IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

CASE NO: 796/11

Reportable

In the matter between:

SALDANHA BAY MUNICIPALITY **APPELLANT**

and

BRITANNIA BEACH ESTATE (PTY) LTD **FIRST RESPONDENT**

BRITANNIA BAY DEVELOPERS (PTY) LTD **SECOND RESPONDENT**

SANDY POINT BEACH PROPERTIES (PTY) LTD **THIRD RESPONDENT**

WEST COAST MIRACLES (PTY) LTD **FOURTH RESPONDENT**

Neutral Citation: *Saldanha Bay Municipality v Britannia Beach Estate (Pty) Ltd* (796/11) [2012] ZASCA 206 (30 November 2012)

Coram: CLOETE and TSHIQI JJA and ERASMUS, SWAIN and MBHA AJJA

Heard: **20 November 2012**

Delivered: **30 November 2012**

Summary: Municipal law – local government – the enforceability of conditions in respect of 'capital contributions' imposed in terms of s 42 of the Land Use Planning Ordinance 15 of 1985 and the various tariffs underlying such conditions.

ORDER

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

1 The appeal is upheld with costs, including the costs of two counsel.

2 The order of the court a quo is set aside and substituted with the following:
'The application is dismissed with costs.'

JUDGMENT

ERASMUS AJA (CLOETE and TSHIQI JJA and SWAIN and MBHA AJJA concurring):

[1] This appeal arises from an order of the Western Cape High Court, Cape Town, declaring the tariff for the calculation of bulk infrastructure development contribution levies, set out in resolutions of the appellant's council, to be of no force and effect; ordering the appellant to account to the respondents in respect of moneys levied by the appellant and paid by the respondents as contribution levies calculated in accordance with the impugned tariff; and ordering the appellant to pay the respondents' costs. The appeal is with leave of this court, the high court having dismissed the appellant's application for leave to appeal.

[2] The appellant is a municipality established in terms of the Local Government: Municipal Structures Act 117 of 1998. Its area of jurisdiction extends over a number of sea-side towns on the west coast, Western Cape.

The respondents are related companies and are all property developers in the jurisdiction of the appellant.

[3] Property developers in the Western Cape province regularly require the rezoning and sub-division of properties acquired by them, and make application to the relevant local authority for such rezoning and sub-division in terms of ss 16 and 25 of the Land Use Planning Ordinance 15 of 1985 (Cape) (LUPO). It has been held that the granting of approvals of this nature impose a financial burden on local authorities.[1] To alleviate this burden s 42 of LUPO provides that when granting applications of this nature, the council of a municipality may impose conditions '[it] may think fit'.

[4] Sections 42(1) and (2) of LUPO provide as follows:

'42(1) When the Administrator or a council grants authorization, 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.

(2) Such conditions may, having regard to-

(a) the community needs and public expenditure which in his or its opinion may arise from the authorization, exemption, application or appeal concerned and the public expenditure incurred in the past which in his or its opinion facilitates the said authorization, exemption, application or appeal; and

(b) the various rates and levies paid in the past or to be paid in the future by the owner of the land concerned,

include conditions in relation to the cession of land or the payment of money which is directly related to requirements resulting from the said authorization, exemption, application or appeal in respect of the provision of necessary services or amenities to the land concerned.'

[5] Section 42(3) of LUPO prescribes a strict procedure to which there must be adherence before any condition imposed in terms of 42(1) can be amended.[2] The relevant part of that section reads as follows:

---

[1]See *Permanent Estate and Finance Co Ltd v Johannesburg City Council* 1952 (4) SA 249 (W) at 258A–F, recently applied by this court in *Municipality of Stellenbosch v Shelf-line 104 (Pty) Ltd* 2012 (1) SA 599 (SCA) para 28.

'Subject to the provisions of the Removal of Restrictions Act, 1967 (Act 84 of 1967), . . . a council, . . . may, in relation to a condition imposed under subsection (1), after consideration of objections received in consequence of an advertisement in term of subsection (4) and after consultation with the owner of the land concerned . . .

(a) . . . 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.'

[6] The tariff for the calculation of capital contributions, ie the sums of money payable under conditions imposed in terms of s 42 of LUPO, is determined by the council by resolution. On 23 September 1997, the council of the appellant's predecessor determined the tariff by way of resolution R55/9–97 (R55).

[7] Resolution 55 reads as follows:

'FINANSIES : KAPITAALBYDRAES : AANPASSING : BELEID VIR BEREKENING VAN BYDRAES VIR INSTALLERING VAN INGENIEURS DIENSTE TYDENS AANSOEK OM DORPSTIGTING, HERSONERING EN ONDERVERDELING

(Verslag van die stadsingeneur) (6/6/2/1; 6/6/2/2; 6/6/2/4)

BESLUIT

(i) . . . ;

(ii) dat die beleid vir die berekening van bydraes vir die installering van ingenieursdienste tydens aansoek om dorpstigting, hersonering en onderverdeling soos vervat in bylae "A" as die raad se beleid met ingang 1 Oktober 1997 aanvaar word;

(iii) . . . ;

(iv) dat hierdie tariewe elke jaar op 1 Augustus, met die indeks van siviele ingenieurswerke, soos op 31 Mei, eskaleer . . . .'

[2]See, in this regard, *Municipality of Stellenbosch v Shelf-Line 104 (Pty) Ltd* (supra) paras 31-33.

[8] This was the tariff applicable at the time the respondents lodged the six applications relevant to this matter. The approvals for the first three applications were granted prior to 1 July 2007, when the tariff in resolution R55 was still applicable. These approvals were granted on 29 April 2003, 29 July 2005 and 5 May 2006 respectively. Payment of capital contributions calculated in terms of this tariff was made a condition of all the approvals, which conditions were accepted by the respondents. The conditions read:

'(q) dat kapitaalbydraes per erf/eenheid plus BTW vir water, riool en paaie, ingevolge raadsbesluit 55/9-97 van 23 September 1997, betaalbaar is by die indiening van bouplanne of by aansoek vir uitklaring welke ookal die vroegste is,

[Hierdie kapitaalbydraes eskaleer jaarliks op 1 Augustus ooreenkomstig die indeks op Siviele Dienste (Projekte) soos op 31 Mei]

. . .

U word gewys op u reg tot appèl, ingevolgde Artikel 44(1) van die Ordonnansie op Grondgebruikbeplanning, Nr 15 van 1985, saamgelees met Regulasies 17 tot 25 uitgevaardig ingevolge Artikel 47(1) van genoemde Ordonnansie, en dat welke appèl binne dertig (30) dae na datum van registrasie van hierdie skrywe, by beide die Premier per adres Die Direkteur, Departement Omgewingsake en Ontwikkelingsbeplanning, Privaatsak X9086, Kaapstad, 8000 en die Munisipale Bestuurder, Munisipaliteit Saldanhabaai, Privaatsak X12, Vredenburg, 7380, moet indien.'

Both the local authority and the relevant applicant is bound to comply with the conditions offered and accepted.[3]

[9] After the approval of the first three applications and whilst the remaining applications were pending, the council adopted resolution R35/6-07 (R35) on 26 June 2007. Resolution 35 reads as follows:

'FINANSIES : KAPITAALBYDRAES : AANPASSING : BELEID VIR BEREKENING VAN BYDRAES VIR INSTALLERING VAN INGENIEURSDIENSTE TYDENS AANSOEK OM DORPSTIGTING, HERSONERING EN ONDERVERDELING

FINANCES : CAPITAL BUDGET : ADJUSTMENT : POLICY FOR CALCULATION OF CONTRIBUTIONS FOR INSTALLATION OF ENGINEER'S SERVICES DURING APPLICATION FOR TOWN ESTABLISHMENT, REZONING ANS SUB-DIVISION

[3] *Municipality of Stellenbosch* (supra) paras 21 and 31, *Estate Breet v Perry Urban-Areas Health Board* 1955 (3) SA 525(A) at 531C–D.

(Verslag van die Munisipale Ingenieur : Siviele Dienste)

(6/6/2/1; 6/6/2/2, 6/6/2/4)

BESLUIT / *RESOLVED*

[i] . . . ;

[ii] dat die raad se beleid gewysig word om ook kapitaalbydraes vir die hantering van vaste afval in te sluit;

[iii] dat die kapitaal bydrae soos vervat in Bylaes “A” en “B” van die verslag van toepassing sal wees vanaf 1 Julie 2007;

[iv] dat die kapitaal bydrae elke jaar op 1 Julie eskaleer.

[v] dat die raad se kapitaalbydraesbeleid in ‘n omvattende dokument vervat word.’ (My underlining.)

[10] It is therefore clear that the tariff in terms of R35 was to come into effect with effect from 1 July 2007. On 12 July 2007, the appellant published a notice relating to the council’s decision in respect of R35, which notice, it was stated, was given in terms of the provisions of s 75A(3) of the Local Government: Municipal Systems Act 32 of 2000 (the Systems Act). The notice stated that objections to the resolution should be directed to the appellant’s then municipal manager. The municipal manager received two objections. However, neither was an appeal in terms of the Systems Act nor was any review in respect of the resolution launched.

[11] On 3 August 2007 the first of the last three applications at issue was approved. One of the conditions related to payment of capital contributions calculated in terms of the tariff in R35. It further included the following paragraphs:

‘. . . that the applicant confirm in writing that he accepts the conditions of approval and if not, that the prescribed procedure be followed in order to appeal against the conditions.

Please note that although it has been resolved to approve the application, you and the objectors have the right to appeal against the conditions of approval to the Municipal Manager of Saldanha Bay Municipality in terms of Section 62 of the Municipal Systems Act No 32 of 2000.

If an appeal is lodged the decision of the Mayoral Committee, is suspended until the outcome of the appeal process in terms of the Municipal Systems Act No 32 of 2000, where upon the right to appeal against the decision of the Local Authority to the Premier of the Western Cape in terms of Section 44(1)*(a)* of the Land Use Planning Ordinance, No 15 of 1985 and paragraph 22 of the Regulations set out in Provincial Notice PN1050/1988, will be given.

Should you wish to exercise your right of appeal, the following procedures should be adhered to (failure to adhere to the below mentioned procedures may render an appeal invalid)

- the appeal must be in writing,
- the appeal in terms of the Municipal Systems Act No 32 of 2000 must be addressed to : **The Municipal Manager, Private Bag X12, Vredenburg, 7380,** by registered post,
- the appeal in terms of Section 44(1)*(a)* of the Land Use Planning Ordinance, No 15 of 1985 should be addressed to : the **Department of Environmental Affairs and Development Planning, Private Bag X9086, Cape Town, 8000** by registered post**, a copy of which must be submitted to this Council at the above mentioned address**, within the mentioned period.
- the appeal must be accompanied by all relevant documentation,
- the appeal must set out the grounds on which it is based;
- the right of appeal must be lodged **within 21 days** of the date of registration of this letter. Council will regard your acting on the right of appeal to be the date on which your appeal is received by the administrative offices of Council.'

[12] In July 2007 the municipal manager reported to the council that, in his view, it was unclear whether the new tariff provided for in R35 was applicable to all approvals, including those granted prior to its adoption. Resolution 50/8-07 was then adopted whereby it was confirmed that R55 applied to all applications approved before 1 July 2007 (the date from which R35 came into effect). This ultimately led to the adoption of resolution R43/12-07 the relevant part of which provides:

'FINANCES: CAPITAL CONTRIBUTIONS : POLICY FOR CALCULATION OF CONTRIBUTIONS FOR THE INSTALLATION OF ENGINEERING SERVICES DURING APPLICATION FOR TOWN ESTABLISHMENT, REZONING AND SUBDIVISION

(Report by the Municipal Engineer : Civil Services) (5/6/1/R)

RESOLVED

'. . .

(iv) that the capital contributions, contained as Annexure "B" and "C" to the report, with the inclusion of solid waste, as calculated and submitted to Council per item R35/6-07 dated 26 June 2007 be reconfirmed to be applicable on all developments approved as from 1 July 2007

. . .

[vi] that a discount of 25 % on the tariffs contained in Annexure "B" and "C" to the report, rounded off to nearest R10, be made applicable on all developments approved prior to 1 July 2007, which discount will be terminated as from 1 July 2008;

. . . '

[13] The respondents objected to resolution R43. The parties exchanged correspondence with a view to settling the matter, which proved unfruitful. The respondents then instituted action in the Western Cape High Court to review and set aside the council's decision relating to R43. The appellant initially opposed the application but later abandoned its opposition and, by way of resolution R105/8-07, resolved to withdraw R43 and then, by resolution R107/3-10, resolved to adopt an interim policy on development contributions.

[14] Before the revocation of R43 and the interim policy was introduced, the last two of the six applications were approved with conditions similar to the application approved on 3 August 2007 that referred to R35. No appeal, either in terms of LUPO or the Systems Act, was lodged and the respondents accepted the conditions.

[15] Resolution 105 to which I have already referred was adopted on the 2 February 2010. Further correspondence followed between the parties until 2 July 2010, when the respondents launched the application in the high court.

[16] To sum up:
Three applications were approved before 1 July 2007,incorporating obligations to pay capital contributions in accordance with R55. Three applications were approved thereafter incorporating obligations to pay capital contributions in accordance with R35. In all six cases the conditions were imposed in terms of s 42 of LUPO and accepted by the applicants.

[17] The court below found that there had been an implied revocation of the tariff set out in R35. It therefore held that 'the new tariff [was] . . . of no force and effect'. I pause to note that the respondents also sought, in the alternative, relief reviewing and setting aside R35, which the court below found unnecessary to deal with in the light of its findings in respect of R43 and the implied revocation of R35. Furthermore, the respondents claimed that by the unlawful levying of the capital contributions in terms of resolution 35 they had overpaid the appellant and were therefore entitled to an accounting in respect of the overpayments made. Based on a 'fiduciary relationship' between the parties the court below ordered the appellant to account to the respondents in respect of those overpayments.

[18] The appellant in this court argued that there was no basis for the court a quo to make any order in respect of R43 as it was rescinded by the appellant council on 2 February 2010 by R105. The appellant further argued – and this is the crux of its case - that the court a quo failed to draw a clear distinction between, on the one hand, the adoption of a policy reflecting a tariff to be applied to conditions imposed in terms of s 42 of LUPO, and on the other, the actual imposition of the conditions under LUPO. Lastly, the appellant argued that there is no factual or legal basis for an order that the appellant account to the respondents in respect of sums allegedly 'unlawfully levied by the appellant' and 'overpaid' by the respondents as capital contributions. In any event, the appellant argued, the application in the court a quo should have been refused on the basis of the respondents' unreasonable

delay, having regard to the prejudice suffered by the appellant as a result thereof.

[19] The main issue on appeal is whether the court a quo could grant the relief it did to the respondents on the basis that the council impliedly revoked resolution R35 and the tariff set out therein when it revoked resolution R43 and, in particular, whether the appellant was entitled to enforce conditions relating to payment of capital contributions calculated in terms of that tariff.

[20] 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 s 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.

[21] 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.[4] These incorporate specific tariffs. It is common cause that the procedure prescribed in s 42(3) of LUPO was not followed. That is the end of the matter and the appeal must accordingly succeed.

[22] The last issue concerns whether the appellant should be ordered to account to the respondents. In view of the conclusions that I have reached, it is not necessary for me to deal with this question. I would nevertheless say this. The respondents did not allege that there was any contractual or statutory obligation on the appellant to account[5] to them. The court below ordered the appellant to 'account' to the respondents on the basis of the

See, in this regard, *Municipality of Stellenbosch v Shelf-Line 104 (Pty) Ltd* (supra) paras 20-22; para 28.

[4]See, in this regard, *City of Cape Town v Helderberg Park Development (Pty) Ltd* 2008 (6) SA 12 (SCA) paras 7-11.

'fiduciary relationship' between the parties. It relied on *Kempton Park/Tembisa Metropolitan Substructure v Kelder* 2000 (2) SA 980 (SCA) in doing so. That case is no authority for the propostion that a fiduciary duty exists between a local authority and a property developer obliging the former to account to the later for overpayments allegedly made. As this court said in *Kempton Park/Thembisa Metropolitan Substructure v Kelder:*

'. . . That there is in a broad sense a fiduciary relationship between the council and its ratepayers is plainly correct As Feetham AJA explained in *Sinovich v Hercules Municipal Council* 1946 AD 783 at 820

"(i)t may, I think, be safely affirmed that the main object of establishing municipal councils and similar bodies for purposes of municipal government, as understood and carried on in the Union of South Africa . . ., is to enable representatives of the inhabitants of given areas to administer, subject to some degree of control by a central authority, the local affairs of those areas in the general interest of their respective communities; and, in order to make such administration adequate and effective, it has now become a common practice to give to each municipal council wide powers to decide according to its discretion, subject to certain checks and safeguards, what measures will or will not serve 'a useful civic or municipal purpose' in its own area".

That local government should be representative of the inhabitants of its area of jurisdiction and that its actions should be open and transparent can certainly not be doubted. No one would, in this day and age, question these propositions. But I do not subscribe to the attribution to the council of private law duties derived from the law of trusts. The council, as has been stated, owes its existence to the provisions of the Local Government Transition Act 209 of 1993 and the proclamations made in terms thereof. Its powers and duties are conferred by the Constitution, by other statutes and the relevant principles of public and administrative law. To impose upon it additional duties in accordance with the principles of private law seems to me to negate its function as an organ of State and a branch of government.'

[23] For these reasons I am of the view that the appeal must be upheld. The parties are in agreement that costs should include the costs of two counsel.

---

[5] See *ABSA Bank Bpk v Janse van Rensburg* 2002 (3) SA 701 (SCA) para 15*; Rectifier and Communication Systems (Pty) Ltd v Harrison & others* 1981 (2) SA 283 (C) at 289H.

[24] The following order is made:

1 The appeal is upheld with costs, including the costs of two counsel.

2 The order of the court a quo is set aside and substituted with the following:

‘The application is dismissed with costs.’

_____

_

N ERASMUS

ACTING JUDGE OF APPEAL

APPEARANCES:

FOR APPELLANT:	JA Newdigate SC (with him M.L. Sher)
	Instructed by:
	Swemmer & Levin Inc., Cape Town
	Matsepes Inc., Bloemfontein
FOR RESPONDENT:	SP Rosenberg SC (with him P.S. van Zyl)
	Instructed by
	Werksmans Inc. J S de Villiers, Cape Town
	McIntyre & van der Post, Bloemfontein