28761\05 - MvD 1 JUDGMENT

Sneller Verbatim/MvD

IN THE HIGH COURT OF SOUTH AFRICA

(TRANSVAAL PROVINCIAL DIVISION)

PRETORIA

CASE NO: 28761\05

2006.06.23

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

DATE 10/8/06 SIGNATURE

In the matter between

ENDANGERED WILDLIFE TRUST Applicant

and

GATE DEVELOPMENT (PTY) LTD Respondent

JUDGMENT

LOUW AJ: This application concerns the review of decisions of the second respondent (the Director: Environmental Management in the Department of Agriculture and Land Administration, Mphumalanga) and the third respondent (the MEC for Agriculture and Land Administration, Mphumalanga) made in terms of the Environment Conservation Act, 73 of 1989 ("the ECA") and regulations thereunder, authorizing the development of a proposed golf and trout resort by the first respondent on a property comprising approximately 703 hectares situated approximately 10 to 15 kilometres south-east of Dullstroom in Mphumalanga.

In terms of the current development plan, the proposed development, to be known as the Highland Gate Golf and Trout Estate, will comprise a housing estate divided into three villages with a total of 455 residential units, an 18 hole golf course, a driving range, a club house, a "wellness centre", trout fishing facilities, an equestrian centre stabling 12 horses, a lodge and a conference centre. The necessary infrastructure is also provided for. The construction will cover approximately 220 hectares of the property, the remainder being open for game viewing, horseback riding, hiking, etcetera.

The first respondent issued a record of decision on 24 August 2004 in terms whereof the development was approved. The applicant thereafter, in terms of section 35 (3) of the ECA, lodged an appeal to the second respondent. The appeal constituted an internal remedy as contemplated by section 72 of the Promotion of Administrative Justice Act 3, of 2000 ("PAJA"). The third respondent decided on 15 February 2005 to uphold the decision of the second respondent. That decision was communicated to the applicant on 24 February 2005.

Section 7(1)(a) of PAJA provides:

"Any proceedings for judicial review in terms of section 6 (1) must be instituted without unreasonable delay and not later than 180 days after the date -

(a) subject to subsection 2(c), on which any proceedings instituted in terms of internal remedies as contemplated in sub-section 2(a) have been concluded; or

(b) where no such remedies exist, on which the person concerned was informed of the administrative action, became aware of the action and the reasons for it or might reasonably have been expected to have become aware of the action and the reasons."

Mr Grobler, who appeared with Mr Putter for the first respondent, argued that sub-section 1(a) and 1(b) provide for different circumstances which trigger the calculation of the 180 day period. Sub-section 1 (b) provides for knowledge, whereas sub-section 1 (a) does not. It is only where no internal remedy has been provided for that the 180 day period is calculated from the day upon which the person concerned is informed of the action. If the 180 day period is calculated from 15 February 2005, so it was argued, it would have expired on 15 August 2005. The application was launched a week later on 22 August 2005. Mr Grobler therefore argued that, in the absence of an application in terms of section 9(1)(b) of PAJA for an extension of the period of 180 days, the applicant was precluded from bringing the application.

Mr Binns-Ward, who appeared with Mr Borgstrom for the applicant, argued that the 180 day period should be calculated from the day on which the applicant was informed of the third respondent's decision, i.e. from 24 February 2005, in which event the 180 day period would not have expired by the time that the application was launched.

Mr Grobler, and Mr Tokota, who appeared with Mr Skosana for

the second and third respondents, both submitted that even if the 180 day period had not expired by the time the application was launched, the applicant had unreasonably delayed the bringing of the application until a few days before the expiry of that period.

Mr Binns-Ward, on the other hand, argued that the applicant was aware that the first respondent still had to obtain certain other statutory approvals before commencing construction, in particular that the applicant had to obtain approval in terms of the Subdivision of Agricultural Land Act, 70 of 1970, ("SALA") for the subdivision of the property and had to obtain water licences from the Department of Water Affairs and Forestry in terms of the National Water Act, 36 of 1998. It was argued that the applicant was justified in delaying the launch of the application while the possibility existed that the proposed development may be prevented by the refusal of one of those other processes, that it came as a surprise to the applicant to learn on 15 August 2005 that construction activities had commenced on the site and that the applicant immediately thereafter launched the application.

In view of the conclusion which I have reached, I will assume, without deciding, that the application was brought within the 180 day period and that the applicant did not unreasonably delay launching the application.

The grounds of review relied upon by the applicant are the following:

1 That the third respondent had not delegated his decision making powers to the second respondent, and that the

second respondent therefore had not authority to make the decision authorizing the activities for which authorization was sought.

2 That authorization was not sought or granted for the activity of extracting water from the Kareekraal spruit and the Valley spruit for the development as it was erroneously perceived by the applicant's independent consultants that such authorization was not required in terms of item 1(m) of schedule 1 to the regulations promulgated in terms of section 21 of the ECA.

3 That the independent consultants appointed by the first respondent to fulfil the procedural and substantive requirements of the ECA and its regulations were not independent as required by regulation 3(1)(a) of the regulations promulgated in terms of section 26 of the ECA.

4 That the independent consultants failed to consider alternatives for the particular development properly as required by section 21(1) of the ECA and that the second and third respondents would, if they had applied their minds, have required the independent consultants to consider reducing the scale of the development as an alternative.

5 That the conclusions reached by the second and third respondents were not rationally connected to the information before them in particular that they could not

rationally have concluded:

5.1 that the development would have a minimal effect on the available water resource.

5.2 that the development would not affect water quality in the Kareekraal spruit and the Valley spruit.

5.3 that the development would not affect a population of the rare Marico barb in the Kareekraal spruit; and

5.4 that the impact on the terrestrial ecology was acceptable.

6 That the second and third respondents failed to recognize the impact of the chosen locations for one of the new dams, being the dam to be located at the confluence of the Kareekraal spruit and the Valley spruit.

7 That the second and third respondents should have realised the need for, and should have required, a more detailed environmental impact assessment to supplement the scoping report provided by the first respondent's independent consultants.

In view of the conclusion which I have reached, I will again assume in favour of the applicant that one or more of the review grounds relied upon is good and that the decisions of the second and third respondents were therefor invalid. The question which then arises is whether, in the exercise of my discretion, I should decline to set the invalid decisions aside. In *Chairperson: Standing Tender*

Committee and Others v JFE Sapela Electronics (Pty) Ltd and Others, [2005] 4 All SA 487 (SCA) the following is said in para. [28] at 497 - 498.

"In appropriate circumstances a court will decline, in the exercise of its discretion, to set aside an invalid administrative act. As was observed in *Oudekraal Estates (Pty) Ltd v City of Cape Town* 2004 (6) SA 222 (SCA) para. 36 at 246 D:

'It is that discretion that accords to judicial review its essential and pivotal role in administrative law, for it constitutes the indispensable moderating tool for avoiding or minimizing injustice when legality and certainty collide.'

A typical example would be the case where an aggrieved party fails to institute review proceedings within a reasonable time. See *eg Wolgroeiers Afslaers (Edms) Bpk v Munisipaliteit van Kaapstad* 1978 (1) SA 13 (A); see also *7 (1) of PAJA* which gives statutory recognition to the rule. In a sense, therefore, the effect of the delay is to 'validate' what would otherwise be a nullity. See *Oudekraal Estates (Pty) Ltd, supra*, para. 27 at 242 E - F. In the present case, as I have found, there was no culpable delay on the part of the respondents. But the object of the rule is not to punish the party seeking the review. Its *raison d'Etre* was said by Brand JA in *Associated Institutions Pension Fund v Van Zyl* 2005 (2) SA 302 (SCA) at para. 46 to be twofold:

'First the failure to bring a review within as reasonable time

may cause prejudice to the respondent. Secondly there is a public interest element in the finality of administrative decisions and the exercise of administrative functions.'

Under the rubric of the second I would add considerations of pragmatism and practicality."

In part A of the applicant's notice of motion, the applicant sought, on an urgent basis, an interdict against the first respondent preventing it from commencing or proceeding further with the development pending final adjudication of the review relief sought in part B of the notice of motion.

Part A was set down for hearing in the urgent court on 24 August 2006, but was dismissed for lack of urgency. The first respondent thereafter proceeded with the development. In its answering affidavit, which was filed on 3 March 2006, the first respondent stated that the decisions which the applicant sought to review had effectively become irreversible due to the further administrative actions which flowed from that decision, being the approval in terms of SALA of the subdivision of the property, the approval of the water licences applied for and the proclamation of the township to be developed on the property and to be known as Dullstroom Extension 3. In order to obtain the proclamation a general plan of the township was required in terms of the Town Planning and Townships Ordinance, 15 of 1986, which plan was approved by the surveyor general and was acted upon by the registrar of deeds by opening a township register in the deeds office. It was further stated that the applicant was in the process of transferring 157 erven, which

transfers would be concluded at the end of March 2006. It was also stated that the first respondent had invested more than R80 million in the development and that it had obtained all the necessary statutory rights to proceed with its development.

At the hearing of the application, the first respondent sought leave to hand up a supplementary affidavit deposed to on 8 June 2006 in which the current state of construction and development is set out. The applicant did not object to the handing up of the affidavit. It appears from the affidavit that the actual figure which the applicant has spent to date is R73 286 940, but that it is contractually bound to the extent of R80 million. The amount spent has been expended in respect of building and site development, land and related expenses, miscellaneous expenses such as marketing, advertising and interest during construction and VAT and commissions paid. It further appears that 8 stands which were sold for a total purchase price of R5 225 000 have been transferred to the purchasers, that transfer documents in respect of a further 8 stands sold for a total purchase price of R9 265 000 have been lodged with the registrar of deeds and were awaiting registration and that transfer documents in respect of a further 15 stands sold for a total purchase price of R20 190 000 would be lodged with the registrar of deeds within days.

It further appears that the water reticulation, sewerage reticulation and electrical reticulation for phase 1 of the development are 100 % complete, that the roads for phase 1 are 90 % complete, that the gate house is 80 % complete and that the show house is

50 % complete. The roads, water, sewerage and electrical reticulation for phase 2 of the development is 60 % complete. Lesser percentages apply to phase 3.

That the first respondent and the purchasers of stands, more particularly those purchasers who have taken transfer of their stands, will suffer substantial prejudice if the decisions of the second and third respondents were to be set aside, is self evident. Mr Binns-Ward argued that, as at the date on which the application was launched, very little construction had taken place and that the first respondent had proceeded with the construction after the dismissal of the urgent application at its own risk. That may be so, but the fact of the matter is that the construction was proceeded with, as the first respondent was entitled to do in terms of the authorities which were granted, and that the monies have been expended and the transfer of stands have taken place.

It was further argued that the review and setting aside of the decisions do not have, as a necessary consequence, that there will be no development. It was submitted that the effect of such an order would be that the matter should go back to the second respondent for reconsideration and that it was feasible that an ECA application would again be approved or that a lesser development would be approved.

It is, of course, also feasible that it would not be approved. If a lesser development is approved, that would probably also cause substantial prejudice. When asked what the effect of a setting aside of the decisions would be on purchasers who have already taken transfer of the stands which they purchased, Mr Binns-Ward

suggested that it would have no effect, but if there had been a non - disclosure by the first respondent to the purchasers, they would have their remedies against the first respondent.

I disagree that the setting aside of the first and second respondent's decisions would have no effect on the purchasers who have taken transfer, or even on those who have not taken transfer. The purchasers obviously purchased the stands and paid the prices which they did on the basis that the proposed development would go ahead. If the ECA application were to be reconsidered and refused, their properties would probably be worth very little. No services, including water and electricity, would be provided and none of the proposed facilities of the development would be available to them. If a lesser development were to be approved, their properties would also probably become worth less.

Furthermore, as mentioned in *Associated Institution's Pension* quoted in the passage of *Sapela* referred to above, there is a public interest element in the finality of administrative decisions and the exercise of administrative functions. In my view it would not be in the public interest to undo what has been done, all of which obviously involved a huge effort by many public officials and by a number of experts in various fields. This much is apparent from the scoping report and the annexures thereto, which *inter alia* comprise the reports of the various experts.

I am furthermore of the view that considerations of pragmatism and practicality dictate against the setting aside of the second and third respondents' decisions.

In all the circumstances, and on the assumption made earlier that the decisions of the second and third respondents were administratively invalid, I would decline to set aside those decisions.

I turn to the question of costs. It was submitted on behalf of the first respondent that the applicant acted irresponsibly in continuing with the application for review after the dismissal of the urgent application. In this regard, I was referred to a statement in the applicant's founding affidavit where it dealt with the balance of convenience in the context of the urgent relief sought and where it was said that the main application would be significantly undermined if the development went ahead and that once the damage was done and the nature of the development area changed, the environmental concerns raised by the applicant in the review application and associated with the exploitation of land which was in an undisturbed state, would be rendered academic.

Whether that would have happened, would, of course, have depended on the extent of the construction which had taken place by the time that the review application was heard. I do not agree that the applicant acted irresponsibly in proceeding with the application. In my view the applicant acted reasonably in the present matter and I do not believe that the applicant should be penalised with a costs order.

In view of the aforegoing, I make the following order.

1 The application is dismissed.

2 No order is made as to costs.