REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

13/5/2015

CASE NO:87035/14

(1) REPORTABLE: ~~YES~~ / NO

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO

13/5/2015 EIMKubushi

In the matter between:

BROOKLYN SECURITY VILLAGE NPC **APPLICANT**

and

THE CITY OF TSHWANE **RESPONDENT**

JUDGMENT

HEARD ON: 20 February 2015

JUDGMENT ON: 13 May 2015

KUBUSHI, J

[1] The application before me, concerns the exercise of power to restrict access to public places. In terms of the Rationalisation of Local Government Affairs Act 10 of 1998 for the Province of Gauteng ("the Rationalisation Act") a mechanism was created for residents of an area to apply to the Municipal Council in their respective areas, for authorisation to secure their residential areas from rampant crime through the erection of physical barriers across public streets and the use of booms/gates through which all traffic must proceed to enter and exit a defined area.

[2] The mechanism for what is called the 'Restriction of Access to Public Places for Safety and Security Purposes' is contained in chapter 7 (sections 43 to 48) of the Rationalisation Act. The purpose of chapter 7 is said to be to restrict access to public places for the sole purpose of safety and security.

[3] For purposes of enhancing safety and security, s 43 of the Rationalisation Act confers a municipal council for the area concerned, with the power to, either on its own initiative, impose restriction on access to any public place; or authorise any person, body or organisation to restrict access to any public place.

[4] In terms of the Tshwane Municipal Council Resolution approved on 31 March 2011, the power to consider all land use and development applications, subject to the Constitution of the Republic of South Africa Act 108 of 1996 (the Constitution), and subject to any other legislation and all powers and functions of the City of Tshwane Metropolitan Municipality as contemplated in the Rationalisation Act, were delegated to the Executive Mayor (Strategic Land Development Tribunal).

[5] The applicant, a non-profit company with the object of furthering the interests of certain residents and property owners in Brooklyn, namely, the residents living within the area bounded by Rupert Street on the East, Waterkloof Road on the South, Jan Shoba Drive on the West and Justice Mohamed Street on the North, incorporating 145 residential

erven ("the area"), submitted an application in terms of chapter 7 of the Rationalisation Act ("the chapter 7 application") with the respondent. I shall for purposes of this judgment refer to that application as the chapter 7 application in order to differentiate it from the application serving before me.

[6] Due to the unacceptable high rate of crime within the area, the members of the applicant resolved to submit a chapter 7 application for the restriction of access to the area. The application was served on the respondent on 16 November 2012. The restriction sought involved erecting booms and fences, across public roads and open spaces, to channel the movement of people and motor vehicles into and out of the area through designated points. The restrictions will not prevent any person or motor vehicle from entering, but merely monitors their movement into and out of the area.

[7] Since the applicant submitted the application on 16 November 2012, the respondent failed to take the necessary steps and to consider the application. The applicant's undisputed evidence is that the chapter 7 application that was submitted by the applicant to the respondent, complied in all material respects with the Rationalisation Act and the respondent's policy requirements. In August 2014 a report was submitted to the respondent confirming that all the internal departments of the respondent as required by the Rationalisation Act supported the application and recommended that it be approved by the Strategic Land Development Tribunal ("the SLDT"). The applicant in its papers refers to this committee as the Strategic Land Development Committee, but according to the Tshwane Municipal Council Resolution approved on 31 March 2011, the committee is referred to as a Tribunal. After a protracted process the application served before the SLDT on 1 October 2014. The SLDT referred the application back to the applicant with a query that other opportunities or possibilities for ensuring the safety of the community be exhausted. In addressing the query, the applicant requested to be allowed to make a

presentation in respect of other measures like monitoring by CCTV cameras. No answer had been forthcoming. The applicant has now approached this court for relief.

[8] Initially when the applicant approached this court it was on the basis of a review application. The main relief sought being for an order to review and set aside the respondent's failure to approve the applicant's application in terms of chapter 7 of the Rationalisation Act; and to authorise the applicant to erect and implement the access control structures in respect of the area and the respondent be restrained from interfering with or removing the said structures.

[9] There was some other relief sought by the applicant in the alternative to the main relief. The two alternative claims sought were in the form of interdicts. The first alternative relief was for an interim interdict pending the final determination by the respondent of the applicant's chapter 7 application. The second alternative relief was for a mandatory interdict, which sought to mandate the respondent to take all the necessary steps to process the applicant's chapter 7 application.

[10] At the hearing of the application, the applicant, through its counsel, for reasons not advanced at the hearing, abandoned prayer 1 which was inclusive of prayers 1.1, 1.2, 1.3 and prayer 3. Prayer 1, as I have said, was mainly for an order to review and set aside the respondent's failure to approve the applicant's chapter 7 application. It meant, therefore, that the review application was abandoned as a whole. Prayer 3 on the other hand was in respect of the mandatory interdict. Having abandoned the two prayers, what remained was the relief for the interim interdict.

[11] The respondent opposed the application and filed an answering affidavit setting out its defence. The answering affidavit was filed out of time without an application for condonation for such late filing. At the hearing of the application, the applicant's counsel raised an objection to the late filing of the respondent's answering affidavit without

applying for condonation. The respondent's counsel conceded that the answering affidavit was filed out of time. He, consequently, abandoned the answering affidavit and opted to argue the matter on the applicant's papers. The matter was thus argued before me only on the basis of the applicant's papers.

[12] In his oral argument before me, the respondent's counsel raised issues of law which sought to be decided outside the facts as presented by the applicant in its papers. At the end of the hearing I instructed both counsel to provide me with heads of argument on the legal issues raised by the respondent's counsel. The heads of argument were duly furnished. I am thankful to both counsel for dealing extensively with the issues in their respective heads of argument.

[13] In essence the respondent's opposition is based on the question whether or not the relief sought by the applicant on the papers before me is competent. In this respect two points were taken by the respondent. I shall deal with the said points *in seriatim*.

PAJA APPLICATION

[14] The point of law raised in this respect relates to prayer 1 of the applicant's notice of motion. The relief sought in this prayer is in regard to the order to review and set aside the failure by the respondent to approve the applicant's chapter 7 application. The respondent's submission being that a decision in terms of chapter 7 of the Rationalisation Act was not an administrative action and was as such excluded from the application of the Promotion of Administrative Justice Act 3 of 2000 ("PAJA").

[15] Even though the applicant had abandoned prayer 1 of its notice of motion, both counsel for the parties addressed me at length on the reviewability of the respondent's failure to approve the chapter 7 application, which debate I found to be of no consequence since the issue had become academic.

INTERIM RELIEF

[16] In its founding affidavit, when addressing the issue of interim relief, the applicant asserted that the application should succeed and the relief sought be approved on the basis that the applicant and/or its members are entitled to:

(a) Their fundamental rights

(b) The implementation of the access restriction structures as *per* the application because:

(i) the Rationalisation Act created a mechanism by which the applicant could apply for restriction of access to public places for the purpose of enhancing safety and security. For this purpose roads are regarded as public places;

(ii) the application complies with the requirements of the Rationalisation Act.

[17] When addressing me in court, the applicant's counsel contended that the applicant has clearly shown a reasonable prospect of success in that the Tribunal and even so the Municipal Council, should they apply their minds, would approve the merits of the application because all the internal departments of the respondent supported the application. In this regard, counsel referred me to the unreported judgment in Lynnwood Manor Estate v The City of Tshwane (34160/2007) [2008] TPD (01/02/2008), wherein Botha J granted an interim order as the applicant therein had shown that there was reasonable prospect of succeeding with their appeal.

[18] The respondent's counsel, on the other hand, contended that having abandoned prayers 1 and 3, the applicant is not entitled to prayer 2 and that the application must be dismissed with costs. The submission being that the application cannot be categorised as an application for interim relief based on the following grounds:

(a) The application in this instance, does not invoke either preservation or restoration of the *status quo ante* pending determination of rights by a court of law.

(b) The suggestion by the applicant that there is a *prima facie* right that the application will be granted by the respondent is unheard of.

(c) Only a municipality may issue the authorisation prayed for by the applicant, within the structure of the Rationalisation Act.

[19] It was my view that from the outset the applicant had not made out a case for interim relief. This is so because the applicant failed in its founding affidavit to establish the fundamentals of an interim interdict.

[20] One of the aims of an interim interdict is to preserve the *status quo ante* pending the final determination of the rights of the parties to pending litigation. That is, there must be legal proceedings on the same facts pending between the parties.[1]

[22] Interim interdicts are generally and in their nature granted *pendente lite*. They are designed to protect the rights of a litigant pending the finalization of pending proceedings or proceedings to be instituted by such litigant. When considering whether to grant or refuse an interim interdict, the court seeks to protect the integrity of the proceedings in the main case. The court seeks to ensure, as far as is reasonably possible, that the party who ultimately is successful will receive adequate and effective relief.[2]

[23] The interim relief sought by the applicant is that pending the final determination by the respondent of the applicant's chapter 7 application:

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[1] Pikoli v President of RSA 2010 (1) SA 400 at 403H.

[2] Pikoli v President of RSA 2010 (1) SA 400 at 404 A-D.

"2.1 The applicant be authorised to immediately erect and implement the access control structures in respect of the area to which the application relates, and that such structures be allowed to remain in place and implemented pending the final outcome of the application in terms of the Act and/or the exhausting of all the domestic remedies and/or the respondent's procedures pursuant to the outcome of the respondent's decision on the application;

2.2 The respondent be interdicted and restrained from removing such access control structures."

[24] It is common cause that there are no legal proceedings between the parties pending on the same facts that are before me. The case by the applicant, which is not challenged, is that the applicant is awaiting a decision of the Municipal Council in respect of its chapter 7 application. Surely this decision cannot be said to be pending legal proceedings.

[25] From the perusal of the applicant's papers it is quite clear that the interim relief, should it be granted, will not preserve any *status quo ante* as required for an interim interdict to have effect.

[26] The Rationalisation Act, in terms of s 43, empowers the Municipality Council to authorise any person, body or organisation to restrict access to any public place. As such, only a Municipal Council can issue authorisation within the scheme of the Rationalisation Act, and not the court. The relief sought by the applicant for this court to authorise the erection of structures for the restriction of access to a public place cannot ensue.

[27] The contention by the applicant that there is a *prima facie* right that the chapter 7 application will be successful is fallacious to say the least. I agree with the respondent's submission that the applicant's contention conflates probable eventualities with vested rights. It is indeed so that a *prima facie* right must exist as at the time of application and should not be contingent upon some future event. Even so, as I have said, the decision awaited is not pending legal proceedings. It is my view that the submission of the

application with the respondent does not confer any substantive right whatsoever upon the applicant none was identified in the applicant's papers.

[28] The judgment by Botha J does not come to the assistance of the applicant. The two cases are distinguishable in that in the Botha J judgment there were pending legal proceedings between the parties wherein a decision was made and subjected to a legal process, whereas it is not the case in this instance.

[29] There is a further issue raised by the respondent's counsel in argument before me, that an interim interdict against an organ of state does not rely on a *prima facie* right. In this regard, counsel referred me to the judgments in Gool v Minister of Justice and Another 1955 (2) SA 682 (C) and National Treasury v Opposition to Urban Tolling Alliance 2012 (6) SA 223 (CC) paras 41 – 45.

[30] When dealing with the test for the grant of an interim interdict, and relying on the Gool-judgment, the court in the OUTA-judgment, stated the following:

> "[44] The common-law annotation to the Setlogelo test is that courts grant temporary restraining orders against the exercise of statutory power only in exceptional cases and when a strong case for the relief has been made out . . ."

[31] I mention this issue without having to resolve for present purposes whether the act of the respondent complained of in this instance is either executive, legislative or administrative.

[32] It is on those bases that I would conclude that the relief sought by the applicant stands to fail.

[33] Having concluded as such, I, however, take cognisance of the frustrations suffered by the applicant's members in the respondent taking too long to decide their chapter 7 application. From the evidence in the applicant's papers the application was submitted on

16 November 2012. Over two years has gone by and the respondent has not responded to the application. It does not even appear from the evidence that the respondent is even nearer to giving that response. I also take cognisance of the fact that the Constitutional rights of the applicant's members as clearly set out in the founding affidavit are infringed and continue to be infringed. It is, thus, my view that I should come to their assistance.

[34] I am of the opinion that using the prayer by the applicant in the notice of motion calling for further and alternative relief, I should in the interest of justice, grant a structural interdict which is aimed to direct the applicant to consider the application. In essence, the order should direct the respondent to take all the necessary steps to process the application lodged by the applicant and to give due and proper consideration to the application within eight weeks of this order and to give the applicant a full opportunity to be heard in connection therewith.

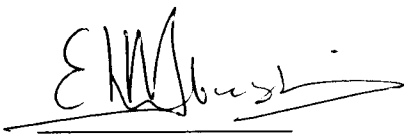
[35] I do not think that the respondent would be prejudiced by such and order. As it is, the applicant had initially sought such an order but abandoned it. The respondent's counsel when arguing this point gave an impression that the respondent would not be adverse to the granting of such an order. In fact, counsel in the heads of argument, conceded that a proper case has been made out in the papers to grant such an order.

COSTS

[36] The issue of costs was also argued at length before me. The applicant's counsel argued for a punitive costs order. I am, however, of the view that such an order should not be granted. Even though the applicant appears to be the successful party in these proceedings but it succeeded not on the prayer it sought. I would in the circumstances order that each party be responsible for own costs.

In the premises I make the following order:

1. The respondent is ordered and directed to take all steps necessary to process the application lodged with it on 16 November 2012 by the applicant and to give due and proper consideration to the application within eight (8) weeks of this order.
2. The respondent is ordered and directed to give the applicant a full opportunity to be heard in connection with the application referred to in 1 above.
3. I make no order as to costs.



E. M. KUBUSHI

JUDGE OF THE HIGH COURT

Appearances:

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