OF INTEREST

IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, EAST LONDON CIRCUIT COURT)

CASE NO. 1217/2019

In the matter between:

BUFFALO CITY METROPOLITAN MUNICIPALITY Applicant

And

OWN HAVEN HOUSING ASSOCIATION NPC First Respondent

LORLES CC Second Respondent

JUDGMENT IN RESPECT OF
APPLICATION FOR LEAVE TO APPEAL

HARTLE J

[1] The applicant seeks leave to appeal against paragraphs 2, 3, 4 and 6 of my order handed down on 26 June 2023.

[2] In a notice dated 5 July 2023, the applicant raised several grounds for its entitlement for leave to appeal but ultimately only persisted with two main threads for its disagreement with my judgment and order. The first concern relates to my finding as to the adequacy or inadequacy of the required public participation by the applicant's Council that preceded its impugned policy making. The second aspect of concern relates to the supposed findings made by me in relation to the rationality or legality review insofar as it impacts upon the first respondent.

[3] With reference to the comprehensive submissions made by the parties in their heads of argument and in oral argument before me, I am not convinced that there are either reasonable prospects of success in the proposed appeal concerning the condensed grounds or that there is some other compelling reason why the appeal should be heard in these two remaining respects.[1]

[4] Concerning the legality of the public participation process, I have revised my judgment in which I exhaustively explained why I felt constrained to find as I did and I do not believe objectively that another court would reasonably arrive at a conclusion different to mine.

[1] See section 17 (1)(a) of the Superior Courts Act, No. 10 of 2013.

[5] Inasmuch as I was criticised for applying a reverse onus, I do not believe that there is any substance to the complaint. I properly found that the onus was indeed on the respondents to make their case in this respect and this they did with reference to the admissible evidence which, viewed from their perspective, supported the premise that there was simply an absence of any participatory democracy when it came to the substantial revision of the rates policy in the mandatory respects required.

[6] Concerning the complaint that I adopted the wrong approach or failed to properly apply the provisions of Rule 53, the applicant overlooks the respondents' unchallenged averment that it first embarked on an objective to obtain all the necessary material utilising the machinery of the Promotion of Access to Information Act.[2] Thereupon it availed itself of the additional procedure that avails itself at the behest of an applicant for review in the machinery of Rule 53. The respondents selected from both measures taken to get to the bottom of the question whether the applicant had complied with the public participation and consultative process required that which it considered relevant to the review. They also warned the applicant (following the approach adopted in *Venmop 275 (Pty) Ltd & Another v Cleverlad Projects (Pty) Ltd & Another*)[3] that if there was something which they had failed to include in the record which the applicant thought was relevant, such documents could be introduced into evidence as annexures to the answering affidavit. The respondents were further meticulous in their examination of everything disclosed by the applicant to satisfy their zeal to prove that the

[2] No. 2 of 2000
[3] 2016 (1) SA 78 (GJ) at [17].

municipality had not done right by them in complying with the requirements for public participation with particular relevance to the rates policy.

[7] Ironically the applicant did not take issue with my conclusion that neither party expected me to have regard to the several volumes constituting that which the respondents by necessary implication earmarked as not being of any relevance to the legality review yet it seeks to imply that there might be something still lurking therein that possibly negates the respondents' complaint that there was not an adequate public consultative process.

[8] A careful dispassionate appraisal of my judgment demonstrates to my mind that I correctly applied the law regarding the approach to be adopted in a Rule 53 scenario as well as the onus resting on the respondents. This led me to a comprehensive review of all the relevant evidence to properly determine the issues before me.

[9] The applicant would do well to consider the cautionary remarks of Leach JA in *Kalil v Managing Municipality*[4] that it is crucial in matters of public-interest litigation, where the legality of government officials' actions are at stake, that they should "*neither be coy*" nor "*play fast and loose with the truth*". On the contrary, as the Supreme Court of Appeal observed, it is the duty of such officials to take the court into their confidence and fully explain the facts so that an informed decision can so be taken in the interests of good governance.

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[4] 2014 (5) SA 123 (SCA) at [30]

[10] The applicant could not have been in any doubt what case it had to meet and answer to in such capacity, even if the onus was on the respondents to make out the case they sought to present. Certainly there was no suggestion of any untruths on the part of the applicant, but its recourse to the gap left by the omission of certain folders which it did not suggest were relevant after all, is somewhat mischievous.

[11] Regarding the second leg to the present application, I made it clear (in paragraph 125 of my judgment) that it was strictly unnecessary to deal with the issue of substantive rationality and that the remarks made in this regard, some antithetical even to submissions made on behalf of the respondents, was merely to be of assistance to the parties going forward. I made no "*findings*" binding on the Municipality.

[12] Having said that I am unpersuaded that there are prospects of success, it is so that I must still enquire into whether there is a compelling reason to entertain the appeal.

[13] Whilst the subject matter of the review implicated a constitutional issue, the legality enquiry (related to process) was essentially a once off historical introspection into a situation which pertained to policy making (in the narrow sense of the applicant's Council adopting a rates policy) in 2018. The force of the applicant's argument was furthermore focused on whether I correctly found on the evidence that the impugned resolution fell afoul of the peremptory requirements for public participation rather than on the remedy which I ordered in the peculiar circumstances of the matter. As I further indicated above, it was unnecessary to

have gone any further once I found that the applicant's Council's efforts had not passed constitutional muster, rendering the policy implicated thereby invalid.

[14] My judgement raises no questions in law or a discrete issue of public importance that will have an effect on future disputes.[5]

[15] The applicable law (catering for the interests of litigants in similar positions to the parties) on the subjects of both the requirements of Rule 53 and the nature and extent of the constitutional obligation on a municipality to encourage the involvement of local communities in matters of local government to which expression is given in local government legislation, is well versed and articulated in numerous judgments of the courts as I indicated in my judgment, and does not in my view therefore require anything to be rehashed or revisited.

[16] In all the circumstances I am not inclined to grant the applicant the leave sought.

[17] The order which I issue is as follows:

1. The application for leave to appeal is dismissed with costs.
2. The costs shall include the costs of two counsel, where applicable.

[5] *Caratco (Pty) Ltd v Independent Advisory (Pty)* Ltd 2020 (5) SA 35 (SCA) at [2].

B HARTLE
JUDGE OF THE HIGH COURT

DATE OF HEARING : 6 December 2023
DATE OF JUDGMENT : 2 April 2024

Appearances:

For the applicant: Mr. R Buchanan SC together with Mr. L X Mpiti instructed by Makhanya Attorneys, East London (ref. Mr. Makhanya).
For the respondents: Mr. E A S Ford SC together with Mr. J G Richards (now SC) instructed by Bax Kaplan Russell Inc., East London (ref. Mr. S Clarke).