THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Case No: 408/2012
Reportable

In the matter between:

MEC FOR ENVIRONMENTAL AFFAIRS AND DEVELOPMENT PLANNING **APPELLANT**

and

CLAIRISON'S CC **RESPONDENT**

Neutral citation: *MEC for Environmental Affairs and Development Planning v Clairison's CC* (408/2012) [2013] ZASCA 82 (31 May 2013)

Coram: Nugent, Ponnan and Tshiqi JJA and Willis and Swain AJJA

Heard: 16 May 2013

Delivered: 31 May 2013

Summary*:* **Administrative law – review – decision-maker required to take relevant considerations into account - weight to be attached to relevant consideration within discretion of decision-maker – perception of predisposition to a decision not in itself objectionable.**

ORDER

On appeal from: Western Cape High Court, Cape Town (Cloete AJ sitting as court of first instance):

The appeal is upheld with costs. The order of the court a quo is set aside and replaced with an order dismissing the application with costs. In both cases the costs are to include the costs of two counsel.

JUDGMENT

NUGENT JA AND SWAIN AJA (**PONNAN AND TSHIQI JJA AND WILLIS AJA** concurring):

[1] The respondent, Clairison's CC (Clairisons) a property developer, wishes to establish a retirement village consisting of 173 units, on a property described as portion 53 (a portion of portion 3) of the farm Ganse Vallei No 444 Plettenberg Bay (the property) situated within the jurisdictional area of the Bitou Municipality (the municipality) 4 km to the north east of the Plettenberg Bay central business district.

[2] In order to do so the respondent was obliged to apply to the appellant, the MEC for Environmental Affairs and Development Planning (the MEC) for:

2.1 the amendment of the designation of the property in the Knysna-Wilderness-Plettenberg Bay regional structure plan (the structure plan) from 'Agriculture and Forestry' to 'Township Development' in terms of s 4(7) of the Land Use Planning Ordinance 15 of 1985 (Cape) (*Lupo*); and for

2.2 environmental authorisation in terms of ss 21, 22 and 26 of the Environmental Conservation Act 73 of 1989 (ECA), because the

proposed development entailed a change of land use from agricultural use to another use.

[3] The application in terms of *Lupo* for the amendment of the designation of the property was successful before the predecessor of the present incumbent of the office of MEC. The application was granted despite a recommendation by the head of the department that it be refused.

[4] The recommendation by the head of the department was in accordance with the policy of the department that new, large residential developments not be allowed to the north of Plettenberg Bay. The present MEC maintains that it is a policy based on legitimate planning and environmental considerations, which in part is derived from the Western Cape Provincial Spatial Development Framework (WCPSDF). The aims of the WCPSDF, it is stated, include the restructuring of urban settlements to address apartheid spatial patterns and urban functional inefficiencies, and the protection of biodiversity and agricultural resources. The means by which the WCPSDF is said to achieve these aims includes restricting the outward growth of urban settlements until specified urban densities are achieved.

[5] Acting in accordance with this policy, the director of the department refused the application by Clairisons for environmental authorisation in terms of ss 21, 22 and 26 of the ECA. Clairisons thereupon appealed to the MEC in terms of s 35(1) of the ECA against the director's decision. The appeal was dismissed by the MEC. Clairisons then applied to the Western Cape High Court to review and set aside the decision by the MEC. The application succeeded before Cloete AJ and the MEC appeals with the leave of that court.

[6] The application succeeded in the court below on two broad grounds. First, it was held that the MEC had taken into account irrelevant considerations, and left out of account relevant considerations, when making his decision, which is a ground for review under s 6(2)(*e*)(iii) of the Promotion of Administrative Justice Act 3 of 2000 (PAJA). And secondly, the court below found that Clairisons had reasonable grounds for apprehending that the MEC was biased, another ground for review, under s 6(2)(*a*)(iii). We deal with each ground in turn.

The alleged failure to take account of relevant considerations.

[7] Leaving aside one matter that we come to presently, Clairisons alleges that the MEC ought to have taken account of, but failed to do so, three factors that are all related.

[8] First, it was alleged that he failed to take account of the fact that adjacent properties were already urban in character, which was in conformity with the development that was proposed.

[9] Secondly, it was alleged that he failed to take into account that the municipality had determined the urban edge for urban development, and that the proposal fell within that urban edge and was thus permissible.

[10] Thirdly, it alleged that the MEC failed to take account of the fact that his predecessor had allowed the proposed development when he approved the amendment to the structure plan.

[11] The three factors we have referred to are inter-related in that, taken together, and in summary, they were said by Clairisons to demonstrate that urban development had already occurred, and further development had been approved, in the area in which the proposed development was to be situated, and that the MEC failed to take account of that when refusing the application.

[12] To expand upon those factors, there is some factual controversy as to the nature of the development that existed on adjacent properties, but we have accepted for present purposes that it was essentially urban in nature. As to the second factor, an urban edge is a planning tool that serves as a guide in restricting the outward growth of urban settlements. There is a dispute as to whether the municipality had validly delineated its urban edge, and where the urban edge delineated by the municipality was situated, but that is of no moment for present purposes. It is sufficient to say that, when making his decision, the MEC regarded the urban edge to be the boundary to which urban development had spread, and not the edge that had allegedly been delineated by the municipality. On the third, the MEC's predecessor had indeed approved an amendment to the structure plan that would allow for the proposed

development, and other like amendments, but the MEC said that he disagreed with those approvals, and declined to follow them as a precedent.

[13] The allegation by Clairisons that the MEC failed to take account of those factors found favour with the court below. The views the learned judge expressed in relation to each of them overlap to an extent, which is to be expected because they are related.

[14] As to the first she said that:

'[t]he development trend in the area has for some years been away from purely agricultural and recreational use. The general principle of planning in the area is thus to accommodate expansion in that area. The approval of [Clairisons' application] would have been consistent with the pattern of development in recent years and would not have created a new node . . . . What [the MEC] did in effect was to disregard these adjacent approvals on the basis that in his view they should not have been granted. In so doing he misdirected himself by failing to take into account relevant considerations and by failing to apply his mind to the planning position in the area as reflected in the structure plan'.

[15] Dealing with the second factor she said:

'In my view it is . . . common cause that [Clairisons'] property falls within the Municipality's delineated wide urban edge . . . irrespective of whether the [MEC] regards that delineation as having been rationally and lawfully determined . . . he should have taken into account that development on properties surrounding that of [Clairisons] had, over the previous 6 years, proceeded in accordance with the wide urban edge as determined by the Municipality.. . . It was not enough for the [MEC] to simply ignore it; the factual position which pertained as a result should also have been considered and fairly weighed against all other factors in light of the history of development in the area'.

[16] With regard to the third she said that:

'[the MEC] appears to have approached the matter on the basis that he would not have granted these approvals – an entirely irrelevant consideration in the context of the ECA authorisation sought by the applicant. The [MEC] was faced with the consequences of a clear set of structure plan amendments in the area which he ignored.'

And

'[T]he [MEC's] views as to whether the applications should or should not have been granted by his predecessors are irrelevant. . . [The MEC] was obliged to consider the factual consequences [of the amendment to the structure plan] as evidenced by the land usage surrounding the applicant's property. He did not do so because he had already formed the view that the structure plan amendments should not have been granted in the first place and he would for that reason disregard their factual consequences. In doing so he failed to consider a relevant consideration and his decision thus falls to be reviewed.'

[17] The finding by the court below that the MEC failed to take account of those factors is incorrect on each count. On the contrary, if there is one thing that is clear from the evidence it is that the MEC pertinently took account of each of the factors – indeed, the application was refused precisely because he took them into account. The true complaint of Clairisons – endorsed by the court below – is instead that he attached no weight to one of the factors, and in the other cases he weighed them against granting the application, whereas Clairisons contends that they ought to have weighed in favour of granting it, which is something different.

[18] We think it apparent from the extracts from her judgment we have recited, and the judgment read as a whole, that the learned judge blurred the distinction between an appeal and a review. It bears repeating that a review is not concerned with the correctness of a decision made by a functionary, but with whether he performed the function with which he was entrusted. When the law entrusts a functionary with a discretion it means just that: the law gives recognition to the evaluation made by the functionary to whom the discretion is entrusted, and it is not open to a court to second-guess his evaluation. The role of a court is no more than to ensure that the decision-maker has performed the function with which he was entrusted. Clearly the court below, echoing what was said by Clairisons, was of the view that the factors we have referred to ought to have counted in favour of the application, whereas the MEC weighed them against it, but that is to question the correctness of the MEC's decision, and not whether he performed the function with which he was entrusted.

[19] The power of review is sourced today in the Constitution, and not the common law, but sound principles are not detracted from because they were

expressed in an earlier era. As was said in *Pharmaceutical Manufacturers of South Africa: In re Ex parte President of the Republic of South Africa* [1]

'That is not to say that the principles of common law have ceased to be material to the development of public law. These well-established principles will continue to inform the content of administrative law and other aspects of public law, and will contribute to their future development'.

[20] It has always been the law, and we see no reason to think that PAJA has altered the position that the weight or lack of it to be attached to the various considerations that go to making up a decision, is that of the decision-maker. As it was stated by Baxter:[2]

'The court will merely require the decision-maker to take the relevant considerations *into account*; it will not prescribe the *weight* that must be accorded to each consideration, for to do so could constitute a usurpation of the decision-maker's discretion.'

[21] That was expressed by this court as follows in *Durban Rent Board and Another v Edgemount Investments Ltd,*[3] in relation to the discretion of a rent board to determine a reasonable rent:

'In determining what is a reasonable rent it is entitled and ought to take into consideration all matters which a reasonable man would take into consideration in order to arrive at a fair and just decision in all the circumstances of the case …. How much weight a rent board will attach to particular factors or how far it will allow any particular factor to affect its eventual determination of a reasonable rent is a matter for it to decide in the exercise of the discretion entrusted to it and, so long as it acts *bona fide,* a Court of law cannot interfere'.

[22] What was said in *Durban Rent Board* is consistent with present constitutional principle and we find no need to re-formulate what was said pertinently on the issue that arises in this case. The law remains, as we see it, that when a functionary is entrusted with a discretion, the weight to be attached to particular factors, or how far a particular factor affects the eventual determination of the issue, is a matter for the functionary to decide, and as he

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[1] *Pharmaceutical Manufacturers of South Africa: In re Ex parte President of the Republic of South Africa* 2000 (2) SA 674 (CC) para 45.
[2] Lawrence Baxter *Administrative Law* 1ed (1984) at 505.
[3] *Durban Rent Board and Another v Edgemount Investments* Ltd 1946 AD 962 at 974, adopted in *Johannesburg City Council v The Administrator, Transvaal and Mayofis* 1971 (1) SA 87 (AD).

acts in good faith (and reasonably and rationally) a court of law cannot interfere. That seems to us to be but one manifestation of the broader principles explained – in a context that does not arise in this case[4] – in *Bel Porto School Governing Body v Premier, Western Cape*[5] and *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs.*[6]

[23] It is clear from the reasons given by the MEC that the factors on which he was taken to task were pertinently considered: they were the very justification he advanced for his decision. His and his department's view, in broad terms, was that the proposed development would contribute to what is colloquially called 'urban sprawl' – to which he and his department were opposed – that had already manifested itself in the surrounding area, and that the approvals of his predecessor, and the urban edge proposed by the municipality, threatened to compound. The case advanced by Clairisons was that the existing development, and the approvals of the former MEC, had set a precedent for urban development that the MEC ought to have adopted. That is no more than a difference of opinion. There has been no suggestion that the avoidance of urban sprawl was not a legitimate environmental concern upon which the MEC was entitled to found his decision on. Whichever opinion might be thought to be the correct one, the law entrusts the decision to the MEC. Once having correctly identified the question for decision and applied his mind to deciding it – both of which he clearly did – then it is the view of the MEC that is required by law to prevail.

[24] There is one further matter under this heading that we need to deal with. The MEC shared the opinion of his department that the proposed development was detrimental to the biodiversity of the area, and to an environmental corridor between two rivers. Expert opinion advanced by Clairisons challenged that opinion. On that controversy the court below said the following:

'Much of the information relied upon by the [MEC] seems to amount to academic statements about, and definitions of, the nature of critical biodiversity areas and

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[4] Bel Porto was concerned with the rationality, and Bato Star with the reasonableness, of executive decisions.
[5] 2002 (3) SA 265 (CC) para 45.
[6] 2004 (4) 490 (CC) esp paras 44 and 45.

corridors and very little is provided in the way of factual evidence under the guise of engaging with the critique provided by [Clairisons] specialist. As far as the functionality of the corridor between the rivers is concerned, it seems to me that this type of dispute cries out for independent specialist input (which it was open to the [MEC] to call for).. . . It is difficult to understand how the [MEC] could have made an informed decision merely by weighing up [Clairisons] input against the department's input and without at least having given serious consideration to further specialist advice. The inference is that he failed to place due weight on the necessity of making a properly informed decision about the impact of the proposed development on the natural environment and as a result the grounds relied upon by him were insubstantial. This also constitutes a ground for review.'

[25] Once again, it is clear from the evidence that the MEC was pertinently aware of the competing opinions of his department and that of the specialist, and preferred to adopt the view of his department. We think it is also safe to assume that he was well aware that he was entitled to take independent advice if he considered it prudent to do so. The extract from the judgment we have referred to reflects only that the court below was of the view that he ought to have sought such independent advice, but that was not what the learned judge was called upon to decide. Clearly the MEC took account of the opinion of the specialist. What occurred is only that he gave greater weight to the opinion of his department, which it was within his discretion to do.

[26] In our view there were no grounds for finding that the MEC failed to take account of relevant considerations when making his decision and the court below ought not to have set it aside on those grounds.

The alleged perception of bias.

[27] It was submitted that the MEC was perceived to be biased for various reasons. The first was that the department's director was the same official responsible for the preparation and submission of the report which recommended that Clairisons proposed structure plan amendment be refused. Because that recommendation was not followed by the previous MEC who granted the approval, the same director, so the argument went, when considering Clairisons application for environmental authorisation, could not

have approached it objectively and would have been influenced by his previous recommendation.

[28] Secondly, it was submitted that the appeal process, as conducted by the MEC, did not result in an independent review of the director's decision, because of the reliance by the MEC on the recommendations of officials in the department on the validity of the grounds of appeal. And thirdly, the MEC was perceived to be biased because he held the view that the structural plan should not have been granted by his predecessor.

[29] In our view the complaint that the MEC was reasonably perceived to be biased is misconceived. Clearly an administrative official, when making a decision, must not be partial towards one party or another, but there is no suggestion that that occurred in this case, nor even that there was a perception that that had occurred. The complaint was only that the MEC was perceived to be partial to refusing the application, which is not the same thing.

[30] Government functionaries are often called upon to make decisions in relation to matters that are the subject of pre-determined policies. As pointed out by Baxter:[7]

'[It] is inevitable that administrative officials would uphold the general policies of their department; in this broad sense it follows that they must be prejudiced against any individual who gets in their way. But this "departmental bias", as it has been labelled, is unavoidable and even desirable for good administration. It does not necessarily prevent the official concerned from being fair and objective in deciding particular cases.'

[31] Nor can there be any objection to the political head of a department adopting recommendations made by the departmental officials, no matter that their recommendations are emphatic. It is precisely to formulate and ensure adherence to policy that departmental officials are there. It must be borne in mind that an appeal in the present context is not a quasi-judicial adjudication. It

[7] Baxter, supra, at 567.

is a reconsideration by the political head of a department of a decision made by his officials. Baxter observes that:[8]

'Since the primary function of a minister is a political one, this form of appeal is obviously only appropriate where it is considered that policy and administrative considerations are paramount and that disputes involving such considerations require his personal settlement. The minister can hardly be expected to adopt a detached posture, acting as an independent arbitrator. If this is expected of him then he should not be bothered with such appeals since a lower administrative tribunal could do the job instead, leaving him free to devote his time to more important matters of policy.'

[32] If the MEC was predisposed to refusing the application because it was contrary to the policy of his department that is not objectionable 'bias'. A government functionary is perfectly entitled to refuse an application because it conflicts with pre-determined policy. No doubt when exercising a discretion on a matter that is governed by policy the functionary must bring an open mind to bear on the matter, but as this court said in *Kemp NO v Van Wyk*,[9] that is not the same as a mind that is untrammelled by existing principles or policy. It said further that the functionary concerned 'was entitled to evaluate the application in the light of the directorate's existing policy and, provided that he was independently satisfied that the policy was appropriate to the particular case, and did not consider it to be a rule to which he was bound, I do not think it can be said that he failed to exercise his discretion'.[10]

[33] There was no basis for finding that the MEC, or the officials who guided him, exhibited bias. In our view the decision ought not to have been set aside on either ground.

[34] Accordingly, the appeal is upheld with costs, including the costs of two counsel. The order of the court a quo is set aside and replaced with an order dismissing the application with costs. In both cases the costs are to include the costs of two counsel.

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[8] Baxter, supra, at 264.
[9] 2005 (6) SA 519 (SCA) para 1.
[10] Para 10.

R W NUGENT
JUDGE OF APPEAL

K G B SWAIN
ACTING JUDGE OF APPEAL

APPEARANCES:

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