CONSTITUTIONAL COURT OF SOUTH AFRICA

CCT Case 11/13
[2013] ZACC 30

In the matter between:

BRITANNIA BEACH ESTATE (PTY) LTD	First Applicant
BRITANNIA BAY DEVELOPERS (PTY) LTD	Second Applicant
SANDY POINT BEACH PROPERTIES (PTY) LTD	Third Applicant
WEST COAST MIRACLES (PTY) LTD	Fourth Applicant
and	
SALDANHA BAY MUNICIPALITY	Respondent

Heard on : 28 May 2013

Decided on : 5 September 2013

JUDGMENT

FRONEMAN J (Bosielo AJ, Jafta J, Khampepe J, Mhlantla AJ, Nkabinde J, Skweyiya J and Zondo J concurring):

Introduction

[1] The applicants are property developers on the west coast. During a period from April 2003 to August 2008 they made six applications (development applications) to the Saldanha Bay Municipality (Municipality) for the rezoning and subdivision of properties acquired by them. These applications were granted by the Municipality, subject to certain conditions for the payment of contributions in respect of the provision of services and amenities to the land. Although these contributions also relate to non-capital expenditure, they have been referred to by all as "capital contributions" and I will, for ease of reference, do the same.

[2] The applicants approached the Western Cape High Court, Cape Town (High Court) for declaratory orders that the tariff upon which the Municipality levied the capital contributions was, for various reasons, unlawful, and for an order directing the Municipality to account to them for overpayments allegedly made in respect of the capital contributions. They largely succeeded in the High Court but, on appeal to the Supreme Court of Appeal, the High Court orders were set aside. The applicants now seek leave to appeal to this Court, but only on the narrow basis that the Supreme Court of Appeal failed to deal with the constitutional issue relating to the Municipality's alleged duty to account for the alleged overpayments. They accept that the Supreme Court of Appeal's analysis of the legal basis upon which the capital contributions were levied is correct, and that their initial attack on the unlawfulness of the

determination of the tariff does not affect the validity of the conditions imposed in relation to the payment of the capital contributions.[1]

[3] In view of this, it is not necessary to traverse the factual and legal basis upon which the tariff was attacked in the High Court in particular detail. What needs to be determined is whether a material constitutional issue nevertheless remains and, if so, whether it is in the interests of justice for this Court to determine that issue.

[4] For the reasons that follow leave to appeal must be refused.

[5] I will first deal with condonation, then briefly with the factual and legal basis upon which the applicants approached the High Court, before summarising the legal basis of the Supreme Court of Appeal's rejection of that approach. Then I will examine what remains of the essential dispute between the parties in the light of the acceptance of the correctness of the Supreme Court of Appeal's findings. Finally, I will turn to whether a material constitutional issue still remains to be determined.

Condonation

[6] The applicants sought condonation for bringing the application for leave to appeal late, by 25 days. The explanation was that the delay occurred over the December holiday period and that the Municipality was not prejudiced by the delay.

[1] The applicants persisted in seeking declaratory relief, but now on the basis that it was justified in relation to future applications.

The explanation is satisfactory and there is no prejudice. Condonation must be granted.

High Court

[7] The applicants sought to impugn certain resolutions of the Municipal council upon which they alleged the tariff for the calculation of the capital contributions was based. The first resolution in this regard was taken in September 1997 (R55 tariff). It remained applicable until 1 July 2007. The first three development applications were granted during this period. While the remaining three applications were still pending the council of the Municipality resolved to amend the tariff as from 1 July 2007 (R35 tariff). The first of the remaining three applications was granted on 3 August 2007.

[8] Some uncertainty about the extent to which the R35 tariff was applicable led to the adoption of a resolution confirming that the R55 tariff would continue to apply to development applications approved before 1 July 2007. Another resolution (R43) then reconfirmed that the R35 tariff was applicable to all developments approved after 1 July 2007 and that a discount was applicable to developments approved prior to this date. The applicants objected to R43 and it was then revoked by the Municipality. Prior to its revocation the last two of the applicants' six development applications were approved. The capital contributions, imposed as conditions when the development proposals were granted, were thus to be calculated in accordance with

the R55 tariff for the first three applications and according to the R35 tariff for the last three.

[9] In the High Court the applicants contended that the revocation of R43 also implied that the R35 tariff was rescinded. This found favour with the High Court. It declared R43, read with the R35 tariff for the calculation of capital contributions set out in council resolutions, to be of no force and effect; ordered the Municipality to account to the applicants for capital contributions levied and paid in accordance with the impugned tariffs; and ordered the Municipality to pay the applicants' costs.

Supreme Court of Appeal

[10] In the Supreme Court of Appeal the attention turned from the lawfulness of the policies adopted by the Saldanha Bay Municipal Council (Municipal council) for the imposition of tariffs, to the lawfulness of the conditions imposed when the development applications were granted. The imposition of these conditions was done in accordance with the provisions of section 42 of Land Use Planning Ordinance (LUPO).[2] Section 42(3) of LUPO prescribes a strict procedure that must be adhered

[2] Land Use Planning Ordinance 15 of 1985 (Cape). Section 42 provides:

> "(1) When the Administrator 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.
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> (2) Such conditions may, having regard to—
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> (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
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> (b) the various rates and levies paid in the past or to be paid in the future by the owner of the land concerned,

to before any condition imposed in terms of section 42(1) can be amended. It was common cause that the applicants did not at any stage attempt to utilise the provisions of section 42(3) of LUPO to amend the conditions imposed when the six development applications were granted.

[11] The Supreme Court of Appeal found that this disposed of the matter:

> "The reasoning of the high court is reflected in the finding that the new tariff's only right of existence thus flowed from R43. This reasoning is flawed. The payment of contributions was an enforceable condition of each approval. That these conditions were validly imposed in terms of section 42 of LUPO is uncontested. The amount payable is determined with reference to a tariff. The tariff, with reference to R55 or R35, was set out in the approvals themselves and cannot owe its right of existence to anything else. The changes in the council's policy from time to time are for that reason irrelevant.
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> The conditions agreed to and set cannot be unilaterally amended by any of the parties. They remain binding unless set aside in review proceedings or otherwise. These

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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.

(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) 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.

(4) The director, where the Administrator may act under subsection (3), or the town clerk or secretary, where a council may so act, as the case may be, shall, if he is of the opinion that the waiver or amendment of conditions or the imposition of additional conditions under subsection (3) adversely affects the interest that any person has in land, advertise the proposed waiver or amendment of conditions or imposition of additional conditions."

> incorporate specific tariffs. It is common cause that the procedure prescribed in section 42(3) of LUPO was not followed. That is the end of the matter and the appeal must accordingly succeed."[3] (Footnotes omitted.)

This reasoning was based on two previous decisions of the Supreme Court of Appeal, *Municipality of Stellenbosch v Shelf-Line 104 (Pty) Ltd*[4] and *City of Cape Town v Helderberg Park Development (Pty) Ltd*.[5]

What remains?

[12] As stated above, the applicants now accept that the Supreme Court of Appeal's reasoning in relation to the lawfulness of the conditions imposing the capital contributions is correct. That is not an issue before us. They nevertheless maintain that they have paid the Municipality too much in respect of these contributions. It is on the basis of this overpayment that the applicants assert a constitutional duty on the part of the Municipality to account.

[13] What is thus left at this stage is a dispute about money: whether the applicants have overpaid the Municipality in respect of the validly imposed conditions requiring the payment of capital contributions. It is also, however, common cause that the applicants have instituted a separate action in the High Court for repayment of the amounts they allege they have overpaid.

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[3] *Saldanha Bay Municipality v Britannia Beach Estate (Pty) Ltd* [2012] ZASCA 206 at paras 20-1.

[4] [2011] ZASCA 190; 2012 (1) SA 599 (SCA) at paras 20-1 and 28.

[5] [2006] ZASCA 91; 2008 (6) SA 12 (SCA) at paras 7-11.

A constitutional duty to account?

[14] Despite the fact that what remains is also the subject-matter of a pending action in the High Court, the applicants maintain that they are entitled to an order that the Municipality account to them for the alleged overpayments. This independent right, they contend, accrues to them – and the corresponding obligation falls on the Municipality – by virtue of the provisions of section 195 of the Constitution. There are a number of reasons why this argument cannot succeed.

[15] One of the fundamental values of the Constitution is a multi-party system of democratic government to ensure accountability, responsiveness and openness.[6] In relevant part section 195 provides:

> "(1) Public administration must be governed by the democratic values and principles enshrined in the Constitution, including the following principles:
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> . . .
>
> (f) Public administration must be accountable;
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> (g) Transparency must be fostered by providing the public with timely, accessible and accurate information."

[16] This Court has on a number of occasions stated that although these values underlie our Constitution they do not give rise to independent rights outside those set out in the Bill of Rights. In *Chirwa*[7] the position was summarised thus:

> "Even if the applicant was permitted to bypass the specialised framework of the LRA in the attempt to challenge her dismissal, the reliance on section 195 is misplaced.

[6] Section 1(d) of the Constitution.

[7] *Chirwa v Transnet Limited and Others* [2007] ZACC 23; 2008 (4) SA 367 (CC); 2008 (3) BCLR 251 (CC).

This is illustrated by the reasoning in *Institute for Democracy in South Africa and Others v African National Congress and Others* (*IDASA*). The Court in that case relied on the decision in *Minister of Home Affairs v National Institute for Crime Prevention and the Reintegration of Offenders (NICRO) and Others*, where it was held:

> 'The values enunciated in section 1 of the Constitution are of fundamental importance. They inform and give substance to all the provisions of the Constitution. They do not, however, give rise to discrete and enforceable rights in themselves. This is clear not only from the language of section 1 itself, but also from the way the Constitution is structured and in particular the provisions of chapter 2 which contains the Bill of Rights.'

Consequently, the court in *IDASA* held that—

> '. . . the same considerations apply to the other sections of the Constitution . . . [including] 195(1). These sections all have reference to government and the duties of government, inter alia, to be accountable and transparent. . . . In any event, these sections do not confer upon the applicants any justiciable rights that they can exercise or protect by means of access to the respondents' donations records. The language and syntax of these provisions are not couched in the form of rights, especially when compared with the clear provisions of chapter 2. Reliance upon the sections in question for purposes of demonstrating a right is therefore inapposite.'

Therefore although section 195 of the Constitution provides valuable interpretive assistance it does not found a right to bring an action."[8] (Footnotes omitted.)

[17] Democratic accountability as a fundamental value of the Constitution does not therefore generally provide the basis for fashioning individual rights outside those specifically enumerated in the Constitution and other relevant legislation. In the

[8] Id at paras 74-6.

present case the so-called 'duty to account' does not fit comfortably with the constitutional demand of democratic accountability. There are other rights and remedies in the Constitution, legislation and court procedure that more than adequately ensure not only democratic accountability, but also that the applicants will not be prejudiced in their claim for the alleged overpayment of capital contributions.

[18] The applicants originally relied on the existence of a fiduciary relationship between themselves and the Municipality to justify the Municipality's 'duty to account'. The reference to a fiduciary relationship that brings with it a duty to account stems from the private law where in certain legal relationships – trusts[9] and partnerships[10] for example – the close relationship between persons in positions of trust gives rise to a legal obligation to account for moneys entrusted to them for the benefit of others. This is a far cry from constitutional democratic accountability. The purpose of an obligation to account in private legal relationships is to make known to beneficiaries what has happened to moneys in which they have a material interest.

[19] In the present case there are statutory provisions that oblige municipalities to account for the money they levy and spend,[11] as well as for the participation of the citizenry in the processes where policies determining rates, taxes and the like are determined.[12] These general provisions seek to give effect to the Constitution's

[9] *Administrators Estate Richards v Nichol and Another* 1999 (1) SA 551 (SCA) at 563.

[10] *Doyle and Another v Fleet Motors PE (Pty) Ltd* 1971 (3) SA 760 (AD) at 762F-763D.

[11] Public Finance Management Act 1 of 1999 and local government equivalents, for example, Local Government Municipal Systems Act 32 of 2000 (Systems Act).

[12] Id.

fundamental values of accountability, responsiveness and openness. The applicants have failed to locate their claim for a duty to account within any existing legislative framework.

[20] There are also more specific remedies available to the applicants to ensure that the information they seek is made available to them. Section 32(1)(a) of the Constitution[13] provides that everyone has the right of access to information held by the state and the Promotion of Access to Information Act[14] seeks to give expression to this fundamental right. Once litigation is instituted this right of access to information is regulated by the rules of court, to be applied flexibly and purposively to ensure the right of access to information.[15] The applicants failed to explain why they could not explore these options, which they should have done before attempting to assert an independent constitutional right. As members of a local community the applicants are required to pursue their remedies through mechanisms and in accordance with processes provided for in the Systems Act[16] and other applicable legislation.

[13] Section 32 provides:

> "(1) Everyone has the right of access to—
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> (a) any information held by the state; and
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> (b) any information that is held by another person and that is required for the exercise or protection of any rights.
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> (2) National legislation must be enacted to give effect to this right, and may provide for reasonable measures to alleviate the administrative and financial burden on the state."

[14] Promotion of Access to Information Act 2 of 2000.

[15] *PFE International Inc (BVI) and Others v Industrial Development Corporation of South Africa Ltd* [2012] ZACC 21; 2013 (1) SA 1 (CC); 2013 (1) BCLR 55 (CC) (*PFE International)* at para 21 and 31.

[16] Systems Act quoted above n 11.

[21] Lastly, on the facts the tariffs (R55 and R35) for the calculation of the capital contributions are contained in the conditions of approval of the six development applications. There is nothing that prevents the applicants from making those calculations and claiming any alleged overpayments from the Municipality. They have indeed done so.

Conclusion

[22] The scope for an independent constitutional right to require a 'duty to account' from the Municipality does not exist here. One of the requirements for leave to appeal to this Court is the reasonable prospect of success on a cognisable constitutional issue. That requirement has not been met. Even if there was some prospect of success it would not have been in the interests of justice to grant leave because on the facts there is nothing that prevents the applicants from claiming the alleged overpayments from the Municipality in the normal course. All the information they need is already available to them or can be obtained in normal civil proceedings.

Costs

[23] Despite the effort to clothe this matter in constitutional garb, this remains an essentially commercial matter. There is no reason why the applicants should not bear the costs.[17]

[17] *PFE International* above n 15 at para 33.

Order

[24] The following order is made:

1. Condonation is granted.

2. Leave to appeal is refused with costs including the costs of two counsel.

For the Applicant:	Advocate SP Rosenberg SC and Advocate PS Van Zyl instructed by Werksmans Inc.
For the Respondent:	Advocate JA Newdigate SC and Advocate ML Sher instructed by Swemmer & Levin Inc.