THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 1251/2017

In the matter between:

ALLEN TARGHI TAVAKOLI	**FIRST APPELLANT**
DLX PROPERTY (PTY) LTD	**SECOND APPELLANT**

and

BANTRY HILLS (PTY) LTD	**RESPONDENT**

Neutral citation: *Tavakoli v Bantry Hills* (1251/2018) [2018] ZASCA 159 (28 November 2018)

Coram: Lewis, Zondi and Dambuza JJA and Mokgohloa and Rogers AJJA

Heard: 14 November 2018

Delivered: 28 November 2018

Summary: Town planning – item 40(c) of Development Management Scheme constituting Schedule 3 to the City of Cape Town's Municipal Planning By-law of 2015 – whether appellants had standing to complain of non-compliance – appellants failing to establish membership of class for whose benefit item 40(c) enacted – appellants also failing to establish harm caused by non-compliance – court a quo correctly found appellants lacked locus standi – appeal dismissed.

ORDER

On appeal from: The High Court of South Africa, Western Cape Division (Saldanha J sitting as court of first instance).

The appeal is dismissed with costs, including the costs of two counsel.

JUDGMENT

Rogers AJA (Lewis, Zondi and Dambuza JJA and Mokgohloa AJA concurring)

[1] The appellants applied in the Western Cape Division of the High Court of South Africa for an order reviewing and setting aside the City of Cape Town's approval of building plans submitted by the respondent for the construction of a luxury block of flats on property it owns in Sea Point (the Bantry Hills property). The City was cited as a respondent but abided the court's decision.

[2] Three issues were argued in the court a quo, namely (i) whether the appellants had locus standi; (ii) if so, whether the approval of the plans was unlawful because they contravened item 40(c) of the Development Management Scheme (DMS) constituting Schedule 3 to the City's Municipal Planning By-law of 2015 (By-Law); (iii) if so, whether the court should in the exercise of its discretion refrain from setting aside the approval. The court a quo found against the appellants on the first two points and said that it would have found for the respondent on the third as well provided certain remedial action was effected within a specified time.

[3] The appellants applied for leave to appeal. The court a quo found that they did not have reasonable prospects of success on locus standi and refused leave to

appeal on that ground. The court a quo nevertheless granted them leave to appeal against its interpretation of item 40(c). The court a quo erred in so doing. An appeal lies against the order, not the reasons, of a court. Unless the appellants could overcome the attack on their locus standi the dismissal of their application could not be reversed on appeal. This court removed the conundrum by granting the appellants leave to appeal on locus standi. The same three issues as were before the court a quo are thus before us.

[4] The review application, incorporating a request for interim relief, was launched in October 2016. The application for interim relief was heard by Gamble J who gave judgment on 3 November 2016 (*Tavakoli & another v Bantry Hills (Pty) Ltd & another* [2016] ZAWCHC 157). In terms of his order the review was set down for hearing on an expedited date in February 2017 with a timetable for the filing of further papers. Undertakings given by the respondent were made an order. These were that until judgment was granted on the review building work would not progress beyond the ground floor slab in respect of four of the blocks and beyond the first level slab in respect of the fifth block.

[5] The review was duly heard in February 2017. The court a quo gave judgment on 21 April 2017, dismissing the review. The interim interdict having fallen away, building resumed. The development comprises 66 apartments spread over five residential blocks extending above ground level to seven floors in respect of one block, eight floors in respect of three blocks and four floors in respect of a fifth block. According to an affidavit dated 27 July 2018, the external structures as at that date were complete while internal work was far advanced. Full completion was anticipated by 13 August 2018. Of the 63 apartments 53 had already been sold.

[6] The Bantry Hills property is about 7500 m² in extent. It lies between Regent Road to the north, Kloof Road to the south and Kings Road to the west. (The sea lies downhill to the north, Signal Hill uphill to the south, the city centre to the east and Camps Bay/Clifton to the west.) The plans provide for two vehicular driveways onto the property. Vehicles approaching the property from Regent Road will turn up Tramway Road, a one-way street which runs southwards to the boundary of the property before making a right turn and exiting onto Kings Road. The first vehicular access will be straight ahead off Tramway Road at the corner where it turns right towards Kings Road. Vehicles approaching the property from Kloof Road will turn down Kings Road, a one-way street running northwards, then right into Ilford Road, a one-way street which runs eastwards before making a right turn and exiting onto Kloof Road. The second driveway onto the Bantry Hills property will be on one's left at the corner where Ilford Road turns up to Kloof Road.

[7] The appellants own three residential properties adjacent to each other on the upper (south) side of Kloof Road in the suburb of Fresnaye. Immediately opposite their properties to the north is the block bounded by Kloof Road, Kings Road and Ilford Road. The Bantry Hills property lies immediately beyond this block. The appellants' properties are about 80 metres from the Bantry Hills property. The Bantry Hills property and the appellants' properties have General Residential (GR) zonings. The Bantry Hills property is zoned GR4, the applicable height limit and bulk factor being 24 metres and 1.5. The appellants' properties are zoned GR2, the applicable height limit and bulk factor being 15 metres and 1.

[8] Item 40 of the DMS applies to all properties zoned GR2 to GR6. It reads:

'40. The following use restrictions apply to property in these subzonings:

(a) Primary uses subject to paragraph (c) are dwelling house, second dwelling, group housing, boarding house, guest house, flats, private road and open space.

(b) Consent uses subject to paragraph (c) are utility service, place of instruction, place of worship, institution, hospital, place of assembly, home occupation, shops, hotel, conference facility and rooftop base telecommunication station.

(c) Notwithstanding the primary and consent uses specified in paragraphs (a) and (b), if the only vehicle access to the property is from an adjacent road reserve that is less than 9 m wide, no building is permitted other than a dwelling house or second dwelling.'

[9] The parts of Tramway Road and Ilford Road adjacent to the Bantry Hills property have road reserves which are less than 9 metres wide. The issue on the merits of the review application is the proper interpretation of item 40(c). The appellants contend that it applies unless there is at least one vehicular access to the property from an adjacent road reserve that is 9 metres or more wide. The respondent contends that the item applies where there is only one vehicular access to the property and such access is from an adjacent reserve that is less than 9 metres wide.

[10] For the reasons which follow, the court a quo was right to find that the appellants lacked locus standi. It is thus unnecessary to pronounce on the proper interpretation of item 40(c). It is, however, necessary to say something of its purpose. The lawmaker's concern was, I consider, the congestion that might be caused by frequent ingress from and egress onto narrow roads. High-density properties such as blocks of flats are accompanied by frequent vehicular ingress and egress. The lawmaker may also have been concerned with congestion caused by the parking of visitors' cars on narrow roads though, in view of the detailed provisions contained in Chapter 15 of the DMS for the provision of adequate off-street parking, this is unlikely to have been a primary concern. At any rate, traffic congestion, howsoever arising, must have been the mischief at which item 40(c) is directed.

[11] The appellants did not contend, either in the court a quo or in this court, that they had locus standi merely because the Bantry Hills property and their properties form part of the City's municipal area and are thus both subject to the DMS. In *JDJ Properties CC & another v Umngeni Local Municipality and another* [2012] ZASCA 186; 2013 (2) SA 395 (SCA) the question arose whether the owner and tenant of a commercial property in Howick, a town governed by a town planning scheme, had standing to seek the review and setting aside of the approval of building plans relating to a neighbouring commercial property. The majority of this court (per Plasket AJA, Lewis and Pillay JJA concurring) held that the owner and tenant indeed had standing.

[12] Plasket AJA stated that the question of standing involves 'a consideration of the facts, the statutory scheme involved . . . and its purpose'. The issue had to be determined 'in the light of the factual and legal context' (para 27). In regard to town planning schemes and their purpose, Plasket AJA began his discussion with reference to the statement by Ogilvie-Thompson JA in *Administrator, Transvaal & The Firs Investments (Pty) Ltd v Johannesburg City Council* 1971 (1) SA 56 (A) at 70D that it was of the essence of a town planning scheme that it is 'conceived in the general interests of the community to which it applies'. He then quoted a passage from the judgment of Grosskopf J in *BEF (Pty) Ltd v Cape Town Municipality & others* 1983 (2) SA 387 (C) at 401B-E to the effect that a town planning scheme is intended to operate not in the general public interest 'but in the interest of the inhabitants of the area covered by the scheme, or at any rate those inhabitants who would be affected by a particular provision'. Grosskopf J added that a provision might 'affect' an inhabitant without causing him financial loss – there might be some negative effect of a subjective nature bearing on the amenities or character of the area.

[13] Plasket AJA observed that Grosskopf J's remarks in *BEF* were a specific application of the broader principle enunciated in *Patz v Greene and Co* 1907 TS 427 and summarised in *Roodepoort-Maraisburg Town Council v Eastern Properties (Pty) Ltd* 1933 AD 87 at 96, viz that where the lawmaker has prohibited the doing of an act in the interest of a person or class of persons, such person may enforce the prohibition 'without proof of special damage'. The corollary is that if the prohibition has been enacted in the public interest generally, a litigant must prove that the violation of the prohibition has caused him damage. As Grosskopf J said in *BEF*, a township restriction may be imposed for the benefit of a specific class and also for the benefit of the public in general (400H). In such a case the standing of persons in the specific class does not depend on proof of damage whereas the standing of other persons does.

[14] In *BEF* Grosskopf JA refrained from the 'dogmatic' assertion that in the case of a town planning scheme a remedy would be available to all persons living in an area as large as the one covered by the Cape Town scheme. It was unnecessary to do so because the objecting party was an immediate neighbour. The issue did, however, arise for decision in *Prinsloo & Viljoen Eiendomme (Edms) Bpk v Morfou* 1993 (1) SA 668 (T), a full court appeal. With reference to *BEF*, Eloff JP said that whether an owner in a scheme covering a large area could enforce a prohibition depended on the circumstances and the nature of the condition or restriction (672A):

'There may be circumstances in which the particular town planning scheme covers a large area with a variety of uses and restrictions and that it is inconceivable that an owner in, say, the southern part of the area may enforce a condition of a parochial nature applicable to the northern part of the scheme.'

Eloff JP held that the applicant had failed to establish that the prohibition he sought to enforce was enacted in the interests of property such as the one the applicant owned. Since he based his standing solely on the fact that his property

was situated in an area to which the town planning scheme applied his application should have been dismissed.

[15] In *JDJ Properties* Plasket AJA discussed *Prinsloo & Viljoen Eiendomme* without disapproval. Regarding the identification of persons in whose interests a particular town planning provision operates, he summarised Eloff JP's analysis of the authorities as follows (para 33):

'In all of the cases in which a property owner was held to have standing, Eloff JP stated, the "nature of the conditions and the circumstances of the case" showed that the scheme had been enacted in the interest of the applicants concerned: in all of these cases the applicants whose standing was recognised were persons who owned land in the vicinity of the respondent's land and in each case their properties fell within the same use zone as the respondent's.'

[16] This summary led Plasket AJA to the following conclusion on the facts of the *JDJ Properties* case (para 34):

'In this matter, the nature of the interest involved is the right to enforcement of the Howick scheme. It is this interest that gives the appellants standing. They are part of the class of persons in whose interests the Howick scheme operates for three interlocking reasons: first, they are an owner and a lessee respectively of property within the area covered by the Howick scheme in a modestly sized town; secondly, their properties and businesses are within the same use zone as the development to which the building plans relate; and thirdly, their properties and business are in such close proximity to the second respondent's development, being across a road, that no question of them being too far removed from the second respondent's development can arise. These factors distinguish their circumstances from those of the respondent in the *Prinsloo & Viljoen Eiendomme* case and placed him squarely within the principle set out in the *BEF* case.'

[17] The above passage should not be understood as laying down immutable requirements applicable to every case. The passage must be viewed in the context of the circumstances of that case, including the provisions of the scheme the appellants were seeking to enforce. The fact that an aggrieved person owns or occupies property covered by a scheme may be a prerequisite for enforcing it but

is not on its own sufficient. Depending on the nature of the provision at issue, I can readily imagine that an owner or occupier may have standing to enforce a provision even though his or her property has a different zoning from the offending property – for example, the owner of a residential property might, in appropriate circumstances, be entitled to complain of a departure from restrictions applicable to a nearby commercial property. Proximity will often be an important consideration though this will depend on the nature of the provision at issue. One cannot say, as I think the appellants sought to argue in the present case, that a proximity of 80 metres is always close enough.

[18] The DMS is an integral part of the By-Law and has the force of law (s 26(3) of the By-Law). The By-Law, including the DMS, applies to all land within the geographic area of the City and binds all owners and users of such land (s 2 of the By-Law). Given the City's very large geographic area, the owners and users, viewed in their totality, should in my opinion be regarded as the general public rather than a specific class for purposes of applying the principle laid down in *Patz v Greene*. If item 40(c) was imposed solely for the benefit of the general public in this sense, the appellants – in order to have locus standi – needed to establish that they suffered harm from a contravention of the item beyond that which it may be supposed all owners and users in Cape Town suffered. If, on the other hand, item 40(c) was imposed for the benefit of a specific class of owners and users, or partly for the benefit of such a class and partly for the benefit of the general public, the appellants could establish standing by showing that they belonged to the specific class.

[19] The starting point is thus to ascertain whether item 40(c) was enacted for the benefit of a specific class to which the appellants belong. It is not sufficient, in this regard, that the item in fact operates to the advantage of a class of persons to which the appellants belong. It must appear that the lawmaker had the interests of

the particular class in mind in enacting the provision (*Kuter v South African Pharmacy Board & others* 1953 (2) SA 307 (T) at 310H-311A). I have explained that the mischief with which the prohibition is concerned is traffic congestion in narrow roads giving vehicular access to high-density properties. The implicated congestion does not extend beyond the narrow road or roads actually giving vehicular access (for purposes of discussion I shall assume in the appellants' favour that the item applies even where more than one narrow road gives access to the property). If at least one road giving access to the property has a road reserve which is 9 metres wide or more, it does not matter that other roads forming part of the immediate road network are narrow and may become congested. The additional traffic which may be attracted to the vicinity of of a new block of flats is unaffected by whether the abutting road giving access to the flats is more or less than 9 m wide. It is only the properties on the abutting road itself which may be prejudicially affected by the fact that the road is narrow and may become congested

[20] It seems to me, therefore, that the class which the lawmaker had in mind when enacting item 40(c) comprises the owners and users of properties in the narrow road or roads giving access to the subject property. The appellants are not such persons.

[21] It might be argued that the prohibition was also enacted for the benefit of owners and users who are likely to use the narrow roads and thus be 'affected' by congestion ('affected' in the sense contemplated by Grosskopf JA in *BEF*). On this assumption, one would have to have regard to the proximity of the relevant properties and the particular features of the road network in the vicinity to determine whether an owner or user has standing on this basis. Any member of the public might notionally use one of the narrow roads but this notional

possibility cannot mean that every member of the public has the right, without proof of damage, to complain of a violation of the item.

[22] The appellants do not form part of the class of persons likely to be affected by congestion in Tramway Road or Ilford Road. Persons owning or residing on properties on the upper (south) side of Kloof Road would have no occasion to use Tramway and Ilford Roads as access routes to other destinations. A resident of Kloof Road would use Kloof Road itself to reach the city centre to the east or Camps Bay/Clifton to the west, and would use Kings Road to reach Regent Road and the beachfront area. Such a resident would have no occasion to turn down off Kloof Road into Kings Road and then turn right into Ilford Road, since this would simply take him or her back to Kloof Road. And such a resident wishing to reach his or her home from Regent Road would not turn up Tramway Road because this would take him on to Kings Road which is a one-way street running back down to Regent Road.

[23] The appellants' counsel, while acknowledging that traffic congestion in narrow abutting roads was the primary mischief at which item 40(c) is directed, submitted that an additional purpose may have been to maintain the low-density residential character usually associated with narrow roads. The appellants' properties were sufficiently proximate to the Bantry Hills property to benefit from the preservation of this character.

[24] I cannot agree that this was a purpose of item 40(c). The character of areas within a zoning scheme is established by the zoning applicable to the properties in that area. In regard to residential areas, the lowest-density zonings in the DMS are Single Residential Zones 1 and 2. The GR Zones make provision for urban living at higher densities, including blocks of flats, so as to promote efficient urban development and manage urban sprawl (see the introductory notes to Chapter 6).

The permitted density increases from GR1 to GR 6. The Bantry Hills property falls in an area characterised by GR4 zoning, ie relatively high-density residential development. Item 40(c) would be a very arbitrary and unsatisfactory way of preserving the character of an area. A GR4 property might be abutted by two narrow roads but if the vehicular access were provided from a third road which was at least 9 m wide the restriction would not be applicable. This shows that the restriction is concerned not with narrow roads as such but with the traffic associated with narrow roads giving vehicular access to high-density properties.

[25] I thus conclude that the appellants do not have locus standi by virtue of membership of a specific class for whose benefit item 40(c) was enacted. I am prepared to assume that item 40(c) was enacted not only for the benefit of a specific class but also for the benefit of the general public, ie all owners and users of property within the geographic area of Cape Town. On that assumption, however, the appellants needed to prove that the violation has caused or will cause them damage.

[26] The appellants were required to establish their locus standi in their founding papers. The only founding allegations concerning standing are in para 21, where their deponent, Mr Tavakoli, said that they had standing because they were entitled to enforce the DMS against the respondent and because their constitutional rights to just administrative action had been infringed by the approval of the plans. The first of these grounds is a conclusion unsupported by facts. The second, as the *JDJ Properties* case shows, does not relieve the appellants of the burden of establishing their standing along conventional lines. With reference to s 38 of the Constitution, the appellants have not alleged that they are acting in anyone's interests other than their own. The sufficiency of their own interest must be determined in accordance with the principle emanating from *Patz v Greene.* As Cameron JA stated in *Giant Concerts CC v Rinaldo*

Investments (Pty) Ltd & others [2012] ZASCA 28; 2013 (3) BCLR 251 (CC), an 'own-interest litigant' does not acquire standing from the invalidity of the challenged decision but from the effect it will have on his or her interests (para 33).

[27] In the answering affidavit the respondent's deponent denied the appellants' locus standi. In reply the appellants' deponent, Mr Tavakoli, 'noted' this denial. There was no advance, insofar as locus standi is concerned, when the appellants delivered their supplementary founding affidavit following the furnishing of the City's record.

[28] In the supplementary answering affidavit the respondent's deponent, Mr Rossi, pointed out that the appellants continued to advance their case 'without any allegation relating to what special or peculiar interest he may have in the legislative provision'. Mr Rossi explained at some length why, in the respondent's view, non-compliance with item 40(c) would not have any negative effect on the appellants and their properties. He pointed out that the appellants had made no allegations concerning the impact which the development might have on traffic in the area 'and accordingly the applicants are not and would not be entitled to assert any argument in this regard at the hearing of the matter'. Mr Rossi nevertheless annexed two traffic impact assessment reports demonstrating that the development would have an insignificant impact on traffic. In his supplementary replying affidavit Mr Tavakoli again 'noted' Mr Rossi's allegations, saying that they were matters for legal argument. He said that it was difficult to understand why Mr Rossi had annexed the traffic impact assessment reports.

[29] In written argument the appellants' counsel referred us to a letter annexed to the founding affidavit in which their attorneys, in requesting access to the building plans, stated that the appellants had an interest in the proposed

development inter alia because it would ‘dramatically increase the traffic congestion in the area’ and potentially decrease the value of their properties. Reliance in this way on an annexure is not permissible (*Minister of Land Affairs and Agriculture & others v D & F Wevell Trust & others* 2008 (2) SA 184 (SCA) para 43), all the more so where the appellants in their affidavits chose to treat the question of traffic congestion as irrelevant. I simply add that the annexed impact reports are at odds with a suggestion of a significant increase in traffic. Upon completion of the development the volume-to-capacity ratios of all relevant intersections will remain low and the levels of service good.

[30] The appellants thus failed to demonstrate that the violation of item 40(c) has caused or will cause them harm. Their true concern seems to have been that the new development would impair their view but in their supplementary replying papers they disavowed this concern as a basis for locus standi. In conclusion I should emphasise that my conclusion on locus standi is made in relation to a restriction which is, to adapt Eloff JP’s expression, highly parochial. Many of the DMS’ other provisions may have a far wider reach.

[31] The following order is made:

The appeal is dismissed with costs, including the costs of two counsel.

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O L Rogers

Acting Judge of Appeal

APPEARANCES

For Appellants	A M Smalberger SC Instructed by K J Bredenkamp Attorneys, Cape Town Hill McHardy & Herbst, Bloemfontein
For Respondent	S P Rosenberg SC (with him R D E Gordon) Instructed by Edward Nathan Sonnenbergs, Cape Town Webbers, Bloemfontein