19422/08

IN THE HIGH COURT OF SOUTH AFRICA
NORTH GAUTENG DIVISION, PRETORIA

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

2011.04.12
DATE **SIGNATURE**

13/4/2011

MARIA M KRUSE	*First APPLICANT*
ALETTA MM KRUSE N.O.	*Second APPLICANT*
MARTHA E C BEZUIDENHOUT N.O.	*Third APPLICANT*
HESTER ISABELLA LOTZ	*Fourth APPLICANT*
V	
CITY OF TSHWANE METROPOLITAN MUNICIPALITY	*First RESPONDENT*
THERESA MARIE ROSSOUW	*Second RESPONDENT*
CATHARINA MARIA FROELING	*Third RESPONDENT*

JUDGMENT

MABUSE J:

[1] This is a review launched in terms of the provisions of Rule 53 of the Uniform Rules of Court in conjunction with sections 6 and 8 of the Promotion of Administrative Justice Act 3 of 2000("PAJA"). It is aimed at reviewing and setting aside the decision of the First Respondent to approve the Second Respondent's building plans in respect of a certain structure within the Second respondent's property.

RELIEF SOUGHT:

[2] In this review, the Applicants seek the following order:

"1. That the first respondent's decision, taken on 27 March 2008 in which the First Respondent approved the Second Respondent's building plans should be reviewed and rescinded.

2. That the first and second respondents should be ordered, jointly and severally, to pay the costs of this application."

The order sought above constitutes part A of an application that initially consisted also of parts B and C. In this matter this court is concerned only with the relief sought under part A of the application. This application is opposed by the Respondents.

[3] **THE PARTIES:**

3.1 The First Applicant is a practising medical doctor of 185 Lys Street, Rietondale, Pretoria. She approaches this court in this review application firstly in her personal capacity and secondly in her capacity as a co-trustee of the Bezuidenhout Family Trust("BF Trust").

3.2 The Second Applicant is a pensioner of 185B Lys Street, Rietondale Pretoria. She approaches this court in her capacity only as a Co-Trustee of the Alec Kruse Family Trust("AKF Trust").

3.3 The Third Applicant is also a pensioner but stays at 187 Lys Street, Rietondale, Pretoria. She has *locus standi* in this application by reason of the fact that, together with the First Applicant, she is a co-trustee in the Bezuidenhout Family Trust("BF Trust").

3.4 The Fourth and last Applicant is a teacher who resides at 7A Cerbeveba Street, Acon Park, Vereeniging. She approaches this court for the remedy sought in her capacity, together with the First and Third Applicants, as a co-trustee of the Bezuidenhout Family Trust("BF Trust").

3.5. The trustees of BF Trust have been properly appointed as such by the office of the Master of the High Court in Pretoria under Trust No. 2383/94. The said appointment was done on 14 October 2002 under letters of authority of an even date. The *locus standi* of the co-trustees of BF Trust is accordingly not in dispute.

3.6 The First Respondent is the City of Tshwane Metropolitan Municipality with legal personality of 227 Andries Street, Pretoria. The Second Respondent is a medical doctor of 187 Lys Street, Rietondale, Pretoria. The Third and last Respondent is a medical doctor of 183 Lys Street, Rietondale, Pretoria. The Third Respondent is the owner of the remaining portion of Erf 482. No relief is sought against her.

[4] **THE PROPERTIES:**

4.1 It is only apposite at this stage to describe the situation of the properties involved in this application. The position of the relevant properties and how they impact on the disputed servitude is aptly captured in annexure "K2" by Frederik Daniel Van Niekerk ("Van Niekerk"), a duly admitted and practising conveyancer of Menlopark, Pretoria. First and foremost, it is clear that the applicants, in their personal and representative capacities, are owners of two adjoining properties in Rietondale.

4.2 I will proceed to describe the layout of the properties from Lys Street where the entrance to the disputed way is located. The Remaining Portion of Erf 482, the property that belongs to the Third Respondent, is situated to the right hand side of the *via* that is in dispute. Across this via and to the left hand side of the entrance, is the Remaining Portion 4 of Erf 13, which is the property of Theresa Marie Rossouw, the Third Respondent. At the end of this *via*, there are two entrances. The right entrance leads to Portion 4 of Erf 482. This is the property owned by M.M. Kruse, the First Applicant, while the left entrance or gate leads to Portion 6 of Erf 13, consisting of Portion 1 and Portion 2. Portion 1 of Portion 6 of Erf 13 belongs to AKF Trust while Portion 2 of Portion 6 of Erf 13 belongs to BF Trust. The layout of the properties, the disputed passage and the ownership of the properties as set out by Van Niekerk in Annexure "K2" re not in dispute.

4.3 For the purpose of convenience, I will refer to this stretch of land which constitutes the servitude as *"a passage"*. Van Niekerk has longitudinally divided the passage into two halves. The one half of the passage that runs from Lys Street alongside of the Third Respondent's property up to the entrance that leads to the First Respondent's property and another one-half runs alongside the second Respondent's property that leads to the entrance of Portion 6 of Erf 13. Both these halves constitute the passage. This passage constitutes the servitude over the Third and Second Respondents' properties in favour of Portion 4 of Erf 482 and Portion 6 of Erf 13.

THE FACTUAL BACKGROUND

[5] During March 2008 the Second Respondent notified the Applicants that the First Respondent had approved her building plans for the erection of a double garage on portion 6 of Erf 13. The said garage would be located very close to the boundary of the servitude and in that manner access to this garage would only be through the Applicants' servitude. The Applicants only became aware of the First Respondent's approval of the Second Respondent's building plans after the Second Respondent had sought their consent to the plans and they had refused.

[6] The Second Respondent never made the building plans available to them for inspection before she submitted them to the First Respondent for its approval. The Second Respondent's attorney promised to let them have insight into the said plans but never fulfilled his promise. However, the First Respondent allowed their architect, one Mr. Kal Rofahil("Rofahil") on 11 April 2008 to have

insight into the Second Respondent's building plans. The relevant file relating to the application of approval of the Second Respondent's building plans was made available to Rofahil and in it he saw the First Respondent's approval of the said building plans which took place on 27 March 2008.

[7] On further inspection he discovered that the reference number of the said building plan was RE3/3269/07; that the said plans showed the contemplated building included a motor garage; that the motor garage would be located against the southern border of the remainder of portion 4/13 and against the eastern side border of the servitude area of the said portion. While the Remaining Portion 4/13 already had access to Lys Street from the street front, the building plan showed a contemplated second access to the motor garage through the servitude next to the northern border of portion 4/482 and the Remaining Portion 6/13. Fourthly, the length of the motor garage was more than 7.5 metres. The relevant building plans showed the existing building in respect of which there was no plan approved by the First Respondent.

WHY THE APPLICANTS SEEK THE ORDER:

[8] The Applicants felt aggrieved by the First Respondent's approval of the Second Respondent's building plans. They oppose the decision of the First Respondent to approve the said building plans on three grounds firstly, that the value of their properties will be drastically reduced by the approval of the building plans; secondly, that the First Respondent's approval of the Second Respondent's building plans was irregular and illegal on the grounds that the First Respondent had disregarded the provisions of section 7 of the National Building Regulations and Basic Standards Act 103 of 1977("the Act"). The said section provides as follows:

" 7(1)(a) If local authority, having considered recommendation referred to in section 6 (1)(a)

(a) *is satisfied that the application in question complies with the requirements of this Act and any other applicable law, it shall grant its approval in respect thereof;*

(b) (i) is not satisfied; or

(ii) is satisfied that the building to which the application in question relates-

(aa) is to be erected in such manner or will be of such nature or appearance that-

(aaa) the area in which it is to be erected will probably or in fact be disfigured thereby;

(bbb) it will probably or in fact be unsightly or objectionable;

(ccc) it will probably or in fact derogate from the value of adjoining or neighbouring properties;

(bb) will probably or in fact be dangerous to life or property, such local authority shall refuse to grant its approval in respect thereof and give written reasons for such refusal ."

[9] Thirdly the Applicants contend that it was not very clear from the building plans themselves as to who had approved them on behalf of the First Respondent and what authority or delegation or otherwise did such a person have. In the circumstances, the applicants challenge the authority of the person who approved the Second Respondent's plans. The Applicants' challenge of the authority of such a person who the approved the Second Respondent's plans is anchored on the provisions of the section 28 (4) of the Act. The said section provides as follows:

"Any local authority may in writing delegate any power conferred upon it by or under this Act, other than a power referred to in section 5, to any committee appointed by it or to any person in its employ, but the delegation of any such power shall not prevent the exercise thereof by such local authority itself".

[10] Section 5 itself deals with the appointment of a building control officer by the local authority. According to its provisions it is the duty of the local authority to appoint a building control officer. The local authority may not delegate its powers to appoint a building control officer, whose powers are circumscribed in section 6 of the Act. The said section 6 provides as follows:

"6 (1) A building control officer shall-

(a) make recommendations to the local authority in question, regarding any plans, specifications, documents and information submitted to such local authority in accordance with section 4(3);

among others.

[11] Relying on the provisions of section 6(1)(a) of the Act, among others, the applicants state that:

"Nadat die bouplan deeglik nagegaan is, en gesirkuleer is na die relivante beamptes van die plaaslike owerheid se onderskeie departemente, kan sodanige aanbeveling ook deur die boubeampte, die boubeheerargitek op die hoofplan nasiener gemaak word. Laasgenoemde persone bevoegheid om so aanbeveling te maak is egter onderworpe daaraan die magte van die boubeheerbeampte skriftelik na hulle gedelegeer is".

They contend therefore that a building officer, the building control officer and the chief plan examiner's authority to make recommendations as contained in section 6(1)(a) should be delegated in writing.

[12] The applicants case is, in particular, that the recommendations for the approval of the second respondents building plans were, contrary to the provisions of section 6 (1)(a) of Act, done by the chief plan examiner. They challenge the chief plan examiner's authority to make recommendations in respect of the Second Respondent's building plans on two grounds, firstly that he did not have the necessary qualification to approve the building plans and secondly that he did not have necessary authority to approve such plans.

[13] According to the First Respondent, the Second Respondent's plans were inspected by one H W Schoeman("Schoeman"), a building inspector on 4 January 2008. Subsequently on 25 January 2008 the building plans were recommended for approval by one Magagula, the chief plan examiner, whose job description was approved by the Strategic Executive Officer ("SEO") in terms of the authority granted to him. The said Strategic Executive Officer,

according to the First Respondent, has the necessary authority to delegate certain tasks to the said Magagula.

[14] The plans were approved by Marandela, the First Respondent's plan examiner. It is the First Respondent's case that the said Marandela had been properly authorised to approve the said plan. In absence of any further submission from the applicant the court will accept that the plans were properly approved by someone who was qualified to do so.

[15] The Applicants contend that the First Respondent should, in terms of the provisions of Sec. 7(1)(b)(ii)(cc) of the said Act, have refused to approve the Second Respondent's Building Plans on the following grounds; the said decision of the First Respondent as contemplated in terms of the provisions of section 6(2)(a)(I) PAJA was taken without any proper observation of the provisions of section 6(2)(b) of Paja; the decision was arbitrary as envisaged by section 6(2)(e)(10) of Paja; and it is not rationally connected to the purpose for which section 7(1)(b) of the Act was designed or the information before the First Respondent's Building Control Officer as envisaged in Sec. 6(2)(f) of Paja.

[16] Of course as the review was aimed at challenging the decision of the First Respondent, it is clear that the Second Respondent, apart from relying on the First Respondent's view and affidavit, would have nothing to say about the grounds on which the Applicants seek to challenge the First Respondent's decision. In the first Place, Modise Reginald Maimane, who deposed to the First Respondent's answering affidavit, denied that the value of the Applicants' properties would be diminished as a result of the First Respondent's approval of the Second Respondent's building plans. He noted that the Applicants have not provided any valuation of their properties prior to the approval of the building plans nor did they subsequently obtain the value of their properties after such approval. According to the First Respondent, in the absence of proof of the value of the Applicants' properties before and after the approval of the Second Respondent's building plans, nothing prevented the First Respondent from approving such plans. The Applicants have not filed any replying affidavit and

the court is not in a position to establish their reaction to this allegation. The court will accept that the correct procedure would, in the circumstances, have been for the Applicants to do an impact study and to establish, by obtaining valuations of their properties, how the values of their properties would be affected.

[17] The First Respondent denied that its decision to approve the Second Respondent's building plans was unauthorised. It denied furthermore that it failed to observe any material conditions; that it took an arbitrary decision or that its decision was not rationally connected to the purpose for which the said section was designed. It contends that the First Respondent's official made a proper evaluation of the plans the Second Respondent had submitted and, having properly considered all the relevant aspects, which included the aesthetical value and the possible impact on the value on the adjacent properties, took a decision to approve the plans.

[18] The Applicants contend that in view of the fact that the First Respondent's decision will affect the value of their properties, the First Respondent should have notified them of its contemplated decision in terms of the provisions of section 4(3) of Paja or the First Respondent should have notified the Applicants of the Second Respondent's applications and have accordingly sought their reaction to the approval of such plans. The said Sec. 4(3) provides as follows:

"4.3 *If an administrator decides to follow a notice and comment procedure, the administrator must –*

(a) take appropriate steps to communicate the administrator's action to those likely to be materially and adversely affected by it and call for comments from them;

(b) consider comments received;

(c) decide whether or not to take the administrative action, with or without changes; and

(d) comply with the procedures to be followed in connection with notice and comment procedures, as prescribed."

[19] On the contrary, apart from denying that the value of the Applicants' properties was diminished, the First Respondent denies furthermore that it was necessary for it to give the Applicant any notice of a decision it had contemplated taking or any notice of the Second Respondent's application of approval of her building plans. In ***Walele vs City of Cape Town and Others 2008(6) SA129 at p145*** *paragraph 31)* the court stated as follows:

"(31) On a proper construction of s 3, the applicant's claim to a hearing can only succeed if he establishes that the decision to approve the building plans materially and adversely affected his rights or legitimate expectations. The parties involved in the application for the approval were the respondents and the City. The applicant was not a party to that process nor was entitled to be involved. The building plans in question were drawn at the instance of the respondents who wanted to erect a four- storey block of flats on there own property. The granting of the approval could not, by itself, affect the applicant's rights".

It will be recalled, by way of digression, that the plans in *casu involved,* according to the Applicants, a motor garage or carport, according to the First and Second Respondents. In the premises it would appear that the Applicant's attack of the First respondent's approval of the Second respondent's building plans is unsustainable. Furthermore the First Respondent denies that the decision that it took was procedurally unfair.

[20] The Applicants contend that notwithstanding the fact that the contemplated motor garage falls partly within the building restrictions area border on the southern rear border building or the western side border is in contravention of Sec. 15A of the Scheme. The Applicants contend so on the following basis:

20.1 The Second Respondent's property, R4/13, measures 1137m², according to the deed of servitudes K6277/93. According to Table B1 of the Scheme, which constitutes part of clause 15A (1), the rear border building line is

3.00m. This interval includes the building restriction line on the southern border of the property in which the Second Respondent may not build unless he complies with the exemptions of Clause 15A(2)(d) of the Scheme. On face value, the exemptions have not been complied with and in that regard the Applicants contend that it is for the First and Second Respondents to prove that the exemptions have been complied with.

The same situation, so contend the Applicants, applies in respect of the Second Respondent's western side border building line. According to the said Table B1 the building line restriction on the Second Respondent's property on the western side of Erf 4/13 is 2.5 m. This is the area from the western border of the property which the Second Respondent must maintain and within which she may not put up any structure.

20.2 These allegations by the Applicants are denied by the First Respondent who contends, in the first place, that the structure depicted in the Second Respondent's building plans is a carport and not a motor garage, as stated by the Applicants. Secondly, the First Respondent denies that the said carport is subject to any building restrictions. According to the First Respondent, the aforementioned carport may, in terms of clause 15A (2) (d), be erected even within any portion of the building restricted area.

20.3 It is, in my view, important to look at the provisions of the said clause 15A (2) (d). It provides as follows:

"(2) Ondanks die bepalings van subklousule 1 of enige verondening – Die mag 'n enkelverdieping Garage; motordak of skuiling, asgoedkamer, privaat swembad, kleedkamer vir 'n private swembad, tennisbaan, muurbalbaan, of pakkamer op enige gedeelte van die boubeperkingsgebied anders dan waar sodanige strukture aanliggend aan 'n straatgrens is, opgerig word."

20.4 Counsel for the First Respondent argued that the First Respondent's contention that the structure which constitutes the subject of the decision is a carport or "motordak" has not been challenged. In the premises it will appear that the court should accept that the relevant structure is a carport and that a carport is exempted from complying with the building restrictions. In a letter dated 23 April 2008 and entitled REDES VIR GOEDKEURING, the building control officer referred to the relevant structure as *"motorafdak / skuiling"*. Counsel for the Respondents argued that the relevant structure is not a garage but a carport. He argued, and I accept his argument, that in terms of the provisions of Clause 15A (2) (d) a carport may, subject to the following conditions, be approved.

"Met dien verstande dat:

i Die posisie daarvan nie die aantreklikheid van aangrensendeeiendom of eiendomme benadeel nie;

ii. Die hoogte daarvan nie 3.8 meter moet oorskry nie;

iii. "Die buitevlak van die grensmuur daarvan van suursteen moet wees, tensy die eienaar of eienaar's van die aangrensende eiendom of eiendomme skriftelik tot 'n alternatiewe duursame afwerking inwillig;

iv. Die afstand tussen die hoofgeboue en sodanige ander gebou aan die hand van 2.25meter is ; "15.8.90/27081/3603"p

iiv. "Enige motordak/skuiling wat aan die hoofgebou is of wat op enige ander grens as 'n straat grens gebou is aan twee kante heeltemal oop moet wees en die lengte daarvan nie 7.5 meter moet oorskry nie.

viii. "Dat dit op of direk teenaan die aangrensende ten minste 1 meter van die erf moet opgerig word.

I find that there is no merit in the argument by counsel for the Applicants that the structure in question is a motor garage.

20.5 With regard to the Applicant's contention that the First and Second Respondents should prove that they have complied with the exemptions as set out in sub-clause 15A (2) (d), the First and Second Respondent's attitude is that the applicants have misconstrued the law with regard to the duty to prove. It was argued on the respondents' behalf that, in terms of the law, no duty rests on them to prove that they have complied with the aforementioned exemptions. They contend, which is quite correct in my view, that the Applicants, having launched this review application, have the onus to show that the First Respondent has not complied with the exemptions. It is the principle of our law that he who asserts, and not he who denies, proves. See **Pillay v Krishna and Another 1946 AD 946 at p. 952**. Accordingly I accept the First Respondent's view that the onus to satisfy the court that the First Respondent has not complied with the said exemptions rests on the Applicants and not the First Respondent.

[21] Having regard to the Second Respondent's motor garage as shown on the building plans, so contend the Applicants, the First Respondent's decision to approve the Second Respondent's building plans was unlawful in as much as it was done contrary to the said Scheme. It is contrary to the provisions of Sections 6(2)(a)(I),(b), (c),(d),(e), (VI) and (f) of *PAJA.*

[22] The motor garage is, contrary to the provisions of clause 15 A (2) (d) (vi) of the Scheme, longer than the prescribed length of 7.5 metres. This allegation is denied by the Respondents who contend, on the contrary, that the length of the carport complies with the provisions of clause **15A (2)(d)(vi)** of the Pretoria Town Planning Scheme. According to the first respondent, the carport allows proper access for any vehicle that utilises the servitude to gain access into the Second Respondent's property. The respondent's contend furthermore that the length of the shelter is 6.7 metres and its width is 6.9 metres

[23] If the First Respondent approved the Second Respondent's building plans in terms of clause 15A of the Scheme, the First Respondent should have notified the applicants and offered them an opportunity to present their views. They opine that in view of the fact the First Respondent approved the Second Respondent's building plans without notifying and giving them an opportunity to hear them first, such a procedure was unfair to the applicant and contrary the dictates of section 6 (2) (c) of *PAJA.*

[24] The First Respondent has also challenged the application on a point of procedure on the grounds firstly, that the written authority of AKF Trust issued

by the Master of the High court was not attached to the application. In the absence of such a document the second Applicant has not established her *locus standi*. In the premises the First Respondent is not in any position to admit that the Second Applicant was so authorised to represent FAK Trust in this application.

[25] The Second Respondent also took a similar view that, until such time as the Trustees of AKF of Trust had produced letters of authority issued by the Master of the High Court in terms of section 6 of the Trust Property Act 57 1988, the trustees do not have the authority to represent AKF Trust. On this basis the second respondent denied that the trustees of AKF Trust have been duly authorised to bring the current application.

[26] The First Respondent's second string to its bow was that the trustee had not attached any resolution. On the basis of the failure by the trustees to annex a resolution authorising her to bring this application to her papers, the First Respondent denies that the Second Applicant has any authority to represent AKF Trust.

[27] Finally the applicants have launched an appeal against the decision of the First Respondent. This appeal was launched on 11 April 2008 in terms of the provisions of section 9 (1)(c) of the Act read with regulation 9 of the Review Board Regulations. The purpose of the letter dated 11 April 2008 by the applicants' attorneys to the Review Board was clear. The said letter stated that:

"This letter serves as a Notice of Appeal in terms of section 9 of the Act, read together with Regulation 9 of the Regulations, against a decision the City of Tshwane Metropolitan Municipality (CTMM) to approve building plans under reference number RE3/3/269/07 ("the building plans") for certain additions and/or alterations to the Dwelling/House situated on Portion 4 of Erf 13, Rietondale Pretoria "(the subject property) ".

[28] Save for the fact that the said letter did not refer to Fourth Respondent, it is clear that the attorney who wrote the said letter was acting for the Applicants. Applicants have nowhere in their application referred to the appeal nor have explained what happened to the appeal. What is clear however is that the said appeal was noted before the applicants launched their application on the 16 April 2008.

[29] It was argued on behalf of the First Respondent that the provisions of *PAJA* require of the applicants to exhaust other internal remedies provided for in the said Act. Section 7(2)(a) *PAJA* provides as follows:

"7(2)(a) Subject to paragraph (c) no court or tribunal shall review an administrative action in terms of this Act unless internal remedy provided in any other law has first been exhausted".

[30] At the time the applicants launched the current application, they had already noted the said appeal but had in that respect not exhausted the internal remedies as enjoined by section 9 of the Act. The said section provides as follows.

"(9)(1) Any person who

(a) feels aggrieved by the refusal of a local authority to grant approval referred to in section 7 respect of the erection of a building;

(b) feels aggrieved by any notice of prohibition referred to in section 10; or

(c) disputes the interpretation or application by a local authority of any national building regulation or any other building regulation or by- law, may, within the period, in the manner and upon payment the fees prescribed by regulation , appealed a review board."

[31] According to *PAJA*, the applicants should first have exhausted the internal remedies provided for by section 9 of the Act and should have done so to the conclusion of the appeal before launching this application.

I am satisfied both on the merits and respect of procedure that the applicants have not made a good case and that the application cannot succeed.

Accordingly I make the following order:

1. The application to review and set aside the decision of the First Respondent of 27 March 2008 is hereby dismissed with costs.
2. The applicants are hereby ordered to pay the cost of this application, the one paying and the others to be absorbed.

P.M. MABUSE
JUDGE OF THE HIGH COURT

__Appearances:__

Applicant's Attorneys:	*Roestoff and Kruse*
Applicant's Counsel:	*Adv. SJ du Plessis SC*
Respondent's Attorneys:	*Moduka More; Venn & Muller*
Respondent's Counsel:	*Adv. T. Strydom*
Date Heard:	*26 July 2010*
Date of Judgment:	*13 April 2011*