

IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, MAKHANDA

Not reportable
Case No: 675/2021

WAYNE'S ELECTRICAL & REFRIGERATION (PTY)LTD
THOMAS DESMOND CLARK
ANDREW PETER VAN WYK
HEILA MAGDALENA VAN WYK

First Applicant
Second Applicant
Third Applicant
Fourth Applicant

and

THE ENOCH MGIJIMA LOCAL MUNICIPALITY
LAURENE SAHD N.O
HEINRICH EBERHARDUS GRIEBENOUW N.O
MARINDA CATHERINA GRIEBENOUW N.O

First Respondent
Second Respondent
Third Respondent
Fourth Respondent

JUDGEMENT

Mfenyana AJ

Introduction

[1] On 26 August 2020 an official of the first respondent took decisions approving the rezoning from residential 1 to residential 2, and the removal of the restrictive title condition in the Deed of Transfer in respect of Erf 8256, Komani (the Property). The property is registered in the name of the H E Griebenouw Trust, the third respondent.

[2] On 20 January 2021 the first respondent approved building plans in respect of the property. The said plans were a departure from the site development plan already approved by the first respondent.

[3] The application is brought by the applicants who are registered owners of immovable property adjacent and / or near the property. The central point in the review by the applicants is that the decisions are not in compliance with the law.

[4] The application is opposed only by the second to fourth respondents as the owners of the property.

[5] The first respondent (the Municipality) has not opposed the application but has filed the record of the decision in compliance with Rule 53 of the Uniform Rules of Court.

[6] The applicants also seek costs of the review application including the costs of two counsel, as well as the reserved costs of the interdict proceedings.

Factual background

[7] On or around April 2018, the third respondent made application to the first respondent ostensibly in accordance with the Spatial Planning Land Use Management Act (SPLUMA)¹ and the Land Use Planning Ordinance (LUPO)², in terms of which it sought the rezoning and removal of restrictive conditions in the title deed of the property. In terms of the application, the rezoning was intended for the purpose of additional dwelling units on the property from a single dwelling unit to a townhouse development of six (residential)units.

[8] As the existing restrictions on the property only allowed for a second dwelling, in other words, one additional dwelling, the third respondent, as registered owner of the property sought to have this restriction removed after which it would rezone the erf in accordance with its new intended purpose.

¹ Act 16 of 2013

² No. 15 of 1985

[9] In terms of the applicable provisions, particularly SPLUMA, LUPO and the by-law, any person who could be affected by the decision had to be notified and could in turn, if they so desired, object to the planned changes in the prescribed format.

[10] Without proper notification to the affected persons and without considering any objections, an official of the first respondent, purportedly acting on behalf of the first respondent, approved the application. Subsequent thereto the third respondent also submitted new building plans which were a deviation from the plan initially approved by the first respondent. These new building plans were also approved by the respondent.

[11] It was not until the construction started on the property that the applicants became aware of the process that had unfolded and brought an application interdicting the respondents from proceeding with the construction. On 9 February 2021 this court per Roberson J granted an interim order interdicting the respondents from performing any construction work on the property pending the present application. The costs of the interdict proceedings were reserved.

Grounds for review

Promotion of Administrative Justice Act (PAJA)³

[12] The applicants contend that the removal of the restrictive condition in the title deed of the property could only be made in terms of SPLUMA and the by-law as this is not authorised in terms of LUPO. This is in reference to the third respondent's reference in the application that the application for rezoning and removal of restrictive condition was allegedly made in terms of both SPLUMA and LUPO. They further contend that as at the time the decisions were taken, the by-laws⁴ in respect of SPLUMA were in operation, and therefore the application relating to the removal of restrictive conditions could only have been decided by applying SPLUMA and the by-law as SPLUMA repealed the Removal of Restrictive Conditions Act 84 of 1967.

³ Act 2 of 2000

⁴ Enoch Mgijima Local Municipality By-Law

[13] In respect of the rezoning aspect of the decision, the applicants rely on section 17(2)(a) of LUPO, which mandates that the application be advertised, by serving 'a notice on every owner of land who in the opinion of the of the director or a town clerk or secretary has an interest in the matter, and whose address he knows or can obtain and, if the director or the said town clerk or secretary, as the case may be, so decides, to publish in the Provincial Gazette and in the press stating that objections may be lodged ...within 21 days after the date of service or publication of the notice.

[14] It is the applicants' contention that the first and second applicants were not served and did not receive any notification of the intended application to rezone and remove restrictions. It later transpired that the notification was in fact sent by registered mail, to the address of Mr Coetzee, the owner of Erf 1798, as opposed to Erf 1794 which was owned by Mr Geyer at the time. It is common cause that the notification intended for Mr Geyer was sent to the wrong address/erf number.

[15] Likewise, the applicant continue, Ms James, who was the owner of Erf 8257 at the time, which is presently owned by the second applicant, was not served, and did not receive any notification of the application to rezone and remove restrictive conditions in the title deed of the property. The notice was sent to a post box and addressed to a Mr L James who was not the registered owner of the property. According to the track and trace report, the document was 'returned to sender' by the post office.

[16] The third and fourth applicants were and are still owners of erf 1801. They were not served and did not receive any notification to rezone and remove restrictive conditions in the title deed of the property. According to the track and trace report, the document did not reach them and is indicated as 'In transit'.

[17] Because the applicants were never served they contend that they were not given an opportunity to object to the application and have their views considered as interested landowners and as required in terms of LUPO. Therefore, the applicants further argue, the application was not advertised as required in terms of section

17(2). On that basis, they further argue that the decisions of the first respondent fall to be reviewed and set aside in terms of the PAJA. The applicants rely on the following provisions of PAJA:

Section 6 (2)

“A court or tribunal has the power to judicially review an administrative action if-

- (a) the administrator who took it-
 - (i) was not authorised to do so by the empowering provision
- (b) a mandatory and material procedure or condition prescribed by an empowering provision was not complied with.
- (c) ...
- (d) the action was materially influenced by an error of law;
- (e) the action was taken -
 - (i) for a reason not authorised by the empowering provision;
 - (ii) ...
 - (iii) because irrelevant considerations were taken into account or relevant considerations were not considered;
- (f) the action itself-
 - (i) contravenes a law or is not authorised by the empowering provision; or
 - (ii) is not rationally connected to-
 - (aa) the purpose for which it was taken;
 - (bb) the purpose of the empowering provision;
 - (cc) the information before the administrator; or
 - (dd) the reasons given for it by the administrator;
- (g) ...
- (h) the exercise of the power or the performance of the function authorised by the empowering provision, in pursuance of which the administrative action was purportedly taken, is so unreasonable that no reasonable person could have so exercised the power or performed the function; or
- (i) the action is otherwise unconstitutional or unlawful.

[18] Relevant to the above provisions, the applicant contend that the starting point is to establish whether an irregularity has occurred in the processes and procedures followed by the decision-maker which constitute a ground for review and evaluate the irregularity to determine whether it amounts to a ground for review under PAJA,

taking into account the materiality of the departure from legal requirements by linking the question of compliance to the purpose of the provision. The latter is the central element of the enquiry. Once a ground of review has been established under PAJA, the Constitution requires that decision to be declared unlawful.

[19] It is common cause that the notices issued by the respondents did not reach the applicants. This, the applicants states, falls short of the provisions of LUPO, to serve the interested/ affected landowners. Relying on the judgement in *Cool Ideas v Hubbard*⁵ the applicants aver that words must be given their ordinary grammatical meaning and state that 'serve' means to deliver to the person concerned in a legally formal manner. I align myself with this submission. They argue that the applicants were not served.

Failure to consider an objection received

[20] It is submitted that Mr Coetzee, being an affected and/ or interested landowner, and registered owner of erf 1798, upon receipt of the notification which was intended for Mr Geyer of erf 1794, lodged an objection to the application on 28 June 2018. He had received the notification on 25 June 2018 even though it was dated 4 May 2018. His objection was thus lodged within the stipulated 21 days following the service of the notification.

[21] Relying on the decision of in *Jicama 17 (Pty)Ltd v West Coast District Municipality*⁶ the applicants further contend that it is not open to the first respondent to supplement or alter the basis for its decisions as an attempt to validate the decisions it has made and further avers that the decisions of the first respondent failed to consider an objection by Mr Coetzee which was timeously lodged. According to the applicants, Mr Coetzee's objection triggered the application of the by-law which stipulates that if an objection is lodged, the Municipal Planning Tribunal **must** adjudicate the application. They decry the fact that the decisions sought to be reviewed were not taken by the Municipal Planning Tribunal but by a person, on a purported 'delegated authority'. According to the applicants, section 6(2)(a)(i) of

⁵ 2014 (4) SA 474 (CC)

⁶ 2006 (1) SA 116 (C)

PAJA finds application as the persons who took the decisions were not authorised to do so.

Failure to consider prescribed issues

[22] The applicants contend that the first respondent appears not to have distinguished the two applications it was faced with and consider the aspects prescribed in each application. In so saying the applicants aver that the first respondent dealt with the application for rezoning and the application to remove restrictive conditions as a single application. However, the applicants demonstrate that each comes with its own unique requirements and processes. Critically, the relevant provisions of SPLUMA prescribe the test to be applied for the removal of a restrictive condition which includes having due regard to the respective rights of all those affected, and to the public interest. In so far as rezoning is concerned, SPLUMA prescribes the procedure to be followed including consideration of the municipal spatial development framework. The applicants further aver that there is no indication that the first respondent considered any of the prescribed requirements.

Reasons for the decisions

[23] The applicants' contention in this regard is that the first respondent has failed to disclose the reasons for its decisions and has provided no evidence that the prescribed issues were considered in both the rezoning and the application for the removal of restrictive conditions, and therefore 'it must be presumed and concluded that the decisions were taken for no good reason.'⁷

Approval of site development plan and unauthorised deviation

[24] On or around 4 December 2018, the first rezoned the property and approved a site development plan (SDP- Number 0372B for 6 townhouses each with two parking bays, and an additional five parking bays at the back of the property. However on 20 January 2021 the third respondent submitted building plans which

⁷ *Wessels v Minister for Justice and Constitutional Development and Others 2010 (1) SA 128 (GNP)*

deviated from the approved plan, with a double storey with five units on each storey, and twenty- six parking bays. The applicants aver that it is common cause that the new building plans do not accord with the approved site development plan, and that the third respondent is precluded from submitting a new building plan which is not in accordance with the approved plan. Thus they aver that the approval of the building plans falls to be set aside.

The second to fourth respondents' opposition

[25] The second to fourth respondents contend that at the time the applications were made by the Trust to the first respondent, the owners which fell to be notified for purposes of section 17(2) of LUPO and in accordance with the Municipality's procedure existing at the time, were owners of adjoining properties or properties within a block of the property. At this point it may be pertinent to recall that section 17(2) requires a land owner who applies for rezoning to advertise the application by serving a notice on every owner who is considered to have an interest in the matter and may publish the application in the provincial gazette and in the press... 'stating that objections may be lodged ...before a date specified, being not less than 21 days after the date on which the notice is so served or is so published...'.

[26] The respondents further state that no valid objections were received by the first respondent and relies on a letter received from the first respondent dated 24 June 2021 in which it states that an objection was received on 28 June 2018 outside of the 30 day period stipulated in the notice.

[27] In respect of the applicants' contention that the official who approved the applications was not authorised to do so, the respondents contend that the application was duly assessed by a registered professional planner in the employ of the Municipality who completed and signed an 'approval report /check list' and recommended for approval. For this too, the respondents rely on the same letter from the first respondent which refers to the said approval report/ check list as a 'resolution' in terms of which the 'authorised official or professional valuer was appointed. The said document is not a resolution as suggested. In their answering affidavit, the respondents concede that subsequent to the approval of the rezoning

and removal of restrictive conditions, it submitted building plans which deviated from the approved site development plan. They however contend that these plans although 'somewhat altered', remained compliant with the approved zoning. These plans were also approved by the first respondent. On this basis, the respondents instructed their builder to commence with the construction.

[28] The respondents argue that the applicants have not exhausted internal remedies in that they have failed to lodge an appeal against the impugned decisions within 21 days of the date of the notification of the decision, either as persons whose rights are affected by the decision, or as interested parties in terms of section 51 of SPLUMA. They contend that the applicants in bringing this application assert that they are interested persons and therefore fall within the ambit of persons entitled to bring an internal appeal. They further contend that the applicants' reliance on the provisions of the by-law cannot assist the applicants as the by-law is subordinate to SPLUMA. Thus the respondents contend that as the applicants were not party to the rezoning application and were not notified of the impugned decisions when they were taken, but were notified on 26 January 2021 and should have lodged an appeal within 21 days thereof. On this basis alone, the respondents argue that the application falls to be dismissed with costs.

[29] As far as the requirement to serve the notification goes the respondents contend that it was the Municipality's standard procedure at the time to send the notifications by registered mail and submit that sending by registered mail falls within the meaning of 'serve' if the word 'serve' is taken in context. The respondents further aver that the applicants chose not to collect the registered letters from the post office, however the requirements of LUPO were satisfied. I do not understand the respondents' contention to be that because it was the norm for the first respondent at the time to only give notice to owners of adjoining properties, that situation should prevail. Nor do I understand them to be saying that they were in compliance with the provisions of the legislation. Indeed to suggest that would be tantamount to simply disregarding the purpose of the provision.

[30] The respondents deny that they did not take into consideration any prescribed issues, and in this regard contend that the approval report/ checklist and the decision letter dated 26 August 2020 both distinguish the two parts of the application and clearly state the provisions of SPLUMA and LUPO. They proceed to say that this reference, by implication, shows that the factors that needed to be considered were considered.

The law relating to reviews

[31] At the heart of every administrative decision is a duty on the repository and decision-maker to act with fairness and reasonableness. This will inevitably depend on the circumstances of each case. As O'Regan J once stated in *Bato Star*⁸:

“Factors relevant to determining whether a decision is reasonable or not will include the nature of the decision, the identity and expertise of the decision-maker, the range of factors relevant to the decision, the reasons given for the decision, the nature of the competing interests involved and the impact of the decision on the lives and well-being of those affected. Although the review functions of the court now have a substantive as well as a procedural ingredient, the distinction between appeals and reviews continues to be significant. The court should take care not to usurp the functions of administrative agencies. Its task is to ensure that the decisions taken by administrative agencies fall within the bounds of reasonableness as required by the Constitution.”⁹

[32] There is no doubt that the decisions made by the first respondent have far-reaching consequences for those who are affected by them. The impact of the decisions, particularly the removal of the restrictive conditions on the neighbouring properties, particularly the applicants is immense. There is no indication that this has been considered.

[33] It is trite that in reviewing an administrative decision, the review court must confine the enquiry to the reasons furnished by the first respondent for approving the applications made by the third respondent. *Ex facie* the first respondent's decision as

⁸ *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* (CCT 27/03) [2004] ZACC 15; 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC) (12 March 2004)

⁹ at para 45

it appears from the letter, no reasons were furnished. The letter, and indeed the entire record makes no reference to any objections having been received in which case the decision ought to show that even after consideration thereof, it was decided that the approval should stand. To the contrary, and perhaps in an attempt to salvage the situation, the respondents rely on an 'after the fact' letter from the first respondent, which states that an objection was received outside of the stipulated timeframe.

[34] I agree with the applicants' submissions as supported by the decision in *Jicama*¹⁰ that a party cannot supplement reasons for a decision, which were clearly taken and made ex post facto the decision. As the learned judge went further to state in that matter that;

"The question here is not whether there were other reasons in the record that justified the board's decision, but whether it could give reasons other than those it gave initially for refusing the application. The duty to give reasons for an administrative decision is a central element of the constitutional duty to act fairly. And the failure to give reasons which include proper or adequate reasons should ordinarily render the disputed decision reviewable."

[35] Within the meaning and contemplation of SPLUMA, LUPO and the by-law, the first respondent was charged with the responsibility to consider the totality of factors relevant to the determination of the third respondent's application, including all the requirements set out in both SPLUMA and LUPO which set out the test to be applied in each case, weigh up and consider any objections received and if found to be without merit, indicate as much, and why that was found to be the case. Supposing that objections were received out of time, as the respondents now seem to suggest, the first respondent was required to reflect this in its decision. It did not. The only logical conclusion that can be drawn is that the first respondent did not consider the objection received. Only upon such meticulous examination of all the factors and material required to be considered, would the first respondent have discharged its responsibility to avoid the review and setting aside of its decision.

¹⁰ *supra* at [26] to [27]

[36] It is clear from the first respondent's letter that it failed to take into account relevant considerations and apply its mind to all the considerations necessary for it to arrive at a decision. What is more is that it failed to consider the purport of the empowering provisions.

According to the respondents, the fact that the letter refers to specific provisions of SPLUMA and LUPO should be sufficient to show that regard was had to all factors to be taken into account. Respectfully, I disagree. This is not apparent from the first respondent's decision.

Failure to exhaust internal remedies

[37] The respondents have argued quite fervently that the application fell to be dismissed on account of the applicants' failure to lodge an appeal against the decisions, in so saying exhaust internal remedies. I align myself with the averments made on behalf of the applicants in this regard in that the internal remedies referred to by the respondents are not available to the applicants. For the simple reason that they were not party to the application, they were not and could not have been notified of the decision. The respondents make a further point of saying that the applicants should have brought an appeal when they became aware of the decision. The difficulty with this proposition is that it completely disregards the circumstances in which the applicants learnt of the decision, which was when the construction started 'next door'. To regard that as notification would amount to be grossly unfair. Quite to the contrary, it would in my view qualify as an exceptional circumstance to be taken into account.

Just and equitable remedy

[38] It was argued on behalf of the respondents that in the event that this court concludes that the impugned decisions fall to be reviewed and set aside, it would be just and equitable not to set them aside on the bases that the intended purpose of the property continues to be for residential purposes, that the application was made having taken advice in good faith, , and that the respondents have incurred expenses on building consultants following the approval of the zoning application as it has commenced with construction. The reasons advanced by the respondents only

seek to confirm that the driving factor behind the haste and disregard was economical. Even so, section 8 of PAJA gives the court a wide discretion to make any just and equitable remedy. Such discretion must however be exercised judicially.

[39] While I agree with the applicants that the impugned decisions fall to be reviewed and set aside, it seems to me that the respondents were ill-advised in proceeding in the manner that they had in respect of the application to the first respondent. Had they been properly advised, they would have perhaps acted differently. That being the case it would be just and equitable remedy to remit the matter to the first respondent

Costs

[40] The applicants, through no fault of their own, have incurred costs in bringing the application. There is thus no reason for them to be put out of pocket in the circumstances. I can also find no justifiable reason why the respondents saw it fit to persist with their opposition when it seemed plain that the relevant prescripts were not complied with.

Order

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

1. The decisions dated 26 August 2020 by Z Nxano, General Manager: Human Settlements and Land Managemen, purportedly taken on behalf of the first respondent in terms of which it approved:

- (a) the rezoning of erf 8256, Komani (the property) from residential 1 to residential 2;
- (b) the removal of restrictive title conditions in the Deed of Transfer T[...] in respect of erf 8256, are reviewed property;
- (c) building plans relating to the property on 20 January 2021 are reviewed and set aside.

2. The matter is remitted to the first respondent to reconsider the applications.

3. The second to fourth respondents are ordered to pay the costs of the review application inclusive of the costs of two counsel.

4. The first respondent is ordered to pay the costs of the interdict proceedings.

S. M. MFENYANA
ACTING JUDGE OF THE HIGH COURT
EASTERN CAPE DIVISION, MAKHANDA

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Date Heard:

20 January 2022

Date Delivered:

26 April 2022