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IN THE NORTH GAUTENG HIGH COURT. PRETORIA (REPUBLIC OF SOUTH AFRICA)
NOT REPORTABLE

CASE NO. 47233/11

DATE:28/06/2012

In the matter between

PELLENCIN, S W

APPLICANT

and

CITY OF TSHWANE METROPOLITAN MUNICIPALITY

RESPONDENT

JUDGMENT

LI VORSTER AJ:

[1] The applicant applies for an order compelling the respondent to issue an occupation certificate in respect of Street, Wonderboom, Pretoria and also costs of suit against the respondent. The dispute between the parties is purely a dispute of law. The relevant facts in this matter are not in dispute, and may be summarized as follows:

1.1 The applicant successfully applied to the respondent, being the relevant local authority, for the approval of building plans in respect of a dwelling to be erected on the property of the applicant.

1.2 The aforesaid building plans were approved by the respondent.

1.3 In the course of the construction of the dwelling, certain deviations from the approved building plans were done in the construction process. This compelled the applicant to apply for the approval of amended building plans which reflected the construction of the building works "as built". The respondent refused to approve of the building plans as built. When requested for reasons for its refusal, the respondent by a letter dated 23rd of March 2010, informed the applicant that the grounds for its refusal were as follows:

"The building to which the application in question relates will be of such nature or appearance that -

- (1) It will probably or in fact detrimentally affect the privacy of the adjoining property owners;
- (2) The area in which it is to be erected will probably or in fact be disfigured thereby;
- (3) It will probably or in fact derogate from the value of adjoining or neighbouring properties."

1.4 The applicant appealed against the refusal of the respondent to a review board in terms of section 9 of the National Building Regulations and Building Standards Act, No 103 of 1977 ("the Act"). The review board upheld the appeal of the applicant.

1.5 The applicant thereafter applied for an occupation certificate in respect of the dwelling in terms of section 14 of the Act. That application was refused. Consequently the applicant applies for the relief claimed in the notice of motion.

[2] The relief claimed by the applicant is a mandamus. It asks the Court to make an order

compelling the respondent to do what in law it is obliged to do, but refuses to do. It is clear that the entitlement of the applicant to claim the aforesaid relief is based fundamentally on the legal interpretation of the effect of the upholding of the appeal of the applicant to the review tribunal. Secondly, the question is whether the upholding of the appeal of necessity entitles the applicant to an occupation certificate in respect of the dwelling and whether any residual discretion to refuse that occupation certificate vests in the respondent in terms of section 14 of the Act. I shall deal with those questions below.

[3] THE LEGAL EFFECT OF UPHOLDING THE APPEAL:

The appeal to the review board is what is commonly called an administrative appeal. It is an appeal in the wide sense which entails a complete rehearing of the merits of the case and a fresh determination thereof on such evidence or information put to the appeal tribunal. Vide: *Tikly & others v Johannes NO & others* 1963(2) SA 588 (T) at 590 - 591. The written decision of the review board attached as annexure "SP05" to the founding affidavit is instructive in this regard as it is clear that the issues were determined by the review board on the basis of the hearing of evidence and determining the issues between the parties de novo in coming to its decision to uphold the appeal. In terms of section 9 of the Act, the time period within and the manner in which an appeal can be made to the review board is as prescribed by regulation. Section 20 of the Act provides in section 20(1)(a) and (b) for the provision of regulations regarding the procedure to be followed at the hearing of an appeal as well as the powers, duties and functions of the review board, including the power to summon witnesses for the purposes of hearing of the appeal. That is a clear indication that the nature of the proceedings before the review board is a rehearing de novo on the merits of the case.

[4] The concept of appeal of necessity implies a power on the part of the appeal body to correct or replace a decision of the body which decision is taken on appeal. But for that implication, the concept of appeal would make no sense and be irrelevant. The implied power to set-aside, correct and replace an incorrect decision by a body of appeal can of course be curtailed or specifically formulated by enabling legislation. In the instant case there is no evidence or material before me to indicate that any such limiting provisions were applicable in the instant case. Consequently I accept that the review board was competent to set-aside the decision of the respondent and to replace it with its own decision. The review board clearly rejected the refusal of the respondent to approve of the building plans as built. It upheld the appeal, but did not expressly state what the effect of upholding the appeal would be. It is however clear that the reasons advanced by the respondent as grounds for refusal to approve of the building plans were found by the review board to be without substance and rejected. Having rejected those reasons, it follows that upholding the appeal is in substance the approval of the building plans as built. The fact that the review board did not explicitly say so is not in my view of any consequence. The reasons for refusing to approve of the building plans were rejected by the review board and in the absence of any other reasons, it follows that the respondent could not lawfully refuse to approve of the said building plans.

[5] RESIDUAL DISCRETION TO REFUSE OCCUPATION CERTIFICATE:

Section 14(1) of the Act provides as follows:

"(1) A local authority shall within 14 days after the owner of a building of which the erection has been completed, or any person having an interest therein, has requested it in writing to issue a certificate

of occupancy in respect of such building -

(a) issue such certificate of occupancy if it is in the opinion that such building has been erected in accordance with the provisions of this Act and the conditions on which approval was granted in terms of section 7 and if certificates issued in terms of the provisions of subsection (2A), in respect of such building have been submitted to it.

(b) in writing notify its owner or person that it refuses to issue such certificate of occupancy if it is not satisfied or if a certificate has not been so issued and submitted to it"

[6] Section 7(1)(a) of the Act provides as follows:

"(1) If a local authority, having considered a 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"

Clearly, a building plan can only be approved by a local authority if that building plan complies with the requirements of the Act and any other applicable law.

The grounds that were raised by the respondent for the refusal of the approval of the building plan are the grounds mentioned in section 7(b)(ii)(aaa), (bbb) and (ccc). There never was any objection by the respondent that the building plans did not comply with the requirements of the Act or any applicable law. The rejection by the review board of the reliance of the respondent on the provisions of section 7(b)(ii) leaves no other alternative than the conclusion that the building plans as built complies with the provisions of the Act and any other applicable law. That being so, the inevitable conclusion must be that there is no ground for the respondent to refuse the occupancy certificate applied for by the applicant. Clearly the

issuing of an occupancy certificate relate to matters of safety of inhabitation of a particular building. If that building has been constructed in accordance with approved building plans, there can be no residual authority to refuse an occupancy certificate unless the building or structure deviates from the approved building plans in some respect which renders it unsafe for occupation. That is clearly not the situation in the instant case.

[7] The respondent argued that it is not competent for this Court to issue a mandamus against the respondent. That submission is based on the assumption that the nature of the proceedings before the review tribunal is a review and not an appeal. The argument is that Courts do not normally issue a mandamus in cases of review, but rather refer the matter back to the body in question for reconsideration and coming to a proper decision. That is correct in cases of review. The fact is that the proceedings before the review tribunal was not a review but an appeal. That appeal is an appeal in the wide sense of the word where the review tribunal is empowered and indeed, obliged to reconsider the matter on the basis of the totality of the evidence before it and come to its own decision. That is what happened in the instant case. It also follows that the provisions of the Promotion of Administrative Justice Act (PAJA) are completely irrelevant to this case. Those provisions can only find application in the case of a review of the decision of the review board. That has not taken place. The question whether this Court should issue a mandamus against the respondent is entirely dependant upon the question whether a legal obligation rested with the respondent to issue the occupancy certificate which it had refused to do. I am of the view that such legal obligation existed for the reasons that I have already dealt with above.

[8] What remains is the issue of costs. The applicant asks for an order of attorney and client costs to be awarded against the respondent. The difficult question which I must decide is

whether the respondent was willfully obstructive of issuing an occupancy certificate which it was in law obliged to do or whether it actually believed that it was the lawful course of procedure to adopt. Although there certainly is room for the argument that the Respondent was willfully obstructive, I think the benefit of the doubt whether it actually believed its unlawful refusal to issue the occupancy certificate to be lawful operates against the imposition of a punitive cost order against the respondent.

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

1. The Respondent is ordered to issue an occupation certificate in respect of the dwelling situated at Street, Wonderboom South, Pretoria to the applicant.
2. The Respondent pays the Applicant's costs of suit.

L I VORSTER WR