THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable
Case no: 320/12

In the matter between:

LAGOONBAY LIFESTYLE ESTATE (PTY) LTD **Appellant**

and

THE MINISTER FOR LOCAL GOVERNMENT, ENVIRONMENTAL AFFAIRS AND DEVELOPMENT PLANNING OF THE WESTERN CAPE **First Respondent**

THE GEORGE MUNICIPALITY **Second Respondent**

CAPE WINDLASS ENVIRONMENTAL ACTION GROUP AND 24 OTHERS **Third Respondent**

Neutral citation: *Lagoonbay Lifestyle Estate (Pty) Ltd v The Minister for Local Government, Environmental Affairs and Development Planning of the Western Cape & others* (320/12) [2013] ZASCA 13 (15 March 2013)

Bench: **NUGENT, PONNAN, TSHIQI and MAJIEDT JJA and SALDULKER AJA**

Heard: **25 FEBRUARY 2013**

Delivered: **15 MARCH 2013**

Summary: **Land use – regulation of - regional structure plan and zoning and subdivision – applications to amend.**

ORDER

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

1. The appeal is upheld with costs, such costs to include those consequent upon the employment of two counsel to be paid jointly and severally by the respondents.

2. The order of the court below dismissing the application with costs is set aside and in its stead is substituted the following:

‘(a) It is declared that the purported decision by the first respondent dated 28 April 2011 refusing the applicant's application for rezoning and subdivision in respect of the proposed Lagoonbay development is unlawful and is accordingly set aside.

(b) It is declared that the second respondent is the competent authority to consider and determine the applicant's application for rezoning and subdivision in respect of the proposed Lagoonbay development and its decision to approve that application on 17 July 2010 is confirmed.

(c) The applicant’s application for the amendment of the George and Environs Urban Structure Plan from agriculture/forestry to township development in respect of the farm Hoogekraal 238 is remitted to the first respondent for reconsideration.

(d) The respondents are ordered to pay the costs of the application jointly and severally such costs to include those of two counsel.'

JUDGMENT

PONNAN JA (NUGENT, PONNAN, TSHIQI and MAJIEDT JJA and SALDULKER AJA concurring):

[1] At the heart of the dispute in this matter is a proposed development on the farm Hoogekraal 238, which is situated within the George Municipality in the Southern Cape. The development, which is being promoted by the appellant, the Lagoonbay Lifestyle Estate (Pty) Ltd (Lagoonbay), envisages a gated community spanning some 655 hectares. It includes: two 18-hole golf courses; 895 single residential houses; 320 single and fractional title lodges; 150 single and fractional title apartments; a hotel, wellness centre, spa and clubhouse precinct; a commercial area; conference centre and private nature reserve. It is by all accounts a fairly ambitious and expensive project - R5 billion is its projected cost.

[2] Given its vast scale as also the fact that the land on which the proposed development is to be undertaken is zoned 'agriculture/forestry', Lagoonbay had to secure approval for the project in four different phases. The first related to an amendment of the George and Environs Urban Structure Plan (1982) (the structure plan) in terms of s 4(7) of the Land Use and Planning Ordinance 15 of 1985 (LUPO). The second - to an environmental impact assessment process (EIA) in terms of the Environment Conservation Act 73 of 1989 (ECA) and the National Environmental Management Act 107 of 1998 (NEMA). The third - to the rezoning and subdivision of the

property in terms of ss 16(1) and 25(1) of LUPO. And, the fourth and final phase - to the approval of building plans under the National Building Regulations and Building Standards Act 103 of 1977. For the purposes of this appeal only the first and third phases are relevant.

[3] On 17 July 2007 and in response to an application by Lagoonbay for an amendment to the structure plan the then Minister for Local Government, Environmental Affairs and Development Planning of the Western Cape (the Minister), Ms Tasneem Essop, wrote to the municipal manager of the George Municipality:

'1. The Competent Authority for the administration of [LUPO] has decided that the application for the amendment of the Urban Structure Plan, from "Agriculture / Forestry" to "Township Development", on the combined properties known as Hoogekraal 238 in order to allow for a development be approved in terms of section 4(7) [LUPO] subject to the following conditions:

1.1 The applicant must investigate the viability of alternative land-uses which should take into account a triple-bottom line approach, i.e. a principle that must be considered in a balanced manner and within a regional context.

1.2 The current development proposal as it stands should not be regarded as approved. The details of a possible development alternative on the land in question as well as the detail and extent should be resolved during the integrated environment process and planning processes.

1.3 The associated future zoning application in respect of the land concerned shall be subject to approval by the Provincial Government as the location and impact of the proposed development constitutes "Regional and Provincial Planning."'.

[4] On 14 June 2010 the Council of the George Municipality adopted the following resolution:

'*"That the rezoning and subdivision of portion of Hoogekraal no. 238, George (Lagoon Bay Lifestyle Estate) be approved subject to the conclusion of a detailed services agreement and as per the conditions laid down by the administration."*

. . .

In terms of condition 1.3 of the letter of approval dated 17 July 2007 regarding the amendment of the Regional Structure Plan received from the Department of Environmental Affairs and

Development Planning, the rezoning application in respect of the land concerned is subject to approval by the Provincial Government.'

[5] That decision was communicated to the current Minister, Mr Anton Bredell, who after having considered the matter, wrote to Lagoonbay on 28 April 2011:

'1. Your application dated 4 August 2009, referred to me (in terms of condition 1.3 of the approval of the George and Environs Urban Structure Plan, from "Agriculture/Forestry" to "Township Development", dated 17 July 2007), by the George Municipality on 14 July 2010, refers.

2. I, as the Competent authority for the administration of [LUPO], have decided that the applications for:

2.1 the subdivision of Portions . . . of the Farm Hoogekraal No. 238, George, **be refused**, in terms of section 25 of [LUPO];

2.2 the rezoning of the consolidated project site consisting of Portions . . . of Hoogekraal . . . George, from "Agricultural Zone 1" to "Subdivisional Area" to allow the following land uses:

. . .

be refused, in terms of section 16 of [LUPO]; and

2.3 the subdivision of the consolidated project site into . . . **be refused**, in terms of section 25 of [LUPO].'

[6] Aggrieved by that decision of the Minister, Lagoonbay launched an application in the Cape High Court. It cited the Minister as the first respondent, the George Municipality as the second and the Cape Windlass Environmental Action Group, an environmental organisation committed to the protection of the environmental integrity of the Garden Route (also known as the Cape Windlass) and the rural character of the high plateau between George and Mossel Bay, as the third. To the extent here relevant the Notice of Motion read:

'3. It is declared that the decision by the First Respondent dated 28 April 2011, in terms of which Applicant's application for the rezoning and subdivision relating to the proposed Lagoon Bay development, was refused, is constitutionally unlawful and a nullity;

. . .

5. It is declared that the decision taken by the Second Respondent on 17 July 2010, in terms of which the Applicant's application for the rezoning and subdivision in respect of the proposed Lagoon Bay development, was approved, was a decision taken by the correct designated functionary and constitutes the required approval under the Land Use Planning Ordinance, 15 of 1985, as read with the Constitution.'

That application failed before Griesel J, who dismissed it with costs including those of two counsel, but granted leave to Lagoonbay to appeal to this court.

[7] As Nugent JA observed in *Johannesburg Municipality v Gauteng Development Tribunal & Others* 2010 (2) SA 554 (SCA) para 15: 'The Constitution establishes government at three levels. At national level, legislative authority vests in Parliament and executive authority vests in the President (who exercises it together with other members of the Cabinet). At provincial level, legislative authority vests in the provincial legislatures and executive authority vests in the provincial Premiers (who exercise that authority together with other members of the executive councils). At local level, government comprises municipalities, which must be established for the whole of the territory of the Republic, and the legislative and executive authority of a municipality vests in its municipal council.'

[8] What occupies our attention in this case is the interrelationship between the second and third of those three spheres of government. South Africa consists of wall-to-wall municipalities. Municipalities make up regions. And regions, in turn, constitute provinces. A use right in relation to land is a right to utilise that land in accordance with a category of directions setting out the purpose for which the land may be used. The authority to regulate the use of land within a municipal area is conferred upon a municipality, whilst the authority to regulate the use of land within a particular region is a provincial competence. Different considerations will obviously weigh with each in the exercise of those powers. Decisions as to the uses that a municipality will allow will

necessarily be influenced by local considerations including its capacity to provide the necessary infrastructure and services within the constraints of its budget (*Johannesburg Municipality* para 9). Regional planning, on the other hand, is informed by broader interests and objectives. In terms of LUPO, the principal tools for the regulation of land use is through the introduction and enforcement of structure plans at a regional level and zoning schemes at a municipal level. The general purpose of a structure plan is to lay down guidelines for the future spatial development of the area to which it relates in such a way as will most effectively promote the order of the area and the general welfare of the community concerned (s 5). And the general purpose of a zoning scheme is to determine use rights and to provide for control over use rights and over the utilisation of the land in the area of jurisdiction of a local authority (s 11). Thus while a comprehensive land-use regime calls for integrated and coordinated interaction on the part of provincial and municipal government, it goes without saying that the one may not usurp the powers of the other.

[9] Here there is no attack on the structure plan. Nor on the Minister's powers to amend it. Lagoonbay's case is that the Minister's decision constituted a final approval of its application to amend the structure plan. I cannot agree. It seems to me that had the Minister not been satisfied with Lagoonbay's application, it would have been open to her to have refused the amendment. Instead she chose to defer her decision. I cannot comprehend why she was not entitled to say: 'I will not amend the structure plan until I know exactly what is envisaged', or 'I will let you have a provisional approval subject to the relevant officials in my department being satisfied as to what the final development will look like'. For, I daresay, she could hardly have approved the amendment whilst being indifferent to what the development would in due course look like. The logical corollary of that is that she reserved for herself the right to say no after she had been apprised of the detail. It is thus plain that, properly construed, what the Minister did, did not amount to an unconditional approval of Lagoonbay's application.

[10] The Minister's approval was subject to what I, for convenience, shall refer to as three conditions. Those are set out in paragraphs 1.1 to 1.3 of her letter of 17 July 2007

to the George Municipality. Only the third, which provides 'the associated future zoning application in respect of the land concerned shall be subject to approval by the Provincial Government . . .', merits consideration. Zoning, as I have endeavoured to illustrate, was a municipal competence. The rezoning application was thus a matter for the George Municipality, not provincial government. It follows that the Minister usurped for herself and her departmental officials a power that had been reserved for the George Municipality. Accordingly, the condition upon which the Minister's approval was dependent was incapable of fulfilment. And, in consequence, her final decision, which had been deferred, has become impossible of performance. It follows that the structure plan remains unamended and the application for its amendment falls to be considered afresh by the provincial authorities. The upshot of all of this is that the development cannot go ahead until such time as the Minister approves the application to amend the structure plan.

[11] That leaves the rezoning application: The George Municipality resolved to approve Lagoonbay's rezoning and subdivision application. That decision has not been assailed. The municipality thereafter and in the erroneous belief that that application was subject to approval by the provincial government as per condition 1.3 of the Minister's letter of approval, referred it to the present incumbent of that office, Mr Bredell, who, without an appreciation that his predecessor had misconceived her powers, proceeded to deal with the matter. That he lacked the authority to do, for it was a matter that was reserved for the administration of the municipality (*Johannesburg Municipality* para 30). It must follow that his decision in that regard cannot stand and it accordingly falls to be set aside.

[12] In the result the appeal succeeds and it is upheld with costs, such costs to include those consequent upon the employment of two counsel to be paid jointly and severally by the respondents. The order of the court below dismissing the application is set aside and in its stead is substituted the following:

‘(a) It is declared that the purported decision by the first respondent dated 28 April 2011 refusing the applicant's application for rezoning and subdivision in respect of the proposed Lagoonbay development is unlawful and is accordingly set aside.

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(d) The respondents are ordered to pay the costs of the application jointly and severally such costs to include those of two counsel.’

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V M PONNAN
JUDGE OF APPEAL

APPEARANCES:

For Appellant:	M C Maritz (with him H J de Waal) Instructed by: Werksmans Attorneys, Cape Townd Phatsoane Henney Attorneys, Bloemfontein
For First Respondent:	S Rosenberg SC (with him D Borgstrom) Instructed by: The State Attorney, Cape Town The State Attorney, Bloemfontein
For Third Respondent:	I D Potgieter (with him E v d Horst (Ms) Instructed by: Chennels Albertyn, Rondebosch Honey Attorneys Bloemfontein