THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Case No: 615/10

In the matter between:

THE MUNICIPALITY OF STELLENBOSCH **APPELLANT**

and

SHELF-LINE 104 (PTY) LTD **RESPONDENT**

Neutral citation: *Municipality of Stellenbosch v Shelf-Line 104* (615/10) [2011] ZASCA 190 (8 November 2011)

Coram: HEHER, SNYDERS, SHONGWE, MAJIEDT JJA and PLASKET AJA

Heard: 13 September 2011

Delivered: 8 November 2011

Updated:

Summary: Township – conditions of approval – rezoning and subdivision under secs 16 and 25 of the Land Use Planning Ordinance 15 of 1985 – whether municipality may unilaterally amend such conditions after acceptance by developer.

ORDER

On appeal from: Western Cape High Court (Cape Town) (Goliath J sitting as court of first instance):

The appeal is dismissed with costs including the costs of two counsel.

JUDGMENT

HEHER JA (SNYDERS, SHONGWE, MAJIEDT JJA AND PLASKET AJA concurring):

[1] The appellant is a local authority. Within its jurisdiction falls certain immovable property presently owned by the respondent that was formerly described as the Remainder of Portion 3 of the Farm Groenfontein, Annex no 716, Klapmuts and is now known as erven 1340 and 1950, Klapmuts.

[2] The respondent is a property developer. In 1999 its predecessors in title, Guillaume Johannes and Magdalena Elbertie du Toit, applied to the appellant to rezone and subdivide the property in order to develop what was, in effect, a residential township on it.

[3] On 23 February 1999 the council of the appellant resolved to approve the rezoning in terms of s 16(1) of the Land Use Planning Ordinance, 15 of 1985 (hereinafter referred to as 'LUPO') and the subdivision in terms of s 25(1) thereof, subject to specified conditions. An unsuccessful appeal was lodged by certain objectors to the proposed development and in July 2000 the competent authority dismissed the appeal and approved the application in terms which accorded with those initially laid

down by the appellant, including a condition (2.17) that

'The standard conditions of Stellenbosch Municipality for rezoning and subdivision shall be complied with.'

[4] It is common cause that such standard conditions included liability to make payment of bulk infrastructure development contribution levies ('BICLs') in accordance with a tariff set out in the appellant's 'Guidelines for Engineering Services with regard to Subdivisions including Township Establishment, Smaller Subdivisions and Rezonings'. It is also not in dispute that the formulae for the calculation of the contributions which are contained in the tariff remained unchanged from 1999 until the implementation of the council resolution of 29 May 2007 which is the subject of the present dispute and which I shall consider in some detail below.

[5] For reasons that are unexplained in the court papers the Du Toits allowed their rezoning and subdivision approvals to lapse. Presumably they or their successor applied for reinstatement, since in February 2006 the approvals were extended for a period of one year in terms of ss 16(2)(ii) and 27 of LUPO. On 26 March 2006 the respondent's planners were notified that the Executive Director: Economic Facilitation Services of the appellant had resolved that in terms of s 42 of LUPO certain conditions be imposed that included the following:

'5.1.2 All conditions as determined by the Provincial Administration in their letter dated 20/07/2000 be adhered to;

5.1.3 That the development take place in two phases as proposed by the applicant.'

[6] It must be pointed out that the earlier conditions had contained an express condition which required the applicant to notify its acceptance of the conditions in writing. Because of the terms of 5.1.2 (as quoted) that requirement was implicitly repeated on reinstatement. Although the respondent made no positive assertion in the

court below that it had accepted the conditions that is the most probable inference having regard to the subsequent history. The appellant has never placed its acceptance in question.

[7] On 28 March 2006 a subdivisional plan in respect of Phase One of the development was approved by the appellant. On 5 June 2007 a similar approval was obtained for Phase Two.

[8] After approval of the plan for Phase One the respondent carried out its planning on the basis of the estimated costs of development of the whole property including its liability for BICLs, calculated according to the tariff structure in the Guidelines.

[9] In March 2007 the respondent became aware that the appellant was considering a possible increase in its tariff structure for BICLs. Accordingly the deponent to the founding affidavit, Guillaume Johannes du Toit Jnr, and his father (referred to in para [2] above) met with a Mr Hartzenberg, an employee of the Municipality, to try to obtain finality in respect of the respondent's liability for the levies. According to the deponent, Hartzenberg assured them that the existing tariff applied to their development. On the strength of that assurance they calculated the sale prices of the subdivided erven according to their previous estimate of the liability viz R825 000, and proceeded with the marketing on that basis.

[10] Sales of erven were concluded on the understanding that the existing tariff would regulate the amount of the liability, the costs of the levies being factored into the prices.

[11] On 29 May 2007 the council of the appellant considered its draft annual budget for the year commencing 1 July 2007. It resolved:

'(a) that the current approved formulae for the application of Bulk Infrastructure Contribution Levy *(Dev. Levies)*, be escalated by a factor of 3,5 in order to align Stellenbosch's levies with

other municipal levies with immediate effect;

(b) that this increase be included as basis for BICL in the 2007/2008 budget and tariffs;

(c) that developers be permitted to provide bulk services in lieu of BICL with the approval of the Director: Civil Engineering Services and in terms of a service agreement; and

(d) that Council approve the schedule of rate for bulk infrastructure contribution levies (detail attached as **APPENDIX 1**) and that same be implemented with immediate effect'.

[12] Thereafter confusion arose among officials and developers as to the meaning of the resolution and, in particular, whether the council's intention had been to apply the new tariff to all developments in esse or only to developments initiated after 30 June 2007. This uncertainty gave rise to a further council resolution on 20 November 2007 and a 'clarifying resolution' of the Mayoral Committee on 27 November 2007, both of which merely added legal uncertainty to the process (and generated a great deal of additional argument before and during the subsequent litigation).

[13] On 4 December 2007 twenty-three erven in Phase One were simultaneously transferred to purchasers. Three further erven were transferred on 15 February 2008 and, the last five erven in that phase, on 8 July 2008. In all cases the transfers were preceded by the issue of clearance certificates certifying that amounts owing by the seller to the municipality in respect of the land had been paid. Those payments were all calculated according to the old tariff.

[14] On 11 July 2008 and 1 August 2008 the respondent requested the appellant to issue thirty-six clearance certificates relating to erven in Phase Two. The respondent tendered payment of BICLs in accordance with the old tariff but the appellant refused to comply unless payment accorded with the new tariff.

[15] After further exchanges between the parties proved futile, the respondent launched an urgent application in February 2009 in which it claimed an interim order

directing the appellant to issue clearance certificates in respect of the thirty-six Phase Two erven against payment of R590 294-96 and the furnishing of a guarantee for payment of a further R3 060 178-00 in the event of the court finding that the respondent was liable for BICLs on the basis of the appellant's increased tariff.

[16] On 25 February 2009 the Cape High Court made an interim order in terms of which the application was postponed for hearing in June of that year and the appellant undertook, pending judgment in the matter, to furnish clearance certificates for Phase Two erven against payment of the aforesaid amount and the furnishing of an irrevocable undertaking by the respondent to pay according to the increased tariff in the event of the municipality obtaining a favourable judgment.

[17] On 31 May 2010 Goliath J made the following order in the main application in favour of the developer:

'1. The respondent is directed to issue clearance certificates to the applicant in respect of 36 erven situated in phase 2 of the development known as Rozenmeer, Klapmuts, within 24 hours of receipt of an application for the required certificates and provided that the applicant has paid to the respondent an amount of R590 294,96 in respect thereof.

2. The applicant is released of its obligation in terms of paragraph 6.2 of the Court Order dated 25 February 2009.

3. Respondent is ordered to pay the costs of this application, inclusive of the costs of 25 February 2009, including the costs consequent upon the employment of two counsel.'

With leave of the learned judge the municipality appeals to this Court.

[18] The appeal turns on the meaning and, consequently, the scope and application, of the council's resolution of 27 May 2007. According to appellant's heads of argument:

'46.1 Before 29 May 2007 the position was, and had been since 1999, that the rate of BICLs was calculated in accordance with a particular formulae (sic) that Council adopted in 1999.

46.2 On that date, Council authorised the continuation of the use of that formulae but with an escalation by a factor of 3.5, such escalation was to take place with immediate effect.

46.3 Council also resolved that this increase be included as the basis for the applicable BICLs in the 2007/2008 budget and tariffs.

47. Accordingly, there is no question as to which tariff is applicable, whether in respect of developments approved before or after 1 July 2007, or in respect of those where development agreements had been signed or not, or where quotes had been furnished or not. The fact of the matter is that, with effect from 1 July 2007, (the earliest date when Council's decision could lawfully take effect) there was only a single tariff for BICLs, same to be determined in accordance with the formulae that was before Council on 29 May 2007, but escalated by a factor of 3.5. There was no other tariff that could be applied after 1 July 2007. Accordingly, much of the debate that ensued after 29 May 2007 is misdirected because from 1 July 2007 the increased tariff had to be uniformly applied to all payments of BICLs, irrespective of when the payment of those BICLs became due.'

[19] The validity of that argument depends on the underlying principles of township development and the source of the power in the council to impose conditions when granting its approval for such development. The appellant's position is that BICLs are a tax on the development of land paid by successful applicants for township, rezoning and subdivisional rights. The council is entitled to amend its BICL tariffs, and, therefore, vary the amount of the tax every year, if necessary. As a tax, it is operative from the effective date of its imposition, usually the beginning of the council's financial year. Counsel submits that it is in this light that the resolution of 29 May 2007 must be understood, interpreted and applied. As I shall demonstrate, however, that submission is contrary to principle and the established law relating to such developments, at odds with the council's own policy, and, ultimately, in conflict with the statutory foundation for the imposition and amendment of BICLs.

Practical considerations

[20] Township development is an economic speculation that holds serious implications for both the developer and the public authority. The developer, for example, must balance the costs involved in the acquisition of the land, with legal, planning, marketing and infrastructural development expenses against a prediction of future market conditions, the potential of the land, competing developments and so on. The best interest of the local authority lies in the success of the development. It too has infrastructural costs recoverable in the medium to long term. A failed development represents a blot on its management and may involve it in the costs of salvaging the development. In these circumstances prudence requires that both parties exclude by their consensus as much uncertainty as they can at the outset. The development process is, of course, also designed to protect the persons who will be acquiring property in the development and will become its residents and users of its amenities: *Estate Breet v Peri-Urban Areas Health Board* 1955 (3) SA 523 (A), at 531F; *Palm Fifteen (Pty) Ltd v Cotton Tail Homes (Pty) Ltd* 1978 (2) SA 872 (A) at 888F-889B.

[21] There is nothing original in the relationship as I have described it. As Schreiner JA said in *Estate Breet* at 531C-D:

'. . . there is authority and reason for holding that the steps by which a township is established and proceedings can be brought to recover endowment moneys, involve mutual consent between the administrator and the applicant as to the township conditions, and the administrator may be regarded, not inappropriately, as making an offer to the applicant which the latter must accept if a township is to be brought into existence'.[1]

See also *Permanent Estate and Finance Co v Johannesburg City Council* 1952 (4) SA

1 Contrary to the submission of appellant's counsel in supplementary written submissions made after judgment was reserved, the consensus does not result in a contract, as is shown by the judgments in *Breet's* case.

249 (W) at 257; *Administrator (Cape Province) v Ruyteplaas Estates (Pty) Ltd* 1952 (1) SA 541 (A) at 551.

[22] Although those cases related to township development simpliciter while the application presently under consideration covered the lesser field of rezoning and subdivision, this is a distinction without a difference given the extent of the respondent's proposed development.

The appellant's own practice

[23] The conditions for approval imposed in the present instance reflect the principles to which I have referred. Both in relation to the original and revived applications for rezoning and subdivision the applicant (the present respondent) was notified that its acceptance of the conditions in writing was required before the approval would become effective. The applicant was thus offered the opportunity of considering the financial implications involved in fulfilling the conditions with the alternative of abandoning the application if it considered them too onerous or such as to detract materially from the viability of the project. This opportunity was particularly relevant in relation to clause 2.17 of the conditions. The standard conditions incorporated the formulae for developers' contributions to bulk infrastructure costs, an important factor in the costing of the development and, hence, the prices at which the applicant would offer the subdivisions to the public.

[24] The Guidelines for Engineering Services also provided protection for the municipality, as it was proper they should. In relation to BICLs they contained an express provision that:

'The capital contribution is due when the new rights are approved or at a time mutually agreed upon by the parties.'

There was, in this instance, no mutually agreed time. So the municipality need not have

been prejudiced by any delay on the part of the developer in pursuing its development: it had only to invoke the remedy.[2]

[25] In its supplementary submissions the appellant contended that BICLs did not become due and payable unless and until a development contract was signed between the municipality and the developer. As it was common cause between the parties that no such contract had been entered into the council remained at liberty to amend the conditions and impose them on the respondents. Counsel referred to clauses 5 and 6 of the Standard Conditions of Rezoning and Subdivision:

'5 a development contract must be entered into between the Municipality and the developer before any contractor may go on site and before any services design plans or building plans will be approved.

6 With the signing of the above-mentioned development contract, the developer must pay the Municipality pro rata contributions to the main services (as calculated by the Town Engineer and the Electrotechnical Town Engineer) or, alternatively if approved by the said departmental heads and the Town Treasurer, provide the Municipality with an acceptable bank guarantee for the total amount of the said pro rata contributions.'

[26] No doubt those represent the general terms of approval in default of express conditions applied to particular situations. The appellant's deponent Mr Kenned, its Municipal Manager, had, in the answering affidavit, identified the specific policy, comprising 'a set of guidelines and formulae to be applied by [the council] in determining a developer's pro-rata contribution towards BICLs' (the Guidelines to which I have earlier referred). The terms of that policy, being directed to a specific end, clearly superseded the general terms in para 6 with regard to the due date for payment. Counsel submitted that the respondent had been unaware of the terms of the policy at

2 In their supplementary heads counsel for the appellant submitted that payment can, at the earliest, be due 'when such service [ie the provision of infrastructure] is actually provided, or its provision is imminent'. That interpretation conflicts with the express words of the standard terms and the Guidelines.

the time of approval of its application. Even if that was so (and I do not find that to be clear on the affidavits) the respondent committed itself to the council's standard conditions when it elected to proceed with the approved development. Those conditions included the policy on BICLs and the formulae contained in that policy.

[27] It will be obvious from the aforegoing discussion of the relationship between the parties that the municipality's attempt to rely on an interpretation of the resolution of 29 May 2007 as the exercise of a unilateral right to vary the standard terms and conditions accepted by the applicant for the development in 2000 and again in 2006, flies in the face of the underlying principle of consensus. Of course the municipality possessed the right and the power to amend those terms and conditions and, in so far as it did so, the range and effect of such conditions when accepted in future by an applicant would be according to their amended form. But clearly, in such circumstances, for both legal and practical reasons the resolution could not affect terms and conditions already the subject of acceptance by an developer.

Are bulk infrastructure construction levies a tax?

[28] Counsel for the municipality submitted that the resolution of 29 May 2007 imposed a tax on developers. I do not agree. It did no more than define the obligation of a developer for the purposes of a conditional approval of an application for rezoning and subdivision under LUPO. The obligation required payment to the municipality of defined parts of the latter's infrastructural costs, in return for which the developer could expect to receive a properly serviced development and higher prices for the properties sold by it. The payment would meet what was in effect an endowment obligation. The nature of such a debt was closely examined by Ramsbottom J in the *Permanent Estate & Finance Co* case, supra, at 258A-F:

'The reason for requiring endowment money is clear. When the owner of land obtains

permission to establish a township and to sell lots, he acquires a right, but in exercising that right he imposes upon the local authority, if the township is within the area of jurisdiction of a local authority, a financial burden. A centre of population is brought into being, and the inhabitants require streets to be made, sanitary services to be provided, water and light to be made available and so on. The Legislature has said to applicants for leave to establish a township: “We empower the Administrator to grant your application, but we also empower him, in doing so, to impose as a condition that you will contribute towards the cost of providing the amenities which persons to whom you sell lots will require; the amenities which purchasers know they will get will enhance the price at which you will be able to sell lots in the township and part of that price must be handed to the local authority to enable it to provide those amenities.” The contribution may be made in one or more of the prescribed ways. The township owner may be required to do work himself in the construction of streets. In addition, or in the alternative, he may be required to pay to the local authority money, in a lump sum. Or he may have to transfer erven to the local authority, from the sale of which the local authority may recoup itself. Or he may have to make his contribution, by instalments, as and when he sells his erven.’

The learned judge continued (at 258H-259C):

‘When the Provincial Council enacted that the conditions upon which an owner of land could be offered permission to establish a township might include a condition which, if accepted, would oblige him to contribute towards the cost of the financial burden which would be imposed on the local authority, it clearly did not impose a tax upon him. I do not propose to attempt to give a definition of the word tax. Though difficult to define, I think that a tax can be recognised with reasonable ease. To require any person who carries on a business or who owns a dog or a motor-car to pay a prescribed fee is, I think, to impose a tax. The money paid is taken into general revenue and is used for general purposes; the person who pays receives no specific service in return for his payment. Endowment money paid by a township owner is quite a different thing; it is an agreed payment for services which are to be performed for the

improvement of the township and from which the township owner will derive financial benefit. To require the township owner himself as a condition for the grant of permission to establish a township to make the township habitable by an urban community would not be to impose a tax upon him, and where that work is to be performed by a local authority, to require him to pay for, or to contribute towards the cost of, the work is likewise not to impose a tax.'

[29] This dictum, uttered in relation to a provision in Ord 11 of 1931 (Transvaal), is of equal validity in relation to s 42 of LUPO which provides:

'(1) When the Adminstrator or a council grants authorisation, exemption or an application or adjudicates upon an appeal under this Ordinance, he may do so subject to such conditions as he may think fit.

(2) Such conditions may, having regard to-

(a) the community needs and public expenditure which in his or its opinion may arise from the authorisation, exemption, application or appeal concerned and the public expenditure incurred in the past which in his or its opinion facilitates the said authorisation, exemption, application or appeal, and

(b) the various rates and levies paid in the past or to be paid in the future by the owner of the land concerned,

include conditions in relation to the cession of land or the payment of money which is directly related to requirements resulting from the said authorisation, exemption, application or appeal in respect of the provision of necessary services or amenities to the land concerned.'

Therein lies the authority for the inclusion of the provision that a contribution be made to the costs of bulk infrastructure as a condition of the approval of a township or a subdivision and rezoning application. (The foundation of the original power to impose such a condition is also identified in the *Permanent Estate & Finance Co* case, at 259C-G. Counsel for the appellant submitted that the authority of LUPO, as pre-constitutional legislation, had been superseded by s 229 of the Constitution, but this is

untenable; para 2 of Schedule 6 maintains the force of 'old order legislation' and s 42 of LUPO has neither been amended nor repealed and is not inconsistent with the Constitution.)

The express provisions of the existing law

[30] But section 42 proceeds to create a power to amend such conditions:

'(3) Subject to the provisions of the Removal of Restrictions Act, 1967 (Act 84 of 1967), either the Administrator or a council, as the case may be, may, in relation to a condition imposed under subsection (1), after consideration of objections received in consequence of an advertisement in terms of subsection (4)[3] and after consultation with the owner of the land concerned and, in the case of the Administrator, with the local authority concerned-

(a) waive or amend any condition, and

(b) impose additional conditions of the kind contemplated in subsection (1), which additional conditions shall be deemed to have been imposed in terms of that subsection.'

[31] Inasmuch as s 42(3) requires consultation with the owner of the land before the council may lawfully exercise its power to amend conditions originating in s 42(1), it affirms the consensual substratum of the original process. It compels the local authority to consider and, where appropriate, take account of the practical effects of the proposed amendment on the development process.

[32] In the context of s 42(3) the unilateral imposition of an amended condition upon a developer conflicts with the express terms of LUPO. There was, in the present instance, no consultation with the owner of the land, and the council gave no consideration to the effect of the amendment on the viability of the process. On the contrary, the interpretation which the municipality seeks to place on the resolution of 29 May 2007 would have the legal consequence that when the municipality amends its BICL tariffs unilaterally, as it is entitled to do, it also amends the terms under which it

3 Subsection (4) is not of relevance to the present case.

has previously granted approvals to developers under s 42(1). Such an interpretation cannot live with s 42(3) which plainly requires consultation with each individual owner (and the consequent consideration of factors affecting the development of each body of land upon which each original condition was imposed).

[33] It follows that the interpretation espoused by the council has no foundation. The resolution of 29 May 2007 operated as an amendment of the municipality's BICL tariffs but did not render the changes binding on the respondent.

[34] In the result the appeal is dismissed with costs including the costs of two counsel.

J A HEHER
JUDGE OF APPEAL

APPEARANCES

APPELLANT:	I Jamie SC (with him S K Witten)
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