IN THE NORTH GAUTENG HIGH COURT, PRETORIA

(REPUBLIC OF SOUTH AFRICA)

CASE NUMBER 31436/2009 [redacted]/2009

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/NO.
(2) OF INTEREST TO OTHER JUDGES: YES/NO.
(3) REVISED.

5/12/2013 DATE

SIGNATURE

In the matter between:

KGOALE VINCENT MAJA APPLICANT

and

5/12/2013

LEPPELE-NKUPI LOCAL MUNICIPALITY FIRST RESPONDENT

LIMPOPO PROVINCIAL GOVERNMENT:
DEPARTMENT OF COOPERATIVE GOVERNANCE, HUMAN SETTLEMENTS AND TRADITIONAL AFFAIRS SECOND RESPONDENT

LIMPOPO PROVINCIAL GOVERNMENT:
OFFICE OF THE PREMIER THIRD RESPONDENT

JUDGMENT

TLHAPI J

[1] In this application the applicant caused two notices of motion to be served. The first was issued on the 27 May 2009 seeking the following orders:

"1. An order directing the Respondent to consider the Applicant's application for a certification of allotment and to sign the Memorandum and send it to the Department of Local Government for final approval, for the property known as Stand no. 16691, Ga-Mphahlele Village, Limpopo.

2. Directing the Respondent to pay the costs of this application"

The second and third respondents were later joined and the applicant caused a second notice of motion together with a supplementary affidavit to be issued under the same case number on 18 September 2012 seeking the following orders:

"1. An order directing that the respondents approve the applicant's application for and issue the Permission to Occupy/Certificate of Allotment for the Applicant's commercial property at stand no.16691 in Ga-Mphahlele for which the applicant has already invested R5 000 000.00.

2. An order directing the respondents to jointly and severally compensate for the damages resulting from their gross negligent and reckless administrative action as follows:

2.1 Loss of business income amounting to R358 418 680 and interest thereof of 15.5% amounting to R46 178 285 hence total

damages of R404 596 965 from 1 May 2009 to 31 August 2012 and any additional loss of income incurred after August 2012 with related interest of 15.5% per annum; and

2.1 Damages in respect of emotional pain, suffering, shock concentration, degrading and embarrassment suffered and experienced by the applicant for 6 years as a result of the negligent administrative action of the respondents and sabotage amounting to R 2 500 000 and related interest at 15.5% per annum from date of service of the application to date of payment.

3. Directing the respondents to pay the costs of this application."

Both applications were opposed. The second and third respondent filed their answering affidavits late in that they were served on the applicant and the court on the day of the hearing. The first respondent did not have objection to their late admission in that they addressed issues of law only. The applicant was not given an opportunity to properly respondent to the papers filed by the second and third respondents, I shall therefore only mention the issues raised *in limine* in their papers.

There was further an application for condonation for the late filing of the first respondent's Heads of Argument. This application was opposed. I have considered submission by the applicant and explanation for the late filing and grant condonation.

BACKGROUND

[2] This background is informed by what was averred in the three affidavits to the first application.

[3] The applicant averred that this was an application in terms of section 6 (2) of the Promotion of Administrative Justice Act 3 of 2000 ('PAJA') and was intended to have the conduct of the respondent (in the first notice of motion) reviewed on the ground that he had been prejudiced by the respondents failure and by the unreasonable delay it had taken to make a decision.

[4] The applicant is a professional accountant and sole member of Bakone Retailers and Services CC. Having identified a need to provide shopping facilities for the benefit of his community at his village at Seteleteng, Ga-Mphahlele, he went about acquiring property for that purpose. He wished to establish a supermarket, butchery, bakery, hardware, bar lounge and filing station. He purchased a piece of land which was used for agricultural purposes and measuring 8600 square metres from one Mr Michael Mphahlele. A document marked "KG1" and dated the 3 October 2005 was annexed as confirmation of such transaction and it reads:

> *"I Michael Mphahlele have sold a piece of land of my field with a space of 8600m2 to Kgoale Vincent Maja (I.D 7409125613089) TO BE USED FOR BUSINESSS PURPOSES. The land is situated in Makaepa (Seleteng) Ga-Mphahlele. He has paid me R1000,00 as the purchase price for the land)"*

The applicant annexed applications to the tribal authority for the business of a bottle store and bar 'KG4', a shopping complex 'KG5' and a filling station 'KG6', as

documents purporting to be approval of the transaction of the acquisition of the property from the tribal authority.

[5] The financial institutions which the applicant approached to finance his intended businesses required security to be given by him, which proved his title to the property in the form of either a Title Deed or Certificate of Land Allotment (Permission to Occupy). On 27 October 2005 he approached the local municipality to commence the process of applying for a Permission to Occupy and lodged documents as required by the late Mr Sekwaila ("Sekwaila") an official of the first respondent, being the police report, recommendation from the tribal authority, and proof of payment of the required application fee. Sekwaila conducted an inspection of the property and informed him telephonically of the suitability of the location for the purpose of his intended business. Subsequent to that there was no satisfactory feedback from Sekwaila on his application despite explanation from the applicant that the grant of his application was a prerequisite for receiving financial assistance.

[6] Because his contractors and suppliers had tendered performance, he felt pressurised to respond and he then decided to finance the construction of the shopping complex by taking advances on his residential bond. The applicant averred that he advised Sekwaila via e mail that he had commenced with the building construction and requested to be notified if there were any objections. He sent an e mail dated 5 January 2007 annexed as "KG9" to the Municipal Manager. Neither Sekwaila or the Municipal Manager responded.

[7] He complied with additional requirements over and above those initially required. KG 14 was a list of requirements from Mr Setsiba the regional town planner and dated 25 April 2008. KG15 was a letter dated 25 April 2008 in which the

applicant confirms that he sent the requested information. KG 16 which was a reminder of progress to his application for a Permission to Occupy. On 22 July 2008 the first respondent sent him an acknowledgement that his application had been forwarded for consideration.

[8] Between 2007 and 2009 the applicant addressed several emails to the first respondent, followed by others to Department of Local Government, the MEC for Local Government and Premier's Office and spoke to some officials in these offices in an attempt to have his application considered. He further instructed his attorneys to intervene and, they sent letters of demand and a letter of complaint to the Premier's Office and despite an undertaking to deal with the complaint no decision regarding his application was taken.

[9] He was given a Certificate of Occupancy dated 17 April 2009 and annexed as "KG10" being confirmation that the construction was completed in accordance with building standards and that he could take occupation. Eskom had provided electricity to the property and water supplies had been connected.

[10] Mr Sepitle Mphahlele, the municipal manager, deposed to the answering affidavit. The first respondent was responsible for 'infrastructural and integrated development planning in the area and any upgrading of land rights had to be conducted in conjunction with the respondent. He averred that the applicant had 'flagrantly flouted" the provisions of Proclamation 188 of 1969 and 45 of 1990 in that he had set up a commercial complex without the necessary approval. An applicant for a Permission to Occupy a plot for business purposes in the rural area had to lodge a formal application accompanied by a business plan, letter from the tribal authority, proof of title of the seller, site plan, recommendation from the ward

councillor of the municipality, an identity document or if the applicant was a company or closed cooperation, the registration documents of such entities.

[11] The respondent had to forward a memorandum recommending approval of the property for occupation and, would only grant a building permit after receiving an approval in principle of a Permission to Occupy, from the Department of Local Government and Housing. A Permission to Occupy would be issued only after the business licence had been granted. Where the respondent had declined to give a recommendation, the applicant had a right to petition the department to review or set aside such the decision of the respondent.

[12] The respondent denied that the property concerned had a stand number 16691, as purported by the applicant. If it was sold as a portion of agricultural land, the respondent had to commission a survey of the property before recommending a Permission to Occupy. The respondent contended that annexures KG4, KG5 and KG6 were proof of support by the tribal authority for the businesses applied for and did not constitute proof that the transfer of the property had been approved or that the property was owned by the applicant. The respondent further denied that the building plan had been approved because no building plans had been lodged for approval. Ms Morokolo the project unit manager denied that she was involved in the issue of the applicant's Certificate of Occupancy

[13] Mr Mphahlele conceded that there was a delay occasioned by the necessity to compile a policy document to regulate land issues in his jurisdiction. Furthermore the lack of a recommendation to local Department of Local Government and Housing for approval was because the applicant had already engaged self-help by building the complex without the necessary approval. Any recommendation on the part of the

respondent would have amounted to rubber stamping conduct which was illegal. The applicant's complaints to the Department had failed to disclose that he had either commenced or finished building.

[14] In his reply the applicant contended that he had complied with all the requests from the first respondent for purposes of obtaining a Permission to Occupy. The Permission to Occupy could be converted into a title deed which was necessary for him to secure a loan from the bank. He contended that he had submitted sufficient proof that he was the owner of the land and that this application was not about the illegality of the building permit or about the unlawful building structure. The applicant annexed further documentation to his replying affidavit:

1. A memorandum, being an application for a business dated 22 July 2008 from the first respondent to Local Government and Housing. No site number is given (KG1, KG1A)
2. An inspection form regarding land use management dated 6 July 2008, KG2;
3. Water account dated April 2007;
4. A letter dated 3 October 2007 from Mr Mphahlele confirming the sale of the land;
5. A plan layout of the proposed shopping complex;

[15] The applicant contended that there were no requirements that a survey first be conducted because stands in the area were identified by numbers given by the Lepelle Northern Water and the Town Planner would not have conducted an inspection and approved the building.

[16] The first respondent raised the following points *in limine:*

1. That the applicant had effectively amended his first notice of motion by delivering the second one without complying with Rule 28 of the rules of court, which irregular step the first respondent objected to but that the first respondent had not filed a Rule 30 notice as this would have 'resulted in unnecessary costs and delay;

2. That the supplementary affidavit had duplicated and dealt with issues already dealt with in the three affidavits to the first application and that the effect was that the original relief sought had either been *prima facie* abandoned, alternatively abandoned;

3. In the second application the applicant had launched proceedings to claim for damages from the respondents which constituted a debt in terms of section 1(1)(iii) of the Institution of Legal Proceedings against certain Organs of State Act 40 0f 2002 and had failed to give notice in terms of section 3 of that Act, of his intention to claim such damages. Furthermore that part of his claim had prescribed.

[17] The second and third respondents raised three points *in limine* on which grounds it contended that the application should be dismissed with costs in respect of points 1 and 2 and alternatively be struck off the roll in respect of

point 3:

1. That the application for a Permission to Occupy had not served before second and third respondents and that they had consequently not made any decision that fell within the purview of PAJA;

2. That in terms of section 62 (4) of the Municipal Systems Act 32 of 2000, the applicant could have lodged an appeal with the executive mayor or executive committee against the refusal to grant the Permission to Occupy, and that a decision in that regard was yet to be taken;

3. That applicant should have been aware of the serious dispute of facts that would arise as a result of his claim for damages and should have proceeded by way of action;

[18] I wish first to deal with the second notice of motion and the filing of the supplementary affidavit. Although named a supplementary affidavit, it is in my view actually a founding affidavit to the second notice of motion.

The applicant and counsel for the respondents addressed me on the failure to comply with Rule 28 of the rules of court. Rule 28 (1) provides:

"*Any party desiring to amend a pleading or document other that a sworn statement, filed in connection with any proceedings, shall notify all other parties of his intention to amend and shall furnish particulars of the*

amendment"

The rule is peremptory and the applicant failed to notify the first respondent by properly setting out in a notice that which he wished to amend, thereby enabling the first respondent to deal with such proposed amendment and afford the court opportunity to adjudicate over the amendment if there was an objection thereto.

[19] Furthermore, an applicant who wishes to file additional affidavits may do so only with prior leave of the court and after advancing reasons why such indulgence should be given. In this application the additional papers were filed three years after the first notice of motion and founding affidavit were filed and the applicant was legally represented at the time. No reasons were advanced why it was necessary to file an additional affidavit after joining the second and third respondents. Without such leave, additional affidavits filed beyond those envisaged by the rules were irregular and were to be regarded as *pro non scripto*, *Standard Bank of South Africa Ltd vs Sewpersadh 2005 (4) SA 148 (C). (my emphasis)* In *Hano Trading CC v J R Investments (Pty) Ltd and Another 2013 (1) SA 161(SCA)* Erasmus AJA stated the following:

> *"[10] A litigant in civil proceedings has the option of approaching a court for relief on application as opposed to an action. Should a litigant decide to proceed by way of application, rule 6 of the Uniform Rule of Court applies. This sets out the sequence and timing of filing of the affidavits by the respective parties.....It is accepted that affidavits are limited to three sets. It follows that great care must be taken to fully set out the case of a party on whose behalf an affidavit is filed. It is not surprising that rule 6(5)(e) provides that further affidavits may only be*

filed at the discretion of the court"

[20] Returning to the application for a Permission to Occupy,(dealt with under the first notice of motion) it is necessary to have the issue resolved. Although the applicant should have foreseen that disputes of fact would arise which could not be resolved on paper, it is my view that a proper enquiry was necessary and that this could only be achieved by referring the matter to trial. I mention but a few of the issues:

1. What are the procedures for acquiring a Permission to Occupy; If there was non-compliance can this court order that a Permission to Occupy be issued;
2. Was there a valid transaction between the applicant and Mr Mphahlele regarding the purchase of the immovable property;
3. Can the Tribal Authority approve such transaction and did it in fact do so on the annexures KG4, KG5 and KG6;
4. Did the applicant comply with all the requirements for the purpose of Lodging an application to acquire a Permission of Occupy;
5. What significant role did officials of the first respondent play during the process and how does their conduct impact upon the failure by the first respondent to recommend that a Permission to Occupy be granted.

[21] In light of the above the following order is given:

1. The application is referred to trial;
2. The notice of motion shall serve as a simple summons;
3. The notice to oppose shall stand as an intention to defend;
4. The applicant shall deliver a declaration within 30 days of this order;
5. Thereafter the rules relating to actions shall apply;
6. The costs of this application are to be determined by the trial court

TLHAPI V.V

(JUDGE OF THE HIGH COURT)

MATTER HEARD ON	:	11 FEBRUARY 2013
JUDGMENT RESERVED ON	:	11 FEBRUARY 2013
ATTORNEYS FOR THE APPLICANT	:	RAMONETHA ATT.
ATTORNEYS FOR THE FIRST RESPONDENT	:	A/L MAREE ATT.
ATTORNEYS FOR THE SECOND RESPODENT	:	THE STATE ATT.