THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 1054/2017

In the matter between:

ARTHUR PULE MALEBANE **APPELLANT**

and

ALBERT DYKEMA **FIRST RESPONDENT**

BELA-BELA LOCAL MUNICIPALITY **SECOND RESPONDENT**

Neutral citation: *Malebane v Dykema* (1054/2017) [2018] ZASCA 174 (3 December 2018)

Coram: WALLIS, SWAIN, DAMBUZA and SCHIPPERS JJA and MOTHLE AJA

Heard: 20 NOVEMBER 2018

Delivered: 3 DECEMBER 2018

Summary: Development application in terms of Chapters V and VI of the Development Facilitation Act – not determined before date on which suspension of order of constitutional invalidity in respect of those provisions ended – s 60(2)(*a*) of Spatial Planning and Land Use Management Act 16 of 2013 – whether application pending before development tribunal on 1 July 2015.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Cassim AJ, sitting as court of first instance):

1 The appeal is upheld with costs.

2 The order of the high court is set aside and the following order substituted:

'The application is dismissed with costs.'

3 The cross appeal is dismissed with costs.

JUDGMENT

Wallis JA (Swain, Dambuza and Schippers JJA concurring)

[1] The appellant, Mr Malebane, and the first respondent, Mr Dykema, own farms that straddle the N1 highway running north from Tshwane through Bela-Bela and Mokopane to Polokwane. Both farms are situated within the area of jurisdiction of the Bela-Bela Municipality (the Municipality). Some years ago Mr Dykema (with the support of one of the major oil companies) decided that his farm provided a suitable location for a One Stop service station. On 10 February 2012 he lodged an application with the Limpopo Development Tribunal (the Tribunal) for planning permission for such a service station. This involved a change in land use from agricultural and general to special under Land Use Zone 85 in terms of the Bela-Bela Land Use Scheme, 2008. The application was duly advertised and the Tribunal held various hearings between 13 April

and 5 June 2012. It set 16 July 2012 as the date for submission of final argument on Mr Dykema's application.

[2] On 18 June 2010 the Constitutional Court[1] endorsed a finding of this Court[2] that Chapters V and VI of the Development Facilitation Act 67 of 1995 (the DFA), under which Mr Dykema's application had been made, were unconstitutional. The Constitutional Court suspended its order of invalidity for two years to enable the legislature to remedy the constitutional defect. The order of suspension expired on 17 June 2012, without fresh legislation having been passed.

[3] After the expiry of the period of suspension of constitutional invalidity, development tribunals throughout South Africa, including the Tribunal, continued dealing with applications for developmental approval lodged prior to the date of expiry. They did so on the basis of a Policy Statement issued by the Department of Rural Development Land Reform.[3] In *Shelton* this court held that, once the period of suspension expired, the order of constitutional invalidity came into effect. Consequently the approval of a development application by a Development Tribunal after 17 June 2012 was invalid. It held that the policy statement was incorrect and inconsistent with the declaration of invalidity made by the Constitutional Court. The decision in *Shelton* was reaffirmed in *Patmar*.[4]

---

[1] *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and Others* (*Gauteng Development Tribunal (CC)*) [2010] ZACC 11; 2010 (6) SA 182 (CC).
[2] *Johannesburg Municipality v Gauteng Development Tribunal and Others* [2009] ZASCA 106; 2010 (2) SA 554 (SCA).
[3] See *Shelton and another v Eastern Cape Development Tribunal and others* [2016] ZASCA 125 (*Shelton*), para 18.
[4] *Patmar Explorations (Pty) Limited v Limpopo Development Tribunal* [2018] ZASCA 19; 2018 (4) SA 107 (SCA).

[4] The present dispute arises because the Tribunal handed down a decision approving Mr Dykema's application, on 1 November 2012. The Municipality was rightly unwilling to give effect to that decision and required Mr Dykema to bring a fresh application for rezoning under the relevant planning legislation other than the DFA. Endeavours by his advisers to persuade the Municipality to adopt a different approach proved unsuccessful. In the meantime Mr Malebane (with the assistance of a different oil company) conceived of the idea of developing a similar service station on his property and applied to the Municipality for the necessary planning approvals. This caused Mr Dykema to approach the high court for an interim interdict preventing the Municipality from approving Mr Malebane's application and for an order that it process his application in accordance with the approval granted by the tribunal on 1 November 2012.

[5] The application came before Cassim AJ. He refused to grant the declaratory orders sought by Mr Dykema. He did so on the simple basis that their underlying postulate was that the Tribunal had lawfully approved his application, whereas in the light of the decision in *Shelton*, the purported approval on 1 November 2012 was invalid and a nullity. It might have been thought that this would dispose of the matter. However, without any prayer for that relief, the acting judge granted an order directing the municipality to process Mr Dykema's application for a change of land use and dispose of it in accordance with the provisions of s 60(2)(*a*) of the replacement legislation, the Spatial Planning and Land Use Management Act 16 of 2013 (SPLUMA). This legislation was passed in 2013 and promulgated on 5 August 2013, but only came into a force on 1 July 2015. Although there is little reasoning on the point in the judgment it appears that the acting judge proceeded on the footing that

the application had been pending before a tribunal in terms of s 15 of DFA 'at the commencement of this Act' and had not been decided or otherwise disposed of. The appeal is with his leave and there is a cross appeal by Mr Dykema in respect of an adverse costs order made against him.

The issues

[6] Mr Dykema did not seek to contend that the Tribunal's approval of his application on 1 November 2012 was either lawful or valid. Instead the heads of argument on his behalf advanced two arguments in support of the judgment of the high court. The first was that, notwithstanding the fact that the Tribunal lacked any lawful authority to approve Mr Dykema's application, until set aside by a court of law, it remained valid and binding. Reliance was placed upon the judgments of the Constitutional Court in *Merafong*[5] and *Tasima*.[6] The second was that at the date upon which the order of constitutional invalidity came into effect he had an application pending before the Tribunal and s 60(2)(*a*) of SPLUMA provided that all applications pending before a tribunal at the commencement of that Act had to be continued and disposed of in terms of SPLUMA.

[7] Mr Erasmus SC, who appeared in this court with Mr van Heerden, in place of counsel who prepared the heads of argument, correctly did not pursue the first argument. Although not framed as a review of the decision of the Tribunal, the effect of the judgment was to set aside its decision. Nothing more need be said about that. The only question we

---

[5] *Merafong City Local Municipality v AngloGold Ashanti Ltd* [2016] ZACC 35; 2017 (2) SA 211 (CC).
[6] *Department of Transport and Others v Tasima (Pty) Ltd* [2016] ZACC 39; 2017 (2) SA 622 (CC).

have to decide is whether the high court correctly granted relief on the basis of the provisions of SPLUMA. Mr du Plessis SC, on behalf of Mr Malebane, pointed out that Mr Dykema had not asked for such relief, but said that, in the interests of having the point determined and resolving the matter, he was not raising a procedural objection to the grant of that relief. I accordingly turn to deal with that issue.

The arguments

[8] Whether Mr Dykema's application was pending when SPLUMA came into force on 1 July 2015, depends on s 60(2)(*a*) of SPLUMA, which reads as follows:

'All applications, appeals or other matters pending before a tribunal in terms of section 15 of the Development Facilitation Act, 1995 . . . at the commencement of this Act that have not been decided or otherwise disposed of, must be continued and disposed of in terms of this Act.'

[9] The argument on behalf of Mr Dykema was that, at the date upon which the declaration of constitutional invalidity came into operation, he had an application for a change of land use pending before the Tribunal. All steps taken by the Tribunal after that date were invalid in accordance with the decision in *Shelton*. That left his application pending when the Tribunal lost its powers to determine it and it remained pending when SPLUMA came into force on 1 July 2015. Accordingly it fell to be continued and disposed of in terms of SPLUMA.

[10] Mr du Plessis SC submitted that there were several flaws in this analysis. His starting point was the principle of objective constitutional

invalidity.[7] The effect of a declaration of constitutional invalidity is that the legislation in question is invalid from the time of its enactment, subject to the Court's power under s 172(1)(*b*) of the Constitution to suspend an order for invalidity for any period to enable the legislature to remedy the defect and to limit the retrospective effect of the order of invalidity. In *Gauteng Development Tribunal* the Constitutional Court exercised both of these powers. It suspended the declaration of invalidity for two years until 17 June 2012. Recognising that the legislature might not pass amending or new legislation within that time frame it limited the retrospective effect of its order.

[11] It is helpful to look closely at what the Constitutional Court ordered with a view to avoiding undesirable consequences flowing from the order of invalidity. It said in regard to the period of suspension that:[8]

'A proper balance … may be achieved by allowing the tribunals to continue exercising those powers *during the period of suspension*'. (My emphasis.)

The emphasised portion of this passage shows that the Court was only affording powers to development tribunals during the period of suspension and not thereafter. Recognising that remedial legislation might not be passed within the two year period afforded by the suspension of the declaration, the Court held:[9]

'Finally, a necessary feature of this suspended declaration of invalidity is that it should not have retrospective effect if the period of suspension expires without the defects in the Act having been corrected. In exercising their powers under the impugned chapters, development tribunals have approved countless land developments across the country. It would not be just and equitable for these decisions to be invalidated if the declaration of invalidity comes into force.'

---

[7] *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO* 1996 (1) SA 984 (CC) paras 27 and 28.
[8] *Gauteng Development Tribunal (CC)*, para 81, p 209I-210A.
[9] *Gauteng Development Tribunal (CC)*, para 85.

There is a problem with this somewhat cryptic statement in that the Constitutional Court did not thereafter make any order limiting the retrospectivity of its order. However, the case has been argued before us on the footing that this was the effect of the Court's order.

[12] Mr du Plessis submitted that, notwithstanding the absence of a specific order, the effect of the judgment in *Gauteng Development Tribunal* was to maintain in force all the approvals of land developments granted by development tribunals up until the date upon which the order of suspension expired. As far as applications lodged before the expiry date, but not disposed of before that date were concerned, they lapsed and became invalid. His reasoning was that as the jurisdiction the tribunals had previously exercised was constitutionally invalid from inception so were undetermined applications. They were applications for approval submitted to a body that in law had no power to approve them and accordingly they were invalid in the same way as the relevant chapters of the DFA were invalid.

[13] Mr du Plessis accordingly submitted that Mr Dykema's application was no longer in existence, much less pending, when SPLUMA came into force. He drew attention to the fact that s 60(1) of SPLUMA dealt with the consequences of the repeal of the DFA and not the consequences of the constitutional invalidity of chapters V and VI. Accordingly it could not save Mr Dykema's application from invalidity. In any event a pending application meant one 'remaining undecided; awaiting decision or settlement'. In view of the fact that after 17 June 2012 the Tribunal no longer had the power to decide the application it ceased to be pending at that stage.

Was there a pending application?

[14] The question for decision is whether Mr Dykema's application was pending before the Tribunal on 1 July 2015, notwithstanding that on 17 June 2012 the Tribunal had ceased to have any authority to determine it. The short answer is 'No'. The *Concise Oxford Dictionary* defines 'pending' as meaning 'awaiting decision or settlement'. The rather longer definition in the *Shorter Oxford English Dictionary* is 'remaining undecided, awaiting settlement; orig of a lawsuit'. The *Collins English Dictionary* says that 'if something such as a legal procedure is pending, it is waiting to be dealt with or settled'. The position is no different in American English. The *Merriam-Webster* dictionary gives as the definition of pending in its adjectival sense 'not yet decided: being in continuance'. *Black's Legal Dictionary*[10] has 'Remaining undecided; awaiting decision <a pending case>'. Implicit in each of these definitions is that what is pending is still capable of being determined, which had ceased to be the case with Mr Dykema's application.

[15] The case law, both here and overseas, is to the same effect. In *Mhlungu*, Kentridge AJ in the Constitutional Court said, in regard to the transitional provisions in the Interim Constitution, that the normal meaning of pending is that proceedings 'are pending if they have begun but not yet finished'.[11] In *Nkosi*[12] Spoelstra J referred to dictionary definitions to the same effect as those I have quoted and said:

'It applies to a matter that has commenced and is not yet finalised.'[13]

---

[10] Bryan A Garner (ed) *Black's Legal Dictionary* (9 ed, 2009) p 1248 sv 'pending'.
[11] *S v Mhlungu and Others* 1995 (3) SA 867 (CC). Although this was a minority judgment there was nothing in the other judgments that suggested it was incorrect.
[12] *Nkosi v Barlow NO en Andere* 1984 (3) SA 148 (T) at 154A-B.
[13] I translate from the original, which read: ' Dit dui dus op 'n aangeleentheid wat begin het en nog nie gefinaliseer is nie.' See also *Noah v Union National South British Insurance Co Ltd* 1979 (1) SA 330 (T) at 332B-C.

That case, like most of the reported decisions I have consulted, was dealing with the stage at which a matter became pending, rather than whether an application can be pending before an administrative body after that body has ceased to have the power to determine it. However there are clear statements in some instances to the effect that a matter is pending only for so long as the court or tribunal before which it was brought is capable of making an order in relation to it.

[16] That a legal suit, or an application to an administrative tribunal, such as Mr Dykema's to the Tribunal, is only pending if the court or administrative tribunal still has the power to hear and dispose of it appears clearly from two cases, the one from Canada and the other from New Zealand.[14] In *Garnham v Tessier*[15] it was said:

'"Litigation pending", as here used means any legal proceeding, suit or action remaining undecided or awaiting decision or settlement.'

The following statement appears in *National Bank of New Zealand Ltd v Chapman*:[16]

'A legal proceeding can be said to be "pending" as soon as it has been commenced and it remains pending until it has been concluded, that is, *so long as the court having original cognizance of it can make an order on the matters in issue*, or to be dealt with, therein.' (My emphasis.)

I am satisfied that these statements correctly reflect the meaning of pending in the present context.

[17] It was common cause between counsel that from 17 June 2012 the Tribunal lacked any power to make an order on Mr Dykema's

---

[14] Cited in *Words and Phrases Legally Defined* (3 ed, 1989) p 344, sv 'pending'.
[15] *Garnham v Tessier* (1959) 27 WWR 682 at 688, Man CA.
[16] *National Bank of New Zealand Ltd v Chapman* [1975] 1 NZLR 480 at 482. This judgment appears to be the source of the corresponding statement in *Stroud's Judicial Dictionary of Words and Phrases* (7 ed, 2006) Vol 3, p 194, sv 'pending'.

application. When it purported to do so on 1 November 2012 that was invalid because the Tribunal acted in terms of legislative provisions that were constitutionally invalid. In my view nothing could be clearer than that the application ceased to be pending when the Tribunal lost the authority to deal with it. The position would have been no different had the Tribunal been abolished on that date without any provision being made to deal with applications then pending. An application cannot be pending in any realistic sense before an administrative body when its power to grant it has ceased to exist.

[18] Mr Erasmus responded to these difficulties by contending that their effect was to render the provisions of s 60(2)(*a*) ineffective and meaningless. He said that a court does not lightly conclude that a statutory provision has no meaningful effect.[17] Building on that foundation, he submitted that the only way in which to give the section effect was to interpret the words 'pending before a Tribunal … at the commencement of this Act' as referring to applications that had been properly lodged with tribunals prior to 17 June 2012 and not disposed of before they lost the power to make a decision on them. The implication was that such applications remained pending notwithstanding the fact that they could not be dealt with by the Tribunal and notwithstanding that the legislation envisaged by the Constitutional Court order might not make any provision for them to be pursued under new or amended legislation.

[19] The submission faced substantial difficulties in requiring a distortion of the language of the section and a transition in time of three years from 17 June 2012 to 1 July 2015. It provided no explanation for

---

[17] *National Credit Regulator v Opperman and Others* 2013 (2) SA 1 (CC) para 42.

the status of such applications during the intervening period, when other developers were free to obtain consent for their potentially competing developments from appropriate authorities, including local authorities such as Bela-Bela. Nor did it offer an explanation of what would occur in regard to the application if new or amending legislation made no similar provision. It contemplated a legal situation in which the application would become dormant, but possibly revive at an indeterminate future date, depending on future legislation, the content of which could not be predicted.

[20] A further problem was that the Bill giving rise to the enactment of SPLUMA was prepared and published before the expiry of the period of suspension of constitutional validity. As noted in *Shelton,* the relevant government department had issued a policy statement that development tribunals could continue to dispose of applications lodged with them prior to the expiry of the suspension of the declaration of constitutional invalidity. In the light of that, those responsible for drafting SPLUMA would have anticipated that when it came into force there would be applications pending, but not yet disposed of, before development tribunals even if this were after the expiry of the period of suspension. They might well not have foreseen that there would be a lengthy delay between the enactment of the legislation and its being brought into operation. They would certainly not have foreseen that the relevant policy in terms of which tribunals were continuing to act would be held to be legally invalid as held in *Shelton*. That being the case it seems rather more likely that the transitional provision was put in as a typical

'boilerplate' provision[18] to deal with whatever transitional situation existed at the time it came into force.

[21] Apart from these obvious difficulties, there was a fatal flaw in the argument, because its underlying premise that otherwise s 60(2)(*a*) would have no practical effect was false. The reason is that it overlooked applications in terms of s 61 in chapter VII of the DFA and the mediation and appeal provisions in ss 22 to 24 of the DFA. Chapter VII deals with registration arrangements and was not affected by the declaration of constitutional invalidity. It is not wholly clear whether s 61 could be invoked in relation to developments other than those that had first been the subject of a land development application in terms of Chapters V and VI of the DFA, but that does not matter. I assume for present purposes that Chapter VII was only applicable to land registration arrangements in respect of developments approved by a tribunal under Chapters V and VI.

[22] After a tribunal approved a development under Chapters V and VI, the developer had to take all the steps necessary to bring the development to fruition. In the case of a township development this could be a protracted process. Layout plans would have had to be prepared and approved; provision for services needed to be made; negotiations with various authorities would have had to take place in regard to their requirements in relation to the nature and extent of servitudes for service provision, such as water, electricity and sewage reticulation; there would have needed to be compliance with the conditions of establishment. Many other steps can be envisaged and all of these would need to take time and money. Furthermore the rate of progress of the development would have

---

[18] See *Mhlungu*, op cit, paras 22-23 and 26 (per Mahomed J) and para 75 (per Kentridge AJ).

had to take account of conditions in the property market and the ability to sell the resulting stands in the township.

[23] Once the developer was ready to proceed to opening a township register it could apply to the relevant tribunal for the approval of a registration arrangement under s 61(1) of the DFA. The tribunal would then consider the application. Section 61 required it to be satisfied that there had been compliance with the requirements of s 38 of the DFA and certain other statutory requirements. It would then either grant the application, with or without conditions, or refuse it. Any decision made by the tribunal would be subject to appeal to a development appeal tribunal in terms of s 23 of the DFA.

[24] It is perfectly conceivable that an applicant for development approval might have obtained such approval in early June 2012 before the declaration of invalidity came into effect. For the reasons dealt with in para 11 of this judgment, the approval would have remained valid and unaffected by the declaration of invalidity. If it then took the developer eighteen months or two years before being ready to submit an application for a registration arrangement, and the application was delayed while the tribunal was satisfying itself that all the requirements for granting a registration arrangement were satisfied, it is readily conceivable that such an application could have been outstanding on 1 July 2015. Equally if the tribunal approved the registration arrangement subject to conditions that the developer did not wish to accept, there could have been an appeal to a development appeal tribunal under s 23, read with s 16(*a*), of the DFA.

[25] The point of this example is to demonstrate that, entirely apart from applications under chapters V and VI of the DFA, there was

undoubtedly scope for there to have been applications, appeals or other matters pending before a tribunal when SPLUMA came into operation on 1 July 2015. That being so the foundation for Mr Erasmus' argument fell away. It is unnecessary to give a strained interpretation to s 60(2)(*a*) in order to provide the section with a practical purpose.

[26] I have now had the opportunity to read the judgment by Mothle AJA. He holds that, as the Municipality had informed the Tribunal, while the latter was considering Mr Dykema's application, that it supported the change in land use, 'that approval is protected' by the decision of the Constitutional Court that land development approvals by tribunals would not be invalidated if the declaration of invalidity came into operation without the defects in the DFA having been corrected.[19] The Municipality had an obligation to give effect to Mr Dykema's right to just administrative action by considering his application, but instead delayed and required him to submit a fresh application. The DFA did not put any time limit on applications to it. Either the application was still pending when SPLUMA came into operation in 2015 or it 'must be accepted as having resuscitated such applications and given them a life line'. In his view it was in the interests of justice to grant the relief granted by the high court.

[27] I am unable to agree with this reasoning. Mr Dykema's application proceeded from the premise that the Tribunal had lawfully approved his application. In his own words the purpose of the relief sought was to 'give effect to the approved land use rights of the Applicant'. That was a

---

[19] *Gauteng Development Tribunal (CC)*, para 83. As noted in para 11 of this judgment the Court made no orderr in that regard.

reference to the Tribunal's approval of his application in November 2012. When his planners approached the Municipality in 2013, it was on the basis that he would withdraw his DFA application and resubmit it to the Municipality under the Ordinance. The rider was that the latter would agree that it would be unnecessary to re-advertise the application or follow the procedures under the applicable Ordinance. This would, so he said, enable the Municipality to 'promulgate the approved land use rights in terms of the Ordinance'. He sought to interdict the Municipality from processing Mr Malebane's application because it was not 'processable' in the light of the DFA approval of his application. In summing up his case Mr Dykema said that he was 'the beneficiary of a formal land use change approval issued by the DFA Tribunal'.

[28] Nowhere in the application papers, or the arguments addressed in this court and the high court, was there any suggestion that the Municipality's willingness in 2012 to approve a change of land use for Mr Dykema, conferred any rights upon him as against the Municipality. Nor did he complain that the Municipality infringed his rights to just administrative action. He accepted that the Municipality had a discretion whether to adopt the route proposed by his town planner. He did not suggest that its refusal to exercise that discretion in his favour was unlawful and, in any event, would have had to bring separate review proceedings under PAJA if that was his case. In those circumstances where no allegations were made against the Municipality that it was in breach of obligations owed to Mr Dykema, or that its past conduct amounted to a binding decision to approve a change in land use, the Municipality understandably abided the decision of the court on Mr Dykema's application. Mothle AJA's approach would condemn it on grounds forming no part of the case made by Mr Dykema in

circumstances where the Municipality has had no opportunity to defend itself. That is impermissible.

[29] My colleague accepts that the decision by the Tribunal in November 2012 was invalid. He also accepts that after 17 June 2012 the Tribunal no longer had any statutory authority to deal with Mr Dykema's application under the DFA. The Constitutional Court's decision on retrospectivity meant that tribunal planning decisions already made and affording rights to applicants were not invalidated. The same did not apply to people in the position of Mr Dykema, as recognised by him in his approaches to the Municipality and his proposal that he submit an application under the Ordinance for approval. I have given my reasons for saying that the DFA application was not pending when SPLUMA came into operation. The suggestion that it was 'resuscitated' is a novel one and not one advanced by leading counsel for Mr Dykema. In my view it is unsound. Mr Malebane correctly pointed out that, when he lodged his application in 2015, circumstances would have changed since Mr Dykema's original application – not least because there were now competing applications – and a fair administrative process required the Municipality to weigh up the applications in the light of the change in circumstance.[20]

[30] For those reasons the appeal must succeed. I make the following order:

1 The appeal is upheld with costs.

2 The order of the high court is set aside and the following order substituted:

---

[20] *Logbro Properties CC v Bedderson NO and Others* 2003 (2) SA 460 (SCA) paras 23 to 25.

'The application is dismissed with costs.'

3 The cross appeal is dismissed with costs.

M J D WALLIS

JUDGE OF APPEAL

MOTHLE AJA (Dissenting)

[31] I have read the judgment of Wallis JA (the first judgment). I respectfully disagree with the analysis and the conclusion reached in the first judgment. In my view the applications that were lodged and not finalised (the pending applications) in terms of the now repealed Development Facilitation Act 67 of 1995 (DFA), have neither lapsed nor became nullified on expiry of the period of suspension of the declaration of invalidity, being 17 June 2012 (the date of expiry). On a proper construction of the Constitutional Court order of the declaration of invalidity, read with section 60(2)(a) of the Spatial Planning and Land Use Management Act 16 of 2013 (SPLUMA), I would, for reasons that follow hereunder, dismiss the appeal with costs, and uphold the cross-appeal.

[32] A summary of the background facts appears in the first judgment and will not be repeated in this judgment. Only a short chronology of events and the salient points will be referred to for purposes of context. At the centre of this appeal, is the question of the status and fate of the pending applications from the date of expiry.

[33] The respondent, Mr Dykema's version of events reveals a sense of frustration that he had endured, at the hands of the state, mainly Bela-

Bela Local Municipality (the Municipality), the moment he lodged his application. A brief chronology of events demonstrates this unfortunate experience.

[34] On 18 June 2010, the Constitutional Court held that chapters V and VI of the DFA were invalid. It further ordered that the declaration of invalidity be suspended for a period of 24 months from date of order. Most importantly, the Constitutional Court allowed the provincial tribunals established under DFA and charged with the authority to decide on applications for land use, to continue with the execution of these functions during the period of suspension of the order.

[35] In February 2012, four months before the date of expiry, Mr Dykema lodged his application. His application included documents which indicated that he had commenced work on the project several months before the application was lodged with the Limpopo Development Tribunal (the Tribunal). On receipt of this application, the Tribunal, in the same month (February 2012), forwarded the application under cover of a memorandum, requesting comment from the Municipality.

[36] A process of approximately three months of internal communications within the Municipality in order to consider the application, ensued. Between 17 February 2012 and 7 May 2012, senior officials of various divisions of the Municipality, starting with Technical Services on 17 February 2012, through March and April, up to and including the final signature of the Municipal Manager on 7 May 2012, all approved Mr Dykema's application, subject to the project complying with specified conditions. Some three months later the application was

returned to the Tribunal which approved it, subject to compliance with some technical conditions during construction. The Bakwena Platinum Corridor, the Road Agency of Limpopo as well as the Department of Agriculture and Fisheries had all approved the application as well. The Tribunal conducted hearings between 13 April and 5 June 2012, where evidence was led and expert reports considered. The final leg was to receive submissions from various legal representatives of the interested parties and then take a decision. The hearing stood down by agreement with the parties, for heads of argument to be filed by 16 July 2012.

[37] I pause to mention that on 22 March 2012, three months before the date of expiry (17 June 2012), the Department of Rural Development and Land Reform issued a public statement commenting on the progress of finalising the Spatial Planning and Land Use Management Bill. The statement gave a directive to all tribunals to consider all applications pending before them, even after the date of expiry. However, it directed that no new applications should be accepted as of the date of expiry. An undertaking was also given in the statement as follows:

'(b) Application to the Constitutional Court by the Government for an extension to the 24 months will be made in time if it is established that no other viable alternative exists to processing land applications in any part of the country except via the DFA.

(f) In the North-West, Limpopo, Mpumalanga, Eastern Cape, and Gauteng Provinces it is important to note that the pre-1995 laws on land development management remains in the law books. These laws are still in use, and they will continue to be used until the enactment of the Spatial Planning and Land Use Management Bill into an Act of Parliament.'

[38] To complete the narrative of Mr Dykema's plight, I continue with the chronology of events. After the date of expiry, Mr Dykema's town planners continued to engage the Municipality to seek assistance to have

the application finalised. On 10 July 2013, the town planners wrote a letter to the Municipality, requesting that Mr Dykema's application be finalised in terms of section 69(3) of the Town Planning and Townships Ordinance 15 of 1986 (the Ordinance). The section gives the Municipality a discretion to process and finalise applications such as those of Mr Dykema and take a decision.

[39] The Municipality replied to the town planners on 11 August 2014, more than a year later, in a terse one paragraph response indicating that Mr Dykema must submit a *new* application in terms of the Ordinance. What was alarming about the letter from the Municipality is the following (a) By then the Municipality had already had a period of three months (February to May 2012) to consider and approve Mr Dykema's application as submitted to it for comment by the Tribunal. The Municipality in their comment supported the approval of the application; (b) Mr Dykema's application, but for the legal representatives' submission of heads, was almost completed as at the date of expiry. (c) At the time of their response in August 2014, the Municipality was aware of a competing application from the appellant, Mr Malebane, for a similar project on a property situated about 19 kilometres from the proposed site of Mr Dykema. The documents in the appeal record indicate that as at May 2014, Mr Malebane had, like Mr Dykema, obtained approvals and support from the Road Agency and Bakwena .Platinum Corridor; (d) The Government had not yet promulgated legislation to give direction to the fate of the pending applications, after the date of expiry as indicated in the Department's statement. It had also not approached the Constitutional Court to request an extension of the date of expiry. That legislation became a reality in 2015, three years after the date of expiry; (e) Having been part of the process to consider Mr Dykema's application, the

Municipality was empowered and in a better position to finalise the application in July 2013 as per the directive of the Department.

[40] A period of uncertainty and confusion ensued as regards the status of the pending applications. In Mr Dykema's case, the confusion was compounded by the fact that the final approval of his application by the Tribunal in November 2012 - was invalidated by the effect of two judgments of this Court[21] in 2016 and 2018, after unsuccessful attempts to obtain cooperation from the Municipality concerning post-approval procedures.

[41] At the time Mr Dykema approached the high court, he found himself confronted with an argument from his competitor, Mr Malebane that his (Mr Dykema's) application lapsed or was nullified on the date of expiry when the Tribunal lost the power to consider it. Mr Malebane contended thus:

'… the Applicant's failure to comply with the post-approval obligations stated in the DFA and its Regulations caused the Applicant's DFA application to lapse (by operation of the law) and therefore the approval granted by the LDT lapsed simultaneously.'

[42] The reference to *'by operation of the law'* turned out to mean the declaration of invalidity of the DFA. To put matters in perspective, it is necessary to examine the nature of the application lodged by Mr Dykema.

---

[21] *Shelton v Eastern Cape Development Tribunal* [2016] ZASCA 125 and *Patmar Explorations (Pty) Ltd and Others v The Limpopo Development Tribunal and Others* [2018] ZASCA 19; 2018 (4) SA 107 (SCA).

[43] Mr Dykema's application is an exercise of his right to a just administrative action, as provided for in section 33 of the Constitution.[22] He had a legitimate and justified expectation that his application would be considered and decided upon. The Tribunal in accepting the application, assumed the obligation to consider and decide on the application as provided for in s 33(3) (b) and (c) of the Constitution read with the provisions of the Promotion of Administrative Justice Act 3 of 2000. As at the date of expiry, the pending applications, including those completed or finalised, were in my view the objects of the applicants' right to a just administrative decision.

[44] In declaring chapters V and VI of the DFA to be constitutionally invalid, both this Court and the Constitutional Court effectively removed the administrative powers of the tribunals to receive, consider and decide on land use applications. There is no record that these courts or any organ of state had declared, or by inferential reasoning had accepted that the pending applications lapsed or became nullified. Such a demise of the pending applications would have, by implication, brought an end to the applicants' exercise of their right to just administrative action, without a decision having been taken, one way or the other, a situation that would be untenable.

[45] Mr Malebane's contention conflates instead of separating the pending applications from the loss of power on the part of the tribunals. The pending applications, even after submission, remained as the rights of the applicants who, alone, had the power to decide whether to

---

[22] The Constitution of the Republic of South Africa, 1996. Section 33 reads;

withdraw, abandon or persist with the exercise of their right to a just administrative action before any newly empowered organ of state. As it becomes apparent later in this judgment, this view is buttressed by s 60(2) of SPLUMA.

[46] The Constitutional Court could not have intended for anything other than the removal of the power of the tribunals to consider and decide on the applications. This Court in the matter of *Johannesburg Municipality v Gauteng Development Tribunal*,[23] after declaring chapters V and VI of the DFA invalid, suspended the declaration of invalidity for a period of 18 months subject to the following:

'No development tribunal established under the Act may accept for consideration or consider any application for the grant or alteration of land use rights in a municipal area.

No development tribunal established under the Act may on its own initiative amend any measure that regulates or controls land use within a municipal area.'

[47] The Constitutional Court upheld the decision of this Court to declare chapters V and VI of the DFA constitutionally invalid, but set aside this Court's order of suspension of the period of invalidity as well as the conditions of suspension. Instead, the Constitutional Court ordered in paras 7 and 8 as follows:

'The declaration of invalidity is suspended for 24 months from the date of this order to enable Parliament to correct the defects or enact new legislation.

The suspension is subject to the following conditions:

---

[23] This case first came before the Gauteng Local Division of the High Court and was reported in the law reports under the same name, as follows: High Court 2008 (4) SA 572 (W); SCA 2010 (2) SA 554 (SCA) and Constitutional Court 2010 (6) SA 182 (CC).

(a) Development Tribunals must consider the applicable integrated-development plans, including spatial-development frameworks and urban-development boundaries, when determining applications for the grant or alteration of land use rights.

(b) No development tribunal established under the Act may exclude any bylaw or Act of Parliament from applying to land forming the subject-matter of an application submitted to it.

(c) No development tribunal established under the Act may accept and determine any application for the grant or alteration of land-use rights within the jurisdiction of the City of Johannesburg Metropolitan Municipality or eThekwini Municipality, after the date of this order.

(d) The relevant development tribunals may determine applications in respect of land falling within the jurisdiction of the City of Johannesburg Metropolitan Municipality or eThekwini Municipality only if these applications were submitted to it before the date of this order.'

[48] The conditions of suspension of the orders of this Court sought to prohibit any receipt and consideration of applications during the period of suspension of the declaration of invalidity. That would have had the effect of not only restraining the tribunals from exercising their powers beyond the date of the order of the declaration of invalidity, but also prohibiting prospective applicants desiring to submit applications for consideration during the period of suspension, from doing so. That would have amounted to a total prohibition on the exercise of their constitutional right to just administrative action. The Constitutional Court set that part of this Court's order aside and protected the right of citizens to continue submitting applications after the date of the declaration of invalidity, but limited it to the period of suspension

[49] The exercise of the power to suspend an order of invalidity in terms of s172 of the Constitution, has to be just and equitable and not disruptive and result in the deprivation of rights. *In Steenkamp NO v Provincial Tender Board of the Eastern Cape* 2007 (3) SA 121 (CC), paras 28 to 29 the Court stated thus:

'[S]ince the advent of our constitutional dispensation administrative justice has become a constitutional imperative. It is an incident of the separation of powers through which courts review and regulate the exercise of public power. The Bill of Rights achieves this by conferring on 'everyone' a right to lawful administrative action that must also be reasonable and procedurally fair…'

[50] In *McBride v Minister of Police* [2016] ZACC 30; 2016 (2) SACR 585 (CC) at para 52 the Court stated thus:

'…In *Kruger*, the Court preserved the conduct of the Road Accident Fund that had relied on invalid proclamations. This was to avoid disruption and disorder. There must be an interest of justice consideration that overrides the presumption of objective constitutional invalidity.'

These authorities convey a clear message that the purpose of suspension of an order is not aimed at an infringement of any person's rights. See also *Tronox KZN Sands (Pty) Ltd v KwaZulu-Natal Planning and Development Appeal Tribunal and others* 2016 (3) SA 160 (CC). The current case makes reference to the KZN case in para 19 of the judgment of the high court in this case. The high court wrote:

'In that matter, despite the invalidity of the empowering statute, the Constitutional Court permitted a tribunal to exercise powers pertaining to land use rights, provided it did so from the perspective of a Municipality and not from the perspective of a Province.'

[51] Consequently it would be reasonable to accept that as at the date of expiry, there may have been a considerable number of applications lodged, which were at different stages of consideration, some at the

beginning and others towards finality. As at the date of expiry, Mr Dykema's application, with the support of the Municipality, was in the final stages of completion.

[52] The dictates of good governance would have demanded that the tribunals, immediately transfer the pending applications to the municipalities on the date of expiry. Alternatively, at worst, with their powers divested, to return the applications to the applicants.

[53] In the case of Mr Dykema's application, the Municipality had already considered and approved it as part of the DFA process of considering the application. That approval is protected by the Constitutional Court order as it occurred within the period of suspension. The *Sheldon* and *Patmar* cases invalidated the approval by the Tribunal in November 2012, correctly so as it was made after the date of expiry. As at July 2013, the Municipality had a statutory obligation as the State in terms of s 33(3) (b) of the Constitution, to give effect to Mr Dykema's right to a just administrative action by considering his application. It failed to do so on request, instead replied Mr Dykema one year after his request and informed him to submit a new application. This response would have provided an unfair and unreasonable advantage to those applicants, such as Mr Malebane, who after the date of expiry, had lodged their applications with the Municipality in terms of the Ordinance. The Municipality ignored the directive from the national Department.

[54] As the Constitutional Court observed in its judgment, it was expected of Parliament and the Executive to proclaim remedial legislative measures to correct the constitutional defect. The fate of the pending

applications was thus left to the Executive and Parliament to deal with. I now turn to the remedial legislative measures that were introduced.

[55] The remedial legislative framework envisaged by the Constitutional Court came in the form of SPLUMA, which came in to operation on 1 July 2015, three years after the date of expiry. Section 60 of SPLUMA provided for transitional provisions. Section 60 (1) reiterated the protection of the completed applications as stated in para 85 of the judgment of the Constitutional Court in Johannesburg Metropolitan Municipality case. It is s 60(2)*(a)* that is of relevance to the fate of the pending applications. It provides:

'All applications, appeals or other matters pending before a tribunal in terms of section 15 of the Development Facilitation Act, 1995 (Act 67 of 1995) at the commencement of this Act that have not been decided or otherwise disposed of, must be continued and disposed of in terms of this Act.'

[56] Section 60(2) (d) of SPLUMA further provides that the Minister may prescribe a date by which the pending applications, appeals or other matters must be disposed of, and may prescribe arrangements in respect of such matters not disposed of by that date. The Minister has not yet made such determination. Mr Dykema's pending application may still be submitted as ordered by the high court.

[57] At the time Mr Dykema launched his application before the high court in November 2015, the provisions of s 60 of SPLUMA had been in force as at 1 July 2015. If there was still uncertainty or confusion prevailing on the status of the pending applications, it was clarified by s 60 of SPLUMA. Similarly, if there was any merit in the contention that the pending applications had lapsed or became nullified, then s 60(2) of

SPLUMA must be accepted as having resuscitated such applications and had given them a life line as to how they should be disposed of. The language of s 60(2)*(b*) is couched in peremptory terms for the municipalities to consider these applications. To persist with the argument that the pending applications had lapsed is to render s 60 of SPLUMA superfluous.

[58] Declaring the pending applications to have lapsed could also have far reaching implications. This appeal before us, came three years after the commencement of SPLUMA. It is conceivable that since the commencement of litigation in this case, other pending applications have been considered and finalised in terms of s 60(2)*(a*). It is unclear what the status of such applications would be if one regards them as having lapsed or became nullified on the date of expiry. The reality is that the pending applications would only lapse after they are either withdrawn or abandoned by the applicants; or disposed of with a decision, one way or the other by an organ of state having the power to do so. Parliament accepted that the pending applications could still be considered by another organ of state in terms of s 60(2) of SPLUMA.

[59] There is no merit in Mr Malebane's contention. It cannot be correct. The purpose and effect of the declaration of invalidity was limited to the removal of the power of the tribunals to receive, consider and decide on the applications, not to nullify the applications that were lodged. The DFA did not put any time frames on the lifespan of the applications. The suspension was intended to allow the tribunals to continue providing a service to the public so as to avoid a disruption of the government's processes and services. Thus the argument raised by Mr Malebane that Mr Dykema's application had lapsed, was based on a false

inferential reasoning that had no support in law or fact. It should be rejected and the appeal should fail.

[60] Before concluding, something needs to be said about the effect of the judgments in *Shelton* and *Patmar*. This Court was correct in striking down the decisions taken by the tribunals after the date of expiry as being *ultra vires.* The tribunals had no legal authority to continue with the applications beyond the date of expiry. Similarly, the view expressed by the Department in its public statement that the tribunals must complete the remaining applications beyond the date of expiry was incorrect. However, the striking down of the tribunal's decisions can only affect what they did after the date of expiry. Anything they did before the date of expiry is protected by the order of the Constitutional Court. Consequently, all applications affected by the *Shelton* and *Patmar* decisions logically revert to their status, whatever it may have been, before the date of expiry. Mr Dykema need not have contended for the impugned approval, but should rather have taken his application as it was on 17 June 2012, and submitted it to the Municipality in terms of s 60(2).

[61] The high court was correct to grant the order it did as it is in the interests of justice to do so. The order ensures a lawful, reasonable and procedurally fair administrative action between the parties. I would therefore dismiss the appeal, uphold the cross appeal and award the costs of this appeal to the respondent.

S P MOTHLE

ACTING JUDGE OF APPEAL

Appearances

For appellant: S J Du Plessis SC
Instructed by: Kuilman Mundell & Arlow, Johannesburg
Claude Reid Inc, Bloemfontein

For first respondent: M C Erasmus SC (with him D J van Heerden)
Heads of argument prepared by A Liversage SC
Instructed by: Adriaan Venter Attorneys & Associates, Pretoria
Rossouws Attorneys, Bloemfontein.