IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

Case No 10751/2011

In the matter between:

LAGOON BAY LIFESTYLE ESTATE (PTY) LTD — Applicant

and

THE MINISTER OF LOCAL GOVERNMENT, ENVIRONMENTAL AFFAIRS & DEVELOPMENT PLANNING OF THE WESTERN CAPE — First Respondent

THE GEORGE MUNICIPALITY — Second Respondent

CAPE WINDLASS ENVIRONMENTAL GROUP & 24 OTHERS — Third Respondent

Court: GRIESEL J

Heard: 18 & 19 August 2011

Delivered: 31 August 2011

JUDGMENT

GRIESEL J:

Introduction

[1] This matter concerns a proposed property development in the municipal area of the George Municipality ('the municipality'), the second respondent herein. The applicant, who is the developer, seeks relief on an urgent basis, setting aside a decision of the first respondent, the Minister for Local Government, Environmental Affairs and Development Planning, Western Cape ('the Minister'), taken on 28 April 2011. On that date, the Minister refused an application to rezone and subdivide certain properties making up the development area after the municipal council had earlier, on 14 July 2010, granted the application.

[2] The proposed development in question, known as 'Lagoon Bay Lifestyle Estate', is situated east of Glentana, between the towns of Mossel Bay and George. It is on an ambitious scale: it spans approximately 655 hectares (ha), of which 166 ha will be used for two 18 hole golf courses; 194 ha for a residential housing development,[1] commercial activities and roads; 7 ha for a five-star hotel and clubhouse precinct; 63 ha to be landscaped into private parks and open spaces and 200 ha to be rehabilitated and conserved as a private nature reserve.

[3] The development is highly controversial and has from the outset given rise to sharp differences of opinion in the local community: on the one hand, there are those who believe – based on various promises and projections by the applicant – that the development would be to the economic advantage of the broader George community; on the other hand, there are those who feel, like the present third respondent, the

[1] Comprising some 895 single title residential erven, 320 single and fractional lodges and 150 single and fractional apartments.

Cape Windlass Environmental Group, that the proposed development would be ecologically harmful and undesirable, especially in view of the fact that it would lead to the loss of valuable agricultural land. The proposed development has also given rise to sharp differences of opinion in the ranks of planning officials and decision-makers at various levels of government at various stages of the process.

The process of approval

[4] In order to see the present application in proper perspective, it is necessary to give a brief overview of the whole process that a developer such as the present applicant has to follow in order to obtain all the requisite approvals for a proposed development. In the present case, the process may be divided into four different phases:

- The *first* phase involved an application for the amendment of the George and Environs Urban Structure Plan (1982) ('the structure plan') in terms of the provisions of s 4(7) of the Land Use and Planning Ordinance 15 of 1985 ('LUPO') from 'agriculture/forestry' to 'township development' so as to permit the utilisation of land in accordance with the proposed development. On 17 July 2007 the erstwhile Minister, Ms T Essop, approved the application for amendment of the structure plan. Her decision to that effect was conveyed to the municipality in a letter of that date and was '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 environmental 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".'

Paragraph 1.3 features prominently in this application and will be considered in more detail later herein.

- The *second* phase was the environmental impact assessment process ('EIA') in terms of the provisions of the Environment Conservation Act 73 of 1989 ('ECA') and the National Environmental Management Act 107 of 1998 ('NEMA'). This phase was concluded on 5 May 2009, when the next Minister, Mr P Uys, granted the necessary approval. That approval is being assailed in a pending review application in this court, brought by the present third respondent under Case No 22855/09, the details of which are not relevant for purposes of this application.[2]

- The *third* phase involves the application for rezoning and subdivision of the subject properties in terms of ss 16(1)[3] and 25(1)[4] of LUPO, which application was approved by the municipal council on 14 July 2010. However, because of the 'condition' imposed by Minister

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[2] It would appear, though, that a successful review of that decision would have the effect of rendering the third phase an exercise in futility.

[3] 'Either the [Minister] or, if authorised thereto by the provisions of a structure plan, a council may grant or refuse an application by an owner of land for the rezoning thereof.'

[4] 'Either the [Minister] or, if authorised thereto by scheme regulations, a council may grant or refuse an application for the subdivision of land.'

Essop in paragraph 1.3 of her earlier decision, the municipality felt obliged to refer the application to the present Minister 'for the necessary further attention'. It is his decision on this matter, referred to above, that is under attack in the present application.

- The *fourth* and final phase would involve the approval of building plans under the National Building Regulations and Building Standards Act 103 of 1977, once all the other approvals had been obtained. This part of the process is likewise irrelevant to the present application.

The relief sought

[5] In the present proceedings the applicant seeks an order setting aside the Minister's decision of 28 April 2011 and declaring that the approval by the George Municipal Council on 14 July 2010 in law constituted the required approval of the application. In Part A of the notice of motion, the applicant assails the decision on the legal basis that the Minister did not have the functional competence to decide zoning and subdivision applications – a 'crisp constitutional issue', according to the applicant. In Part B, the Minister's decision is being assailed on various 'traditional' review grounds.

The Minister's competence

[6] The applicant's attack on the Minister's functional competence is based on the argument that the so-called 'condition' imposed by Minister Essop in para 1.3 (quoted above) is (a) *ultra vires* the empowering provision in LUPO and, in any event, (b) constitutionally unlawful

because it offends against the provisions of s 156(1), read with Part B of Schedule 4 to the Constitution of the Republic of South Africa, 1996.[5]

[7] The first point may be briefly disposed of. It is true, as pointed out on behalf of the applicant, that s 4(7) of LUPO does not authorise the Minister to impose any conditions when approving an amendment to a structure plan. However, the argument overlooks the provisions of s 42(1) of LUPO which specifically authorise the Minister, when granting an application, to do so 'subject to such conditions as [she or] he may think fit'. Leaving aside the semantic argument as to whether or not para 1.3 contains a 'condition' in the true sense of the word, I am of the view that, in principle, Minister Essop acted within her permissible powers when she attached certain conditions to her approval of the amendment of the structure plan.

[8] The constitutional argument requires more detailed consideration. In terms of the provisions of s 156(1), read with Part B of Schedule 4, as interpreted by our courts, applications for rezoning and township approval involve aspects of 'municipal planning', which fall within the functional competence of municipalities. The applicant's argument in this regard was based squarely on the authority of the Constitutional Court's recent judgment in *Johannesburg Municipality v Gauteng Development Tribunal* ('*GDT*'),[6] as well as the earlier judgment of the SCA in the same matter.[7] A familiarity with both judgments will

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[5] Section 156 provides as follows:
'(1) A municipality has executive authority in respect of, and has the right to administer –
(a) the local government matters listed in Part B of Schedule 4 and Part B of Schedule 5; and
(b) any other matter assigned to it by national or provincial legislation.'
[6] 2010 (6) SA 182 (CC).
[7] *Johannesburg Municipality v Gauteng Development Tribunal* 2010 (2) SA 554 (SCA).

be assumed, hence it is not necessary for purposes of this judgment to repeat the full and elaborate exposition of the constitutional scheme or to refer in any detail to the reasoning contained in those judgments. Suffice it to say that the Constitutional Court authoritatively interpreted the concept 'municipal planning', as used in Part B of Schedule 4, to refer to the control and regulation of the use of land, including the zoning of land and the establishment of townships.[8]

[9] Building on this foundation, the applicant argued that the re-zoning and subdivision applications decided by the Minister *in casu* form part of the control and regulation of the use of land, which fall within the exclusive autonomous sphere of local government under the rubric of 'municipal planning'. On this basis it follows, so it was submitted, that the Minister had no power or authority to decide the relevant application for rezoning and subdivision, with the corollary that the George Municipal Council had the exclusive power and authority to do so. The purported decision taken by the Minister on 28 April 2011 was accordingly in violation of the Constitution and invalid.

[10] In answer to this argument, the Minister sought to read the judgment in the *GDT* case restrictively. He accepted that the majority of applications for rezoning must be considered by municipalities, pursuant to their functional competence in respect of municipal planning, as the impact of the majority of such planning decisions is limited to the geographical area of the relevant municipality. He submitted however that there is a category of planning decisions which will have an impact beyond the area of a single municipality and will have effects across a

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[8] Para 57.

larger region. He further submitted that for a variety of reasons, including its size and scale, the present development falls into this latter category. These 'extra-municipal' issues, so it was contended, exceed the bounds of municipal planning and fall within the ambit of 'regional planning and development' (in Part A of Schedule 4 to the Constitution) and/or 'provincial planning' (in Part A of Schedule 5 to the Constitution).

[11] I agree with the Minister's argument. In my view, the applicant's reliance on the judgment in the *GDT* case is misplaced. The judgment must be read against the background of the particular piece of legislation that was being assailed in that case, namely Chs V and VI of the Development Facilitation Act 67 of 1995. It was that Act that created the tribunals in question as separate bodies with 'parallel authority', and purported to confer equivalent authority on such tribunals to deal with matters falling within the functional area of 'municipal planning'. It was in that context that the court held that the powers bestowed upon development tribunals by the Act in question impermissibly encroached on the functional area of municipalities and that it could not be saved by interpreting it as falling under 'urban and rural development', as contended for by the respondent in that case: the latter concept is 'not broad enough to include powers forming part of "municipal planning".'[9]

[12] It will be immediately apparent from this synopsis that the courts in the *GDT* case were not called upon to consider the 'complex' constitutional relationship between provincial governments and muni-

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[9] Para 63.

cipalities.[10] It is precisely the nature of this relationship which, in my view, distinguishes the present case from the *GDT* matter. In this regard, it is abundantly clear that the Constitution entrusts provinces with extensive powers and functions of 'supervision', 'monitoring' and 'support' of local government.[11] Thus, for example, s 155(6) requires that each provincial government must 'establish municipalities in its province and, by legislative or other measures, must (a) provide for the monitoring and support of local government in the province'. Moreover, s 155(7) provides that '... the provincial governments have the legislative *and executive authority* to see to the effective performance by municipalities of their functions in respect of matters listed in Schedules 4 and 5, by regulating the exercise by municipalities of their executive authority referred to in s 156(1)' (emphasis added). The heading to Part B of Schedule 4 also makes it clear that municipalities exercise the executive authority in respect of those matters 'to the extent set out in s 155(6)(a) and (7)'; in other words, subject to the provincial government's powers of 'supervision', 'monitoring' and 'support'. In the *First Certification* judgment the Constitutional Court summarised the effect of these provisions as follows:

'Taken together these competences are considerable and facilitate a measure of provincial government control over the manner in which municipalities administer those matters in Parts B of ... schs 4 and 5.'[12]

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[10] As described by Woolman *et al* (eds) *Constitutional Law of South Africa* (2ed) Vol 1 at §20-29 (Original Service).

[11] See *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the RSA, 1996* 1996 (4) SA 744 (CC) paras 369–374 ('*First Certification* judgment'); Steytler & De Visser *Local Government Law of South Africa* (loose leaf, Issue 1) Ch 15 para 2.2.

[12] Para 371. For further examples of provincial monitoring and support of local government matters, see s 31 of the Local Government:Municipal Systems Act 32 of 2000.

[13] Reference may also be made to s 139(1), which provides for a provincial government's power of direct intervention 'when a municipality cannot or does not fulfil an executive obligation in terms of the Constitution or legislation', *inter alia* by 'assuming responsibility for the relevant obligation in that municipality to the extent necessary. . . ' As stated by the Constitutional Court, 'this power to intervene, where these conditions are met, is considerable'.[13]

[14] Seen in this light, I do not read the *GDT* judgment as having decided (a) that *all* questions involving the zoning of land and the establishment of townships invariably, regardless of the circumstances, fall exclusively under the rubric of 'municipal planning'; or (b) that all such questions must be determined exclusively by municipalities; or (c) that provincial government can never have authority, as part of its functions of monitoring and oversight, to decide planning issues, merely because they happen to fall within the category of 'municipal planning'. In *GDT* Jafta J recognised that 'the Constitution confers "planning" on all spheres of government'[14] and that 'the functional areas allocated to the various spheres of government are not contained in hermetically sealed compartments'.[15] It was emphasised, furthermore, that the constitutional scheme specifically envisages 'functional areas of concurrent competence', where different spheres of government may legitimately exercise powers in relation to the same subject matter.[16]

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[13] *Certification judgment, supra,* para 370.
[14] Para 54.
[15] Para 55.
[16] Para 56. See also *GDT (SCA)* para 6.

[15] It follows that the applicant's argument regarding the exclusive power of the municipality in relation to 'municipal planning' cannot be accepted. On the facts of this case, I am accordingly satisfied that it was indeed permissible and appropriate for Minister Essop to have reserved the right of final approval of the application for rezoning and subdivision to the provincial government. For these reasons I am of the view that 'condition 1.3' imposed by Minister Essop in 2007 is not invalid or unconstitutional.

The Minister's powers in terms of LUPO

[16] The Minister stated in his reasons that his decision was in any event also made pursuant to his powers under ss 16(1) and 25(1) of LUPO. The applicant sought to assail the Minister's reliance on these sections on the same constitutional grounds referred to earlier, based on the judgment in the *GDT* matter.

[17] With regard to the Minister's objection that the constitutionality of those sections has not directly been challenged by the applicant in its notice of motion, counsel for the applicant argued, with reliance on the majority judgment in *CDA Boerdery (Edms) Bpk v Nelson Mandela Metropolitan Municipality*,[17] that ss 16(1) and 25(1) of LUPO have been impliedly repealed or amended when the Constitution took effect, to the extent that the power to grant or refuse applications for rezoning and subdivision now vests exclusively in a council, and not in the Minister. In the result, so it was submitted, it was not necessary for the applicant to challenge the constitutionality of those provisions directly.

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[17] 2007 (4) SA 276 (SCA) paras 32.and 44.

[18] For the reasons stated earlier, I am of the view that ss 16 and 25, insofar as they grant authority to the Minister to approve applications for rezoning and subdivision, are not repugnant to the Constitution. In the result, it cannot be held that those sections have been impliedly repealed or amended. It is accordingly not necessary to decide whether or not the applicant's failure to raise a direct challenge to the constitutionality of those sections is fatal to the application. It follows that the relief claimed in Part A of the notice of motion cannot be granted.

Other grounds of review

[19] This brings me to Part B and the substantive grounds of review advanced by the applicant. This part of the application was pursued on behalf of the applicant with much less vigour than the constitutional challenge raised under Part A. Many of the grounds of review raised in the founding affidavit (such as alleged bias on the part of the Minister) were also not persisted with during oral argument.

[20] The Minister furnished written reasons for his decision on 2 August 2011. He had earlier, on 30 April 2011 (ie two days after the decision had been taken), taken part in a radio interview with a local radio station regarding his decision. The applicant made much of the fact that there were certain perceived differences between the reasons advanced by the Minister during the radio interview and his subsequent written reasons. I am not inclined to attach undue weight to these discrepancies which, in my view, amount to nothing more than differences in emphasis. I accordingly agree with counsel for the Minister that it is to the written reasons, furnished in terms of the provisions of the Promotion of Administrative Justice Act 3 of 2000, that one must turn when con-

sidering the question whether any grounds of review have been established.

[21] The gravamen of the applicant's attack against the decision of the Minister was the allegation that the Minister took irrelevant and erroneous considerations into account. This attack was premised on an argument that the first three phases of development approval are separate and discrete processes. Thus, according to the applicant, the Minister was not required for purposes of his decision during phase 3 'to consider the social, economic and environmental impact of the proposed development, including the sustainability and assessment of the socio-economic benefits and advantages thereof'. Questions regarding 'sustainable development' are primarily environmental issues, which had already been considered during phase 2 in a process of much wider scope and magnitude than the rezoning process. These issues therefore should not or could not be revisited during phase 3 of the process, so the argument went.

[22] In my view, there is no merit in this argument. The principle issue that the Minister had to decide was whether the proposed development was desirable or not. Section 36(1) of LUPO provides *inter alia* that any application for rezoning or subdivision 'shall be refused solely on the basis of lack of desirability of the contemplated utilisation of land concerned including the guideline proposals included in a relevant structure plan in so far as it relates to desirability. . . '

[23] In this regard, it was held in *Hayes v Minister of Finance & Development Planning, Western Cape*: [18]

'The test of desirability is conclusive – in terms of s 36(1) a departure application "shall be refused solely on the basis of a lack of desirability". Though the test is phrased in the negative, it lays down a positive test: the test is the presence of a positive advantage which will be served by granting the application.'

[24] I agree with counsel for the Minister that this test raises policy-laden issues which do not give rise to a single right or wrong answer. The Minister took the view that development is not desirable (for the purposes of LUPO) if it is not sustainable. He accordingly considered the cumulative factors why the development was not in his view sustainable. It is not for this court to decide whether his decision in this regard was right or wrong. It is sufficient for purposes of this application to hold, as I do, that he was entitled to have regard to the factors considered by him in coming to his decision.

[25] Although different phases are involved in the same process, this does not mean that each phase takes place in a vacuum which is separate and distinct from the other phases. Different decision-makers are involved at the different phases, applying different tests dictated by different pieces of legislation. If this should eventually result in conflicting and inconsistent decisions taken by different functionaries, officials and organs at different levels of local and provincial government then this is the unfortunate result of a fragmented and cumbersome

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[18] 2003 (4) SA 598 (C) at 624J–625A.

administrative process which 'cries out for legislative reform', as re-emphasised by the Constitutional Court in the *GDT* case.[19]

[26] I conclude that the applicant has failed to persuade me that any grounds exist on which this court can set aside the Minister's decision of 28 April 2011.

Conclusion

[27] For the reasons set out above, I accordingly grant the following order:

The application is dismissed with costs in respect of the first and third respondents, including the costs of two counsel.

B M GRIESEL
Judge of the High Court

[19] Para 33. See also my *obiter* remarks in this context in *Camps Bay Ratepayers and Residents Association v Minister of Planning, Culture and Administration, Western Cape* 2001 (4) SA 294 (C) at 329B-F.