IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case number: 46655/2012

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

9/7/2014 .....
DATE SIGNATURE

14/7/14

In the matter between:

IVAN RICHARD STOUFFS	Applicant
and	
SALVADORA PROPERTIES EIGHT THREE CC	First Respondent
THE CHAIRMAN OF THE MPUMALANGA DEVELOPMENT TRIBUNAL	Second Respondent
THE MEMBER OF THE EXECUTIVE COUNCIL FOR THE DEPARTMENT OF ARGICULTURE, RURAL DEVELOPMENT AND LAND ADMINISTRATION OF THE MPUMALANGA PROVINCE	Third Respondent
THE PREMIER OF MPUMALANGA	Fourth Respondent
THE CHAIRMAN OF THE MPUMALANGA DEVELOPMENT APPEAL TRIBUNAL	Fifth Respondent

Heard: **16 April 2014**
Delivered: **14 July 2014**

JUDGMENT

A.A.LOUW J

Introduction

[1] This review application arises from a decision by the Mpumalanga Development Tribunal (MDT) to approve the establishment of a "land development area" as defined in s1 of the Development Facilitation Act 67 of 1995 (the Act). The applicant seeks the review and setting aside of this decision.

[2] The parties are the following:

the applicant is the proprietor of a business known as Bergwaters Eco Lodge situated on a property adjoining the land development area;

the first respondent was the applicant for the establishment of such land development area;

the second respondent is cited nomine officio as chairman of the MDT;

the third respondent is the MEC of the department responsible for the administration of the Act in Mpumalanga;

the fourth respondent is the Premier of Mpumalanga; and

the fifth respondent is the chairman of the Mpumalanga development appeal tribunal (MDAT).

[3] As further background I quote the following paras from the founding affidavit, the contents of which are admitted by the first respondent:

> " *16.*
>
> ***Background***
>
> *I was one of ten objectors to an application brought by the first respondent in terms of section 31 (2) of the DFA for the establishment of a land development area, as defined in section 1 of the DFA, on Portion 3 (a portion of portion 1) of the farm Kaalbooi No. 368, Registration Division JT, Mpumalanga (known as Rocky Drift Private Nature Reserve) under reference MDT 21/04/10/01/FARM KAALBOOI.*
>
> *17.*
>
> *The proposed development entailed the establishment of 48 freehold residential erven, a guest lodge comprising 10 rooms, a 10 site tented camp, a hiker's camp accommodating 30 persons, a reception area/office and ablution facilities on the subject property. The development is, therefore, for the establishment of a township capable of accommodating approximately 400 people on a permanent basis as residents, staff, employees, hikers and lodgers.*

18.

The application served before the MDT, a tribunal established in terms of section 15 (1) of the DFA."

[4] There was a pre-hearing on 21 July 2010. At this conference the first respondent was represented by Mr Dry, an attorney practicing in White River, who is also the Deputy Chairman of the MDT. The hearing commenced on 24 August 2010 where the first respondent was still represented by Mr Dry as well as Ms Van Niekerk, a town planner, who is also a member of the MDT.

[5] The tribunal decision was taken on 18 November 2010. In part A of the decision approval was granted to the first respondent on exactly the same basis as requested in para 17 of the founding affidavit quoted above.

[8] Paras B to J are remarkable for their vagueness and, to my mind, unenforceability. These paras read:

> *"B. The approval of the relief sought under the provisions of the Department Facilitation Act, 1995 as follows:*
>
> *(i) The subdivision in terms of the layout plan (as amended) accompanying the subdivision proposal.*
>
> *(ii) Consent be granted that the Nature Reserve may be developed on a phased basis (and the applicant to specify number of phases in writing to the registrar).*

(ii) *Proof must be submitted to the Registrar that a Land Owners Association has been formed. Each owner of a portion shall become a member of this Association. The Homeowners Association must provide a copy of a Constitution and one of the conditions and objectives of the Constitution must be the operation and maintenance of all internal services. All the services affected must be clearly stated in the Constitution.*

C. *Development be made subject to the conditions as laid down in the Record Of Decision in terms of the Environment Conservation Act, 1989 (Act No. 73 of 1989)*

D. *The development is to comply to conditions imposed by South Africa National Roads Agency Limited (SANRAL) and Transnet.*

E. *The layout Plan to be amended to provide access to the camping area.*

F. *No development shall take place below 1:100 year flood line from the water courses found in the property.*

G. *The Land Development Area to comply to recommendations from Professionals or Experts' Reports.*

H. *Water samples to be collected for analysis monthly and records of results be made available to downstream water users and the relevant authorities.*

I. All building plans of al structures must be submitted to The Emakhazeni Local Municipality for approval.

J. The Applicant shall comply with all conditions of other relevant authorities including but not limited to the Emakhazeni Local Municipality."

The Act

[9] The long title of the Act states in part as follows:

"To introduce extraordinary measures to facilitate and speed up the implementation of reconstruction and development programmes and project in relation to land; and in so doing to lay down general principles governing land development throughout the Republic, to provide for the establishment of a Development and Planning Commission for the purpose of advising the government on policy and laws concerning land development at national and provincial levels; to provide for the establishment in the provinces of development tribunals which have the power to make decisions and resolve conflicts in respect of land development projects..."

[10] A tribunal shall be tribunal of record[1]. In the context of the applicant's submissions regulation 15, regarding the keeping of a record, is of special importance:

"***Tribunal as a tribunal of record***

[1] s19 of the DFA

15. (1) *A record must be kept of –*

(a) *any decision of the tribunal;*

(b) *any evidence given to the tribunal;*

(c) *any objection made to any evidence received or tendered;*

(d) *any on-site inspection and any matter recorded as a result thereof; and*

(e) *the proceedings of the tribunal generally.*

(2) *Such record must be kept by such means, including shorthand notes or electronic recording, as the tribunal may deem expedient.*

(3) *After the person who made any shorthand notes or electronic recording has certified it as correct, it must be filed with the tribunal registrar.*

(4) *A transcript of the notes or the record or a portion thereof, may be made on the request of the tribunal or any person upon payment of the reasonable expenses incurred by the State in causing such transcript to be made.*

(5) Despite sub-regulation (4), the tribunal registrar may, on good cause shown, dispense with the payment of such amount.

(6) If a transcript is required in terms of sub-regulation (4), the person who made the transcript of an electronic recording or notes must certify it as correct and such transcript, together with any notes or electronic records, must be returned to the tribunal registrar.

(7) The transcript of the shorthand notes or electronic records certified as correct as envisaged in sub-regulation (3) will be deemed to be correct unless the contrary is proved to the satisfaction of the tribunal and it issues an order accordingly."

[11] Similarly the appeal tribunal (in this case the MDAT) is a tribunal of record[2].

[12] In the founding affidavit the grounds for review are stated as follows:

"10.1. The mistakes of fact committed by the MDT are so out of kilter with evidence led and papers submitted by me and

[2] s24(4)

other objectors to the Registrar of the MDT and the MDT itself that it is only explicable on the grounds of bias;

10.2. The reasons given by the MDT for arriving at its decision are so scant and based on factual misdirection that it is reasonable to apprehend that it could only have been arrived at on grounds of bias;

10.3. A mandatory and material appeal procedure prescribed by section 23 of the DFA was not complied with by the fifth respondent (or any of the respondents) and I was denied such right to appeal which right is afforded to me in terms of the DFA as will be demonstrated presently;

10.4. The proceedings before the MDT and that part of the proceedings during which I made an attempt to prosecute my appeal were procedurally unfair; and

10.5. The decision of the MDT was materially influenced by errors of law and bias."

Reasons for administrative action

[13] The reasons given by the MDT for its decision of 18 November 2010 is set out in a document filed by the chairperson on 8 December 2010. These reasons are the following:

"1. The proposed Land development Area application was adjudicated and approved purely on merit.

2. *The applicant through the documentations and presentation put before the tribunal was able to prove the viability and sustainability of the proposed land development.*
3. *The objectors on the other hand denied themselves an opportunity to utilize expert witnesses to prove their case before the tribunal.*
4. *It is emphasized that the matter of the availability access to the proposed Land Development Area was proved before the tribunal, and is thus deemed available unless the South African High Court has a contrary ruling on the matter should it be approached."*

[14] S 5(3) of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) reads as follows:

> *"(3) If an administrator fails to furnish adequate reasons for an administrative action it must, subject to subsection (4) and in the absence of proof to the contrary, be presumed in any proceedings for judicial review that the administrative action was taken without good reason."*

[15] The reasons given are so general that they can be applied to any application for the establishment of a land development area. The applicant and the other nine objectors called four independent experts namely, Mr Van Noordwyk, Mr Bowers, Mr Roux and Mr Van Tonder. The "reasons" do not

deal with the evidence of these witnesses at all neither with other *viva voce* or documentary evidence. It is correctly stated in the founding affidavit as follows:

> *"So inadequate were the MDT's reasons that the applicant found it difficult to properly formulate its ground of appeal and was forced to reserve the right to amplify the same once he had been afforded an opportunity to study the written record."*

[16] The MDT did not provide "proof to the contrary" as envisaged in s5(3) of PAJA and therefore I find that the administrative action was taken without good reason. This means that as the administrative action was taken without good reason the review application has to succeed on this ground alone.

[17] The notice of appeal was served one day late namely on 23 December 2010. The respondents argue that the appeal is thus fatally flawed. On the undisputed facts I cannot agree. Neither Ms Refilwe Motaung, the registrar of the MDT, nor any other official was available on the preceding days to accept the notice of appeal. It was by specific arrangement with Ms Motaung that the notice was served on 23 December.

The Record

[18] The term of office of the members of the MDT expired on 31 December 2010. The first reaction received from the tribunal is dated 27 June 2011. The letter from the registrar Ms Motaung reads as follows:

"Kindly note that the appeal could not be entertained due to the term of office of the Mpumalanga Development Appeal Tribunal that expired on 31 December 2011 (a week following the submission of your letter). The Tribunal has been reinstated; and please accept our apology in terms of any time frames which have not been met as prescribed by the DFA and Regulations due to the logistics at the office of the Registrar.

Please be advised that the department cannot issue you the original documentation neither make copies for you due to the non-availability of funds. However this office can arrange for an official to accompany you to make copies in Nelspruit at your expense and provide you with the voice recording tapes of the hearing for transcription purposes. The documentation and the transcription of the proceedings of the hearing a quo will assist you to prepare for the Appeal Tribunal and the parties on record. You may collect the tapes on Wednesday 29 June 2011 from our office at No. 50 Murray Street, Nelspruit 1200."

[19] The abovequoted passage speaks volumes about the state of the MDT. I highlight the following:

a) it either did not exist or was dysfunctional until somewhere in the middle of 2011;

b) it did not have the resources to make copies of the documentary evidence;

c) it did not have funding to have a transcription made of the proceedings.

[20] On 10 and 11 June 2011 the applicant was given copies of tapes said to be a recording of the proceedings. When an attempt was made to make a transcription from these tapes, it was found that they (all seven of them) were blank.

[21] In supplementary heads of argument requested by me after the hearing the first respondent's counsel argued as follows as regarding "the record". It is firstly argued that regulation 15(2) does not require that the record must be kept by recording it electronically. That is correct. However, in this case the MDT decided to keep the record by means of an electronic recording. As such recording does not exist, this argument does not have any merits. Secondly, it is argued in para 23 of the supplementary submission as follows:

> *"In the circumstances the first respondent submits that there is no substance to the averment that either the appeal could not be prosecuted without the transcripts or that the absence of the transcript is a ground for reviewing and setting aside the decision of the MDT. The "record" in the form that the applicant would want it is an ex post facto transcript of the proceedings and in not a "record" of proceedings contemplated in the DFA and its regulations."*

It is argued that "the record" consists of the documentary evidence placed before the MDT. If this submission were to be upheld it means that the case before the MDT could have been argued as a motion on the papers alone. This argument is rejected.

[22] On 3 August 2011 the applicant informed the registrar that he was thus unable to comply with regulation 33(10)(a). On 10 August 2010 the registrar was asked for directions. This request was repeated a day later. I do not find it necessary to catalogue all the efforts made by the applicant to obtain a record. The correspondence in this regard speak for itself as to what happened in the period 6 September 2011 to 22 February 2012, as confirmed by the annexures to the founding affidavit.

[23] The hearing lasted five days. Needless to say it was impossible for the applicant to reconstruct a sensible record of the evidence led during that period. On 23 March 2012 the applicant delivered his reconstruction of the record, together with a notice of appeal (again) and an application for condonation. These documents were delivered to the registrar of the Mpumalanga Development Appeal Tribunal.

[24] On 8 May 2012 a letter requesting dates for the appeal hearing was delivered to the registrar. The applicant did not receive any reply. It is doubtful whether the MDAT was ever constituted. In any event, after waiting for three months this application was instituted on 14 August 2012.

[25] In regard to the exhaustion of domestic remedies the Constitutional Court held as follows:

> *"An aggrieved party must take reasonable steps to exhaust available internal remedies with a view to obtaining administrative redress... This is not to say, however, that if an aggrieved party had made an attempt in good faith to exhaust internal remedies, but had been frustrated in his or her efforts to do so, a court would be prevented from granting the exemption. It is for the court to determine, on a case-by-case basis, whether circumstances exist for judicial intervention."*[3]

[26] I find that the applicant took all reasonable steps to have an appeal heard by the MDAT. Thus the argument on behalf of the respondents that there was a failure to exhaust internal remedies cannot be upheld.

[27] This leads to the conclusion that the applicant was deprived of his right of appeal and that the review should succeed on this ground as well.

Costs

[28] The failure to give proper reasons and to provide a record of the proceedings is those of the MDT. Thus the second to fourth respondents have to pay the costs in their nominal capacities.

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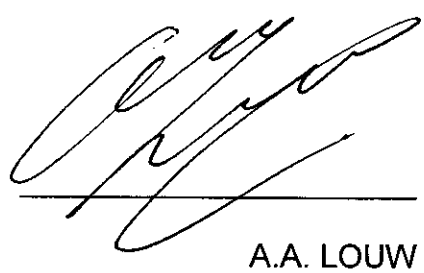
[3] *Koyabe v Minster for Home Afairs* 2010(4) SA 327 (CC) at p 345 para 47

[29] As regards the costs of the first respondent, the argument was made out that the first respondent is a reluctant litigant because an order for costs was sought against it as well in any event, and not only if the first respondent opposed the application. I am not convinced by this argument. If this were the first respondent's only grievance it could easily have been sorted out by communication between the respective attorneys at the stage when this application was initiated. On the contrary, the respondent put up a rigorous argument on the merits. Thus, as between the applicant and the first respondent I find it fair that each party should pay its own costs.

[30] Order:

1. The decision of the second respondent under reference number MDT21/04/10/01 Farm Kaalbooi dated 18 November 2010 is set aside.
2. The second, third and fourth respondents are ordered to pay the applicant's costs, the one paying, the other to be absolved.



A.A. LOUW

Judge of the High Court

For the Applicant	:	HF Jacobs
Instructed by	:	Schreiber Smith Inc
For the First Respondent	:	SD Mitchell
Instructed by	:	A Kaplan Attorneys
For the Second to Fifth Respondents	:	R Bedhesi SC
Instructed by	:	The State Attorney