

IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE - PORT ELIZABETH)

CASE No. 1345/08

NOT REPORTABLE

In the matter between:-

CHASE STREET PROPERTIES (PTY) LTD

Applicant

and

MEMBER OF THE EXECUTIVE COUNCIL, DEPARTMENT OF

HOUSING, LOCAL GOVERNMENT AND TRADITIONAL AFFAIRS

First Respondent

NELSON MANDELA BAY METROPOLITAN MUNICIPALITY

Second Respondent

KINI BAY VILLAGE ASSOCIATION

Third Respondent

D T BROADHURST

Fourth Respondent

MRS ANN CALCUTT

Fifth Respondent

MR HENRY E D VAN ROOYEN

Sixth Respondent

MR BEN HOUGH RUST

Seventh Defendant

MR RICHARD G LUYT

JUDGMENT

Van der Byl, AJ:-

[1] In this matter I on 23 April 2009 granted an order in the following terms:

- “**1.** *That the decision of the First Respondent taken on 3 April 2008 to uphold the appeals against the approval of the application for rezoning of Erf 78, Kini Bay, by the Second Respondent in terms of the Land Use Planning Ordinance, 1985 (Ordinance 15 of 1985), is hereby reviewed and set*

aside.

2. *The First Respondent is ordered to pay the costs of this application.”.*

At the time I indicated that I will furnish my reasons for granting this order at a later stage.

The reasons that follow are my reasons.

[2] The Applicant sought, in addition to the usual order of costs, an order -

- (a) reviewing and setting aside the appeal proceedings in which the First Respondent, being the Member of the Executive Council of the Eastern Cape Province for Housing, Local Government and Traditional Affairs, upheld an appeal by the Third and Fourth Respondents against the decision of the Second Respondent, being the Nelson Mandela Metropolitan Municipality, to approve the Applicant's application for the rezoning of Erf 78, Kini Bay, from Residential Zone 1 to Special Purposes (Guest House and Conference facility) in terms of the Land Use Planning Ordinance, 1985 (Ordinance 15 of 1985);
- (b) extending the 180 day period prescribed by the Promotion of Administrative Justice, 2000 (Act 3 of 2000).

[3] It was at the hearing of this matter not an issue that there was any need for the extension of the 180 day period prescribed by the Promotion of Administrative Justice, 2000, and I will accordingly refrain from dealing with the relief sought in that regard.

[4] Although the Second and Third Respondents filed answering affidavits in this matter the application is opposed only by the First Respondent.

The Third, Fourth, Fifth, Seventh and Eighth Respondents filed a notice to the effect that they will abide by the decision of this Court.

The Sixth Respondent did not respond to the application at all.

[5] It is common cause that an application by the Applicant for the rezoning of its property, Erf 78, Kini Bay, with physical address at 15 Seaview Drive, Port Elizabeth, from “*Residential 1 Purposes*” to “*Special Zone*” so as to enable it to operate a guest house with conference facilities on that property was approved by the Second Respondent on 19 October 2006 by virtue of the powers vested in it by the Land Use Planning Ordinance, 1985 (Ordinance 15 of 1985) (“*the Ordinance*”).

By virtue of this approval the Applicant commenced trading as a guest house and has expended considerable amounts of capital in the form of start up and operating finance.

[6] On 10 April 2008, ie., almost 18 months after the decision rezoning the Applicant’s land was taken, however, the Applicant received a fax from its agents, Metroplan, to which was annexed a letter dated 9 April 2008 addressed to the Fourth Respondent by the Superintendent-General of the First Respondent’s Department to the effect that the First Respondent has on 3 April 2008 upheld certain appeals against the rezoning of Applicant’s Erf for reasons set out therein.

[7] It appears that, apart from a copy of a letter, **Annexure TX 1** (belatedly annexed to the

First Respondent's Heads of Argument), faxed to the deponent of the Applicant's founding affidavit on 17 April 2007, the Applicant received no notice of the Third and Fourth Respondents' appeal lodged against the Second Respondent's decision.

The letter, **Annexure TX 1**, is a letter addressed by the Superintendent-General of the First Respondent's Department to the Municipal Manager of the Second Respondent informing him that an appeal dated 16 April 2007 was received from an attorney, Mr. Robert Martindale, acting on behalf of the Third Respondent and individual residents who objected against the rezoning of the property concerned. Furthermore, the Second Respondent is requested therein to advise the First Respondent on certain matters raised therein and to ensure that all the necessary documentation "*as laid down in the application form*" is forwarded to the Department.

[8] In compliance with a request by the Applicant for access to the record of the appeal proceedings, voluminous documents, marked **Appendixes A and B**, were made available to the Applicant from which it appears that extensive representations were made on behalf of persons and entities objecting against the rezoning of the land concerned and reports prepared by certain functionaries of the First Respondent, none of which, let alone the notices of appeal, was ever made available to the Applicant.

[9] The Applicant's application is based on a contention that it was not afforded a fair or any hearing in the appeal proceedings (see: Unreported judgment in this Division under Case No. 2147/06 in the case of ***Hercules Salomo Du Plessis v MEC of Housing, Local Government and Traditional Affairs, Eastern Cape Province and Others*** delivered on 31 August 2006).

[10] In an opposing affidavit filed by the First Respondent the application is vehemently opposed by the First Respondent on the grounds thereof -

(a) that, relying on the letter, **Annexure TX 1**, the Applicant was at least as from 17 April 2007 aware of the existence of the appeal;

(b) that she considered a site inspection conducted by the spatial section of the Department and the recommendations of the Planning Advisory Board, the Manager, Land Use Management, the Head, Legal Support Services, the General Manager, Spatial Planning and Land Development Administration, the Deputy Director-General, Developmental, Local Government and the Superintendent-General of the Department.

[11] A scrutiny of the papers show that this matter is riddled with irregularities.

[12] In this regard and before dealing with the irregularities I first need to refer to the legal provisions relevant to appeals against decisions taken in this regard by the Second Respondent.

[13] Applications for rezoning of land are dealt with and considered by a municipal council under the provisions of sections 16 and 17 of the Ordinance which provide for -

(a) extensive notice to be given to interested parties and the publication of any such

applications for general information;

- (b) an applicant to be afforded an opportunity to respond to any objections received.

[14] There is no dispute on the papers that the Applicant's application was duly considered in accordance with these provisions and eventually duly approved by the Second Respondent.

I may, however, mention that the Third Respondent launched proceedings in this Court seeking an order reviewing and setting aside the Second Respondent's decision, but the Third Respondent seems to have elected not to proceed with that application after an application for it to provide security for costs was granted in this Court on 3 April 2006 being an order which was confirmed on appeal by the Supreme Court of Appeal.

[15] In terms of section 44 of the Ordinance -

- (a) a person who has, *inter alia*, objected to the granting of any application in terms of the Ordinance, may appeal to the Administrator (now the First Respondent), in such manner and within such period as may be prescribed by regulation, against the granting of such application;

- (b) the First Respondent may, after consultation with the council concerned, in his or her discretion, *inter alia*, uphold any such decision.

[16] In terms of the regulations promulgated under the Ordinance by Provincial Notice No.

1050 of 5 December 1988 -

(a) a decision against which an appeal is received shall in terms of the proviso to regulation 20 be suspended;

(b) the municipal council is in terms of regulation 21 enjoined to notify the applicant if no appeal is received from an objector within two weeks as from the date on which the decision was taken;

(c) an appellant is in terms of regulation 22 enjoined to exercise his or her right of appeal within two weeks as from the date he or she is notified of the decision and at the same time to serve a copy of his appeal on the council concerned;

(d) an appeal referred to in regulation 22 shall, as provided in regulation 23, be in writing and be accompanied by all relevant documents submitted together with confirmation that a copy of the appeal has been served on the council;

(e) a council shall in terms of regulation 24 submit the council's comments and recommendations, if any, to the First Respondent's Department within one month of the date on which the copy of the appeal reached its office.

[17] Against this background, I can now revert to the factual averments contained in the papers.

[18] In the first place it appears that the Fourth Respondent was not one of the objectors in

the application by the Applicant for rezoning and, therefore, as appears from section 44 of the Ordinance, had no right of appeal.

[19] In **the second place** the Third Respondent failed to serve a copy of its notice of appeal on the Applicant or the Second Respondent.

[20] In **the third place** the First Respondent failed to consider the application launched by the Applicant to the Second Respondent and all the documents relevant to that application, such as, for example, a letter addressed on 19 August 2005 by Metroplan to the Second Respondent's Business Unit Manager together with ancillary annexures, such as, an Environmental Management Report from a certain Dr. Cohen. In fact it would appear that the appeal was considered mainly on the papers submitted by the objectors and seems to have been based on their contentions that the Applicant failed to comply with the conditions on which the rezoning was approved. It, furthermore, appears that an appeal by the Applicant itself against some of the conditions imposed was never considered.

[21] In **the fourth place** the notice of appeal was never served or provided to the Applicant together with all documentation submitted to the First Respondent on which her decision was based so as to afford the Applicant an opportunity to respond thereto or to participate in the appeal proceedings which in effect constituted a re-hearing of the matter. The Applicant had a right to be heard (see: ***Hayes v Minister of Housing, Planning & Administration, Western Cape 1999 (4) SA 1229 (C) at 1248H***).

[22] In **the fifth place** the First Respondent failed, as required by section 44(2) of the Ordinance, to consult with the Second Respondent. The only communication between the First

Respondent and the Second Respondent was an invitation by the former to the latter to submit preliminary comments on the appeal. In my view that constituted no consultation as envisaged in the Ordinance (see: *Hayes case, supra, at 1242H*).

[23] It is apparent from the foregoing that the Applicant received, apart from a copy of the letter **Annexure TX 1** telefaxed to it, no notification of the appeal and afforded an opportunity to participate in the appeal proceedings. The letter **Annexure TX 1** refers in any event to an appeal filed out of time which on the face of it appears therefore to have been an invalid document. One would have expected the First Respondent to have at least afforded the Applicant an opportunity to respond to the application for condonation contained in the Third Respondent's notice of appeal.

[24] The provisions of the Ordinance and the regulations made thereunder are to be construed in the spirit, purport and objects of the Bill of Rights and on this basis the Applicant should have been afforded a proper opportunity by the First Respondent and, I add, by the appellants, to respond to the appeal in accordance with the provisions of section 33 of the Constitution. On its rezoning having been approved by the Second Respondent the Applicant must obviously have had at least a legitimate expectation to be heard which entailed it being furnished with all relevant documentation before a decision adverse to its rights being taken, being a decision which seems to have been taken on, *inter alia*, new matter.

[25] I was accordingly of the view that the application was bound to succeed.

[26] I was urged by Mr. Gqamana who appeared on behalf of the Respondent to remit the matter for reconsideration to the First Respondent. I am not inclined to do that. The matter is, as

I have already indicated, riddled with irregularities and it is in my view in the best interests of justice that, should there be a need for the matter to be reconsidered, the matter should be dealt with afresh.

It is for these reasons that I made the order set out in paragraph [1] of this judgment.

.....
P C VAN DER BYL
ACTING JUDGE OF THE HIGH COURT

ON BEHALF OF APPLICANT

On the instructions of:-
33 Bird Street

ADV A BEYLEVELD

MICHAEL RANDELL ATTORNEYS

Central
PORT ELIZABETH
Ref : Mr M W Randell/cvv/KOL20/0004
Tel: (041) 585 9244

ON BEHALF OF FIRST RESPONDENT

On the instructions of:

ADV N GQAMANA

STATE ATTORNEY
29 Western Street
Central
PORT ELIZABETH
Ref: Mr. Mnyande 988/2008/b
Tel: (041) 585 7921

DATE OF HEARING

23 April 2009

REASONS FURNISHED ON

28 April 2009