

Longer Delays For Developers

Developers could face longer authorisation delays following a court judgement that emphasises socio-economic factors and gives ammunition to objectors. John Loos, property strategist for FNB Property Finance, is of the opinion though that this judgement will not have much effect on developers.

A recent Constitutional Court judgement, the Fuel Retailers Association of Southern Africa case, has highlighted the need to separate town planning criteria from environmental decision making dealing with the "sustainability" of a development and its impact on social and economic factors.

"In addition, the judgement looked at the legitimacy or otherwise of the practice of trade competitors who tend to lengthen the authorisation process by raising environmental objections for other than ecological motives," comments Glendyr Nel of Shepstone & Wylie Attorneys' environmental law department.

The issue under the spotlight is whether the consideration of "need" and "desirability" in rezoning applications makes it unnecessary for the environmental authorities to subsequently weigh socio-economic factors afresh.

Nel explains that in the past the consideration of these two planning concepts was wrongly coupled with the environmental standard of "sustainability".

The Court has now recognised the difference between these concepts. In confirming that the consideration of socio-economic factors is an "integral part of its environmental responsibility", it has halted the tendency of the environmental authorities to delegate the assessment of the socio-economic segment of its decision making to the planning departments of local authorities. The obligations of the two sets of authorities are distinct: local authorities consider applications from a town planning perspective while the environmental authorities are tasked with considering whether or not the proposed development will be sustainable.

The practical rationale behind this is that decisions made in town planning matters are based on a narrower set of criteria than those applicable to the consideration of "sustainability", which involves identifying and evaluating the impacts (even cumulative) of a proposed development on three competing, but inter-linked sectors – the environment, society and the economy.

"In the light of the judgement, it is likely that decisions of environmental authorities will be set aside if they do not indicate that they have specifically applied their minds to the socio-economic impacts of a development from a sustainability perspective. To delegate this duty to the local authority would be considered unlawful. To carry out a proper assessment, the authorities will therefore also need to weigh up the socio-economic effects of the planning decision on the environment," says Nel.

A second important point of clarity that affects the authorisation process of a development relates to whether or not the motive of objectors – who raise environmental issues – actually matters, she says. The Court stated that "neither the identity of the litigant who raises the objection, nor the motive, is relevant... An environmental authority whose duty it is to protect the environment should welcome every opportunity to consider and assess issues that may adversely affect the environment".

This is where challenges may arise for developers, adds Nel. She explains that while technically correct, this interpretation will assist opposing business interests, who may have the time and resources to outlast an applicant, delaying the authorisation process by highlighting any number of environmental issues (however insignificant) and submitting additional specialist reports that will need to be considered at length before a decision can be made.

On the positive side, Nel concludes that despite the fact that developers may now face delays in the authorisation process, firstly due to the fact that environmental authorities must specifically consider socio-economic factors in their decision making and secondly because trade objectors have the same rights (whatever their motive) as anyone else to raise environmental concerns, the decision is correct and the court's directive will ensure that South Africa's constitutional right to have the environment protected for the benefit of present and future generations is properly managed.

According to Loos, objectors in this regard are not really a problem. "The main problems are the time it takes to zone land, inadequate supply of bulk infrastructure and shortages in capacity," he says. "If you haven't secured an electricity connection, you can't build."