

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH)**

CASE NO: 1147/2016

In the matter between:

YVETTE GEORGIOU

Applicant

and

NELSON MANDELA BAY

METROPOLITAN MUNICIPALITY

First Respondent

PUMZA GWABENI N.O.

Second Respondent

JOHANN METTLER N.O.

Third Respondent

JUDGMENT

MBENENGE J:

[1] The applicant seeks an order compelling the first respondent (the Municipality) to approve a building plan submitted by her in respect of Erf [...], Lorraine, Port Elizabeth in terms of section 7 of the National Building Regulations and Building Standards Act 103 of 1977 (the Act).

[2] The application has a long and colourful history, spanning approximately the past 10 years. For present purposes, only the salient facts, which are by and large common cause, need be narrated. The applicant purchased Erf [...] during the year 2005. She thereafter purchased the adjoining property located at 250A and, ultimately, during or about December 2014, Erf ...6 at ... Kragga Kamma Road, the intention having been to consolidate the three erven and convert her business into a five-star boutique hotel inclusive of 22 guest rooms, a conference centre, a wedding venue, a chapel, a gift shop and a SPA.

[3] It came to pass during 2007 that the applicant lodged an application with the Municipality in terms of regulation 3.18 of the applicable Zoning Scheme Regulations¹ for special consent to implement a lawful secondary use to the Residential 1 zoning to operate a guest house on Erf [...]. Pursuant thereto, the applicant was granted special consent to operate a twelve-roomed guest house. The Municipality also gave approval to the applicant's site development plan submitted in compliance with the conditions of the special consent on 26 February 2010. Reflected on the site development plan was a room added to Erf [...] which was intended for use as a gymnasium and for multiple purposes.

[4] One of the conditions on the title deed accompanying the site development plan precludes the construction of any building or structure, except boundary walls and fences, closer than 4.5 metres from the rear boundary of Erf [...] or 1.57 metres from a lateral boundary common to an adjoining Erf.

[5] It is common cause that on Erf [...] a private gym, swimming pool and chapel were built without an approved plan. The chapel was built 1.5 metres from the side and rear boundary line of the Erf, in breach of the restrictive condition in the title deed applicable thereto. It is the existence of the restrictive condition pertaining to the rear building line that made the Municipality refuse the applicant's building plan, even though the related site development plan had previously received approval.

¹ The Port Elizabeth Zoning Scheme Regulations.

[6] Meanwhile, construction of the multi-purpose room on Erf [...] had commenced after foundations had been laid with the involvement of the Municipality, in anticipation of the ultimate approval of the building plan. Once the Municipality refused to accept the building plan, construction on the site ceased at a time when a portion of exterior walls had already been constructed.

[7] The applicant also set in motion the process of acquiring Erf ...0, Lorraine, located immediately behind Erf [...] in the hope that a consolidation of erven [...] and ...0 would result in the encroachment over the building line falling by the wayside, or an application made for relaxation of the building line. The construction on Erf [...] resumed and the building work thereon was completed during the latter half of 2013.

[8] On 9 December 2013 the applicant applied to the Municipality for a rezoning of erven [...], ..8 and 1756.

[9] During April 2014 the Municipality brought an application before this court seeking an order directing the applicant to take all necessary steps to demolish all unlawful building structures,² and restraining the applicant from continuing with the construction of buildings until such time as the applicant shall have received an approved building plan from the Municipality.

[10] Amidst opposition, the application by the Municipality was granted,³ and leave to appeal subsequently applied for by the applicant was refused by the SCA and, ultimately, by the Constitutional Court.⁴

[11] The Municipality also successfully applied for the review of its decision in respect of the aforesaid rezoning and the special consent on the basis that an incorrect procedure had been followed.⁵

² On Erf ...8 there was a structure linking the main building to another free standing building without any building plans therefor having been submitted, and Erf 1756 the extensions to the main building (an enclosed patio and sunroom) were built without approved plans and the use of the property for hotel and wedding related activities was in breach of the applicable title deed conditions which prohibited the use of the property for non-residential purposes.

³ Unreported Judgment by Revelas J delivered on 31 July 2015 under case number (1222/14).

⁴ The order of the Constitutional Court was delivered on 31 May 2016.

[12] Subsequent thereto, the applicant engaged her architect to prepare a plan in respect of the structure on Erf [...] constructed without an approved plan, to provide for demolition of the portion encroaching over the rear building line to enable her to comply with the terms of the order by Revelas J directing her to demolish the structure.

[13] On 20 November 2015 the applicant submitted the plan drawn by her architect for approval. The plan was not approved. The relevant functionary of the Municipality proffered the following comment:

“TPMM	TP TO COMMENT
D55	DRAINAGE INSIDE BUILDING NOT ALLOWED
D76	EXISTING UNAUTHORISED STRUCTURE OVER BUILDING LINES TO BE DEMOLISHED
PNTR	PLAN NOT A TRUE REFLECTION OF WHAT IS ON SITE
ADDT	ADJACENT TO COLDROOM & OBTAIN A VENTILATION CERTIFICATE FROM ENGINEERS
DO3	DRAINAGE PALN NOT APPROVED
OIFH	APPROVED FIRE PLAN REQ
RRPO	REDUCE SCALE OF SOUTH EAST ELEVATION
WD1	WINDOW TO BE I M FROM BOUNDARY
SANS	S/T ALL TIMBER USED IN THE ERECTION OF A BUILDING BE TREATED AGAINST TERMITE
SANS 2	AND WOOD BORER ATTACK & FUNGAL DECAY IN ACCORDANCE WITH SANS 10005
CCAS	COURT CASE PENDING
QUPW	QUERY USE OF PROPOSE ADDITION.”

[14] Site meetings involving officials of the Municipality and the applicant’s architect were thereafter held. Steps were also taken by the applicant to give heed to the comments which had resulted in the applicant’s plan being not approved in the

⁵ *Nelson Mandela Bay Metropolitan Municipality v Georgiou t/a Georgiou Guesthouse and Spa and Others* 2016 (2) SA 394 (ECP) at para [82], wherein the following order was granted:

- “1. The decision of the Executive Mayor on behalf of the applicant municipality dated 10 November 2014 to approve a rezoning of erven 1756, 2318 & 2787 Lorraine from Residential 1 to Residential 3 in terms of the Port Elizabeth Zoning Scheme Regulations promulgated under section 9(2) of the Land Use Planning Ordinance, 15 of 1985 is hereby set aside.
2. The decision of the Executive Mayor on behalf of the applicant municipality dated 10 November 2014 to grant special consent to the first respondent to use the aforesaid erven to operate a licenced hotel and a place of worship is hereby set aside.
3. The first respondent is ordered to pay the costs of the application, such costs to exclude the taxed costs of drawing and preparing the applicant’s founding papers in the application.”

first place. The plan was also amended to be in line with the changes the architect had effected.

[15] The amended plan was submitted, but did not receive the approval of the Municipality, on 11 December 2015. On this occasion the Municipality commented:

“ADPA	ADDITIONAL PLAN FEES PAYABLE
DO3	DRAINAGE PLAN NOT APPROVED
CPDR	COVERED POOL DETAILS REQ
15GG	PLAN TO BE A TRUE REFLECTION OF WHAT IS ON SITE
JSHD	SEE LETTER ATTACHED
SANS	S/T ALL TIMBER USED IN THE ERECTION OF A BUILDING BE TREATED AGAINST TERMITE
SAN2	AND WOOD BORDER ATTACK & FUNGAL DECAY IN ACCORDANCE WITH SANS 10005
CCAS	COURT CASE PENDING.”

[16] Some delay in processing the matter was occasioned, punctuated by the loss on no less than 3 occasions, of copies of the already submitted building plan. The loss was not accounted for by the relevant municipal officials.

[17] Exchange of correspondence between the applicant, through her attorneys, and the Municipality (through its attorneys) ensued. The applicant had been urging the Municipality to approve the plan, drawing attention to the fact that all shortcomings previously pointed out had been remedied, without the attraction of any decision favourable to her. For instance, by letter dated 23 March 2016 penned by the Municipality’s attorneys an undertaking was made that the Municipality would consider the plan which had been resubmitted on 8 March 2016 “*within the ambit of the terms of the Court Order where it deals with Erf [...] and the National Building Regulations and Buildings Standards Act 103 of 1977.*” In that letter the applicant was further advised as follows:

“[The Municipality] is the decision maker and we cannot therefore advise on whether the plans will be approved or not until the decision has been made. [The Municipality] will inform your agent of its decision.”

[18] Having been of the view that the Municipality had been dilatory, heedless of the provisions of section 7 of the Act which obliges the Municipality to either grant or refuse its approval of the plans submitted within 30 thirty days after receipt of the application where, as here, the architectural area of the building to which the

application relates is less than 500m², the applicant resorted to the instant application on 11 April 2016.

[19] In pursuit of their opposition to the application, the respondents have contended that subsequent to the launch of the application (on 11 April 2016) the applicant's building plan had been considered on 15 April 2016 and refused because it did not comply with the Act and regulation E1 of the Regulations. It is further contended that approval of the plan would fall foul of the zoning and the limited use to which the properties could be put having regard to the special consent granted and the limitations placed thereon as appears more fully from the judgment of Revelas J. Further affidavits were delivered by the parties resulting from the comment sheet by the Municipality of 15 April 2016 issued subsequent to the launch of the application. Linked to that was an application by the respondents to strike out matters introduced by the applicant not in her replying affidavit but in her supplementary affidavit

[20] According to the relevant comment sheet embodying the decision of 15 April 2016 the applicant's building plan was "*not approved*", and the following comments were proffered by the Municipality:

"NFC	NO FURTHER COMMENTS AT THIS STAGE
SANS	S/T ALL TIMBER USED IN THE ERECTION OF A BUILDING BE TREATED AGAINST TERMITE
SAN2	AND WOOD BORER ATTACK & FUNGAL DECAY IN ACCORDANCE WITH SANS 10005
SAA4	SUBMIT AND APPLICATION FOR DEMOLITION IN TERMS OF REGULATION E FOR ALL 3 PROPERTIES
DO2	DRAINAGE PLAN APPROVED
SAAR	SUBMIT AN AFFIDAVIT RE EXCLUSIVE USE OF RESIDENTIAL 1 FOR ERF [...]
G&SR	FIRE WALL REQ BETWEEN GARAGE AND STUDY
ZA4D	QUERY APPROVAL FOR DISPLAY AREA"

[21] At issue in these proceedings is whether the comment sheets issued by the Municipality, from time to time,⁶ embodying the Municipality's decisions not to approve the applicant's building plan communicated a decision to refuse to grant approval of the plan or whether, properly construed, the comment sheets amounted to

⁶ The papers reveal that more than two comment sheets were issued. For instance there is another comment sheet indicating that the applicant's building plan was "*not approved*" made on 5 February 2016

a postponement or avoidance of a decision. The answer to this question is dispositive of this case.

[22] The bedrock of this application is section 8(1) of the Act which grants the court the power to make an order directing a local authority which fails to grant or refuse timeously its approval in accordance with section 7 in respect of an application within the period stated in such order. Section 7 of the Act which the applicant seeks to invoke provides:

“(1) If a local authority, having considered a recommendation referred to in s 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 so 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 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: Provided that the local authority shall grant or refuse, as the case may be, its approval in respect of any application where the architectural area of the building to which the application relates is less than 500 square metres, within a period of 30 days after receipt of the application and, where the architectural area of such building is 500 square metres or larger, within a period of 60 days after receipt of the application.”

[23] According to the applicant, the decisions embodied in the comment sheets issued from time to time are not any definitive decisions to go by; the failure by the Municipality to deal with her application, goes the applicant’s case, “*is simply procrastinating on giving her relief to which [she is] entitled.*” It was accordingly argued that section 8 accords the applicant a remedy, as the Municipality has not taken any decision within the stipulated time frame.

[24] It was argued, on behalf of the respondents, that even though the decisions are not definitive they constitute an unequivocal refusal to approve the plan and once that

happened a remedy available to the applicant is that provided by section 9(1) of the Act.⁷

[25] A proper construction of section 7 of the Act will provide an answer to the question at hand. In *eThekweni Municipality v Tsogo Sun KwaZulu –Natal (Pty) Ltd*⁸ Heher JA gave the following interpretation to the section:

“[17]...A local authority is not required to reject an application but only to refuse to approve it. There is a significant difference between the two which is made clear in the Act and appears equally plainly in the letter of notification. While ‘*rejection*’ may bear a sense of outright and final refusal, a ‘*refusal to approve*’⁹ is more flexible and does not necessarily shut the door on future approval. This broader meaning is implicit in s 7(5).

[18] No doubt those applications which cannot be brought within the express reservations in s 7(5) must be regarded as having effectively been rejected. In the last-mentioned event the local authority becomes *functus officio* and the applicant who wishes his plans to receive further consideration will have to bring a new application in terms of s 4 (3) of the Act. But a local authority is not *functus officio* if the plans which it has previously refused to approve qualify for reconsideration by reason of s 7(5)(a) or (b). In such the earlier refusal to approve was merely conditional and may be reversed.

[19] Even in this sense of a refusal to approve, the notification must no doubt be unequivocal: it must manifest approval of the plans or refusal to approve them.”

[26] In my view, the remarks made in the *Tsogo Sun* case¹⁰ find application in *hoc casu*. The comment sheets convey clear and unambiguous messages. On the face thereof it appears that the Municipality gave consideration to the application for approval of the applicant’s building plan; the comments made point to certain items deserving of being attended to before further consideration; the comments constitute reasons for not approving the application and what should be attended to before reconsideration is given. The comment sheets did not communicate a postponement of the Municipality’s decision warranting the invocation of section 8.

⁷ Section 9(1) provides:
“Any person who-
(a) feels aggrieved by the refusal of a local authority to grant referred to in s 7 in respect of the erection of a building;
(b) feels aggrieved by any notice of prohibition referred to in s 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 of the fees prescribed by regulation, appeal to a review board.”

⁸ 2007 (6) SA 272 (SCA).

⁹ My emphasis.

¹⁰ *Supra*.

[27] The respondents have stated under oath that the decision taken on 15 April 2016 subsequent to the launch of this application, referred to above, was, in any event, final in nature. On the principle enunciated in *Plascon- Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*,¹¹ the application falls to be dealt with on the version of the respondents. Therefore, I find that the decision was in fact final and definitive.

[28] In sum, therefore, when the instant application was launched, in May 2016, the Municipality had already taken a decision refusing to approve the building plan application, on 20 November 2015 and, subsequent thereto, on 11 December 2015 and 5 February 2016. Those decisions did not render the Municipality *functus officio* and were subsumed by the decision taken by the Municipality on 15 April 2016 rejecting the building plan.

[29] Unless and until the decision of 15 April 2016 has been overturned by a competent tribunal on review on the strength of the maxim *omnia praesumuntur rite esse acta*,¹² it remains of force and valid. Therefore, this court has no jurisdiction to deal with the application directly without the applicant first approaching the review tribunal contemplated in section 9 of the Act.

[30] The applicant has misconceived her cause of action and is therefore not entitled to the relief she is seeking.

[31] I would, in any event, have exercised my discretion against granting the applicant the final interdict she is seeking. The building plan subject to this application relates to a structure that was erected without a building plan. Granting the final interdict would, in the circumstances of this case, undermine the principle of legality.¹³ In light of the view I take of this matter, nothing more need be said on this.

¹¹ 1984 (3) SA 623 (A).

¹² *Oudekraal Estates (Pty) Ltd v City of Cape Town & Others* 2004 (6) SA 222 (SCA) at para [26] and *MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd* 2014 (3) SA 481 (CC) at para [100] – [101] where the Constitutional Court cited with approval the principle enunciated in *Oudekraal*.

¹³ *Lester v Ndlambe Municipality* 2015 (6) SA 283 (SCA) at para [31]

[32] I was of the view that the parties had placed all the facts enabling the court to deal with this matter, hence the respondent's application to strike out was not granted. Instead, the parties were afforded the opportunity to fully ventilate all the issues on all the facts placed before the court.

[33] In the result I make the following order:

The application is dismissed with costs.

S M MBENENGE

JUDGE OF THE HIGH COURT

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Date heard : 11 August 2016

Judgement delivered : 22 September 2016