciation of a right which can be expressly communicated to an affected person or be communicated by conduct.

EVIDENCE ANALYSIS AND EVALUATION:

[25] The Applicant being a company which had bought an Erf zoned as a "general business" was desirous to develop the erf as such. Gerdora's site development plan was approved and this approval by means of a letter dated 30 July 2007 was sent to the Applicant. On 28 August 2007 the Respondent faxed a letter to the Applicant withdrawing the site development approval.

[26] According to the evidence of the Applicant it was not afforded an opportunity to make submissions. The withdrawal was unilateral. It is indeed so that once the

approval to develop was communicated to the Applicant, then the Applicant had been conferred and has acquired right in terms thereof to develop the site.

[27] If an adverse decision like withdrawing the approval was to be taken that decision was and did adversely affect the Applicant for whatever grounds. This administrative action to comply with the law needed to be procedurally fair. For the withdrawal to be fair the Applicant should have been given notice of the Respondent's intention to withdraw the approval because it has adversely affected the Applicant's conferred rights to develop. For lack of inputs from the Applicant the decision was unilateral.

[28] It does not appear in the answering affidavit that the deponent basis the unilateral withdrawal on any provision of the law except to say that the Applicant was not apprised of the decision taken on 27 September 2007 because of the urgent Application which was an intervening event.

[29] By such concession, there is definitely non-compliance with the ***audi alteram partem*** rule and renders the decision indeed unilateral. Section 3(1) of PAJA applies.

[30] According to the Applicant the Respondent had known that the erf was registered in the name of the Applicant on 7 August 2007 before the rezoning which was done on 27 September 2007. The Respondent should have been aware, and was indeed aware, as at 7 August 2007 that the owner of the erf is the Applicant. The Applicant had no application for rezoning which is required by Section 56(1) of the ordinance. In essence, the application for rezoning was not applied by the Applicant which for all intents and purposes is the owner. The Respondent failed to follow the procedure and the requirement that the owner of the land must apply for an amendment of a town-planning scheme. It is without doubt that rezoning is such amendment envisaged by the Ordinance.

[31] If, indeed, the rezoning was meant to relate to the Applicant then section 56(4)(b) should have been complied with. It is the evidence of the Applicant that there was no such compliance. Section 56(4)(b) reads as follows: "On receipt of an

application in terms of subsection (1) the authorised local authority shall, subject to the provisions of subsection (5), forward -

(b) a copy of every objection lodged and all representations made in respect of the application to the Applicant, and the Applicant shall, within a period of 28 days from the date of receipt of the copy, forward his reply thereto to the local authority."

[32] It is without doubt that the Applicant has a direct substantial interest in the decision taken by the Respondent. Not to have informed the Applicant, accordingly as required by the Ordinance is grossly irregular of the procedures pertaining to the Constitution and administrative law.

Vide: Section 33 Constitution Act 108 of 1996
Section 3 PAJA NO: 3 of 2000.

[33] Moreover, Section 56(4)(b) is couched in the imperative by the use of "shall". The section is binding on the respondent if an application serves before it.

[34] Certain conditions in Annexure "H" are said to be contrary to sections 118 and 121 of the ordinance. The conditions in paragraph 2.15 and 2.17 are contrary to the ordinance because they provide that should the applicant decide to start construction it is its own risk for there is under capacity of water. Section 118(b) of the Ordinance provides: "The local authority concerned shall be responsible for the installation and provision of external engineering services. Section 121 applies to township developments.

[35] The deponent to the answering affidavit requests the court to delete certain conditions which are apparently in conflict with Section 63 of the ordinance. It was argued on behalf of the applicant that the court should not accede to the request because the said deponent does not appear to have a mandate to request an amendment of a clause made at a meeting. I agree with the Applicant's submission because the answering affidavit was deposed to on behalf of a *legal persona* with authority given to the deponent. If the deponent executes another mandate of the Respondent he surely requires authority to do so. The additional mandate to propose amendment has not been claimed to exist by the said deponent.

any application before the Respondent has nothing to do with the Applicant and should not be made to affect the Applicant.

[36] The Respondent relies on Section 60 of the ordinance to say that the deponent to the answering affidavit may correct errors where it has expressed itself incorrectly in order to correct the false impression.

COSTS:

[37] Both parties have argued that costs of 11 December 2007 and 18 March 2008 be awarded in their favour. But the summary of the arguments on the costs of those two days are to the effect that the matter had to be heard in court. Both parties have advanced reasons which persuaded me to exercise my judicial discretion not to order costs against any party for those dates but order that each party pays its own costs. In any event both parties had to attend court on those dates.

[42] The Respondent's arguments relying on the sentiments in *CITY OF TSHWANE METROPOLITAN MUNICIPALITY V GROBLER* 2005 (6) SA 61 (T) at 66 is not to the point because the facts are distinguishable. In the *City of Tshwane* matter the Municipality was the Applicant alleging that the Respondents are in contravention of the scheme acting unlawfully and committing a crime. The Respondents were using property for business of a funeral undertaker and morgue before the scheme was amended to permit such use which use was premature. The use was undertaken by the Respondents before their application for rezoning was approved.

[43] As to the costs relative to the finalisation of this application it is fair and just that a successful party should be awarded the costs.

[38] *In casu,* the Applicant has not acted in any manner that has contravened the provisions of the Ordinance. None of the Applicant's action can be termed criminal. The Applicant is not a local authority here. The core of its application is the challenge to procedures followed by the Municipality as being administratively unlawful and unfair.

In the result, I make the following order:

ORDER:

An order in terms of prayers 2, 3 and 4 of the notice of motion is granted.

[39] The argument that the sale of the property to the Applicant does not extinguish the rezoning application by Gerdora CC is not correct because in terms of the Ordinance when the application serves before the Respondent it must be made by the owner of the land. It is common knowledge that when the application was heard it was not the application of the Applicant who was there and then the owner of land.

K MAKHAFOLA
ACTING JUDGE OF THE HIGH COURT

HEARD ON: 18/3/2008
FOR THE APPLICANT: ADV J W LOUW
INSTRUCTED BY: SMITH INC, PRETORIA
(Instructed by Philip Taljaard Att, Pretoria)
FOR THE RESPONDENT: ADV S MARITZ SC WITH ADV N LOUW
INSTRUCTED BY: ROOTH WESSELS & MALULEKA, PRETORIA

[40] In effect, when this application of Gerdora CC was heard, Gerdora CC was no longer the owner of land. Relative to the Applicant and in compliance with Section 56(1) of the Ordinance there was no application before the Respondent.

[41] Whilst there was no application before the respondent, there were no procedures to be followed, and indeed none were followed. The essence of this reasoning is to the effect that the whole procedures followed were flawed and cannot in any manner be put right retrospectively by the Respondent. The Applicant had no application for rezoning serving before the Respondent. Any decision relating to