

**IN THE KWAZULU-NATAL HIGH COURT, DURBAN
REPUBLIC OF SOUTH AFRICA**

CASE NO. 6244/2010

In the matter between:

ETHEKWINI MUNICIPALITY

APPLICANT

and

ALDERWOOD TRADING 61 CC

RESPONDENT

JUDGMENT Delivered on 04 March 2011

SWAIN J

[1] The applicant, the eThekweni Municipality, seeks an order directing the respondent, Alderwood Trading 61 cc to comply with “the ruling” of the Town Planning Appeals Board in Appeal No. 2964/2004, which appeal was heard as long ago as 29 January 2004.

[2] The practical effect of the enforcement of the ruling in question, is to compel the respondent to demolish an exterior staircase, located at a property owned by the respondent and which

is situated at 524/526 Peter Mokoba Road, Overport, Durban (the property). In substitution of access being gained to the upper level of the property, by way of the exterior staircase, the applicant seeks an order directing the respondent to construct an internal staircase, at the property to achieve this objective, in accordance with the said ruling.

[3] In order to consider the ruling of the Appeals Tribunal in context it is necessary to briefly consider the history of the matter.

[4] The property had formerly consisted of residential units which had, with the consent of the applicant, been converted into a pair of maisonettes. The previous owner of the property, the Nazir Malek Trust (the Trust) had sought to convert the residential maisonettes, into business premises.

[5] For present purposes it suffices to consider the application the Trust made in April 2002, for authority for the “as built” building (being the property) and to convert the entire building to offices.

[6] That application was granted by the applicant on 12 July 2002, pursuant to a decision by the Executive Director (Development and Planning), which authorised the Trust to use the whole building for office purposes, subject to the following conditions:

[6.1] The submission and approval of detailed building plans, including a landscape plan, to the satisfaction of the Executive Director.

[6.2] The provision of twenty one parking bays.

[6.3] Restricting the authority to the use of the ground floor as attorneys' offices and the remainder of the building as administration offices only for S A A.

[7] The decision was unsuccessfully brought before the Mayor's Decision Making Committee by way of an interim appeal on 23 June 2003.

[8] The decision was then brought on appeal before the Appeals Tribunal by Professor and Mrs. Bell, the owners of a property adjacent to the property.

[9] The Appeals Tribunal dismissed the appeal and upheld the decision of the Executive Director "subject to the following conditions".

"5. The exterior staircase on the south-western side of the building on the appeal site be demolished, the upper door leading to the staircase be bricked up, and access to the upper floor of the building be limited to the inner staircase leading to and from the front of the building facing on to Ridge Road.

6. That, by way of permanent bollards or other permanent forms of device, motor vehicles be precluded from parking in the south-eastern corner of the appeal site between the bays numbered 5 and 6 on the site plan which was annexed to report number DM25/03 dated 12 May 2003 submitted to the Mayor's Decision Making Committee which formed part of the record filed by the local authority together with its appeal memorandum in this appeal.
7. If the applicant, the Nazir Malek Family Trust, or any registered owner of the property fails to comply with any of the aforementioned conditions numbered 1 to 6 within a period of six (6) months from the date upon which the decision in this appeal as reviewed by the Honourable the Minister for Traditional Affairs and Local Government has been forwarded by the Secretary of the Appeals Board to the applicant or the then current owner, the decision by the local authority made by the Executive Director (Development and Planning) on the 12 July 2002 and confirmed by the Mayor's Decision Making Committee on 19 June 2003 shall forthwith lapse and be of no further force and effect".

[10] Before dealing with the substantive effect of these conditions upon the merits of the application, it is necessary to consider a preliminary defence raised by the respondents. This is that the applicant has failed to allege that the Trust, or the respondent, was ever notified of the decision of the Appeals Tribunal. As a consequence it is submitted that in the absence of proof of such notification, the six month period afforded to the Trust or "the then current owner" of the property to comply with the conditions, has not yet commenced running, with the result that the present application to compel the respondent to comply with the conditions, is

premature. The only response of the applicant to this allegation, in its replying affidavit, is to deny that the application is premature.

[11] Although it is clear that the applicant makes no express allegation that the Trust or the respondent, were ever notified of the decision, it is common cause that the exterior staircase in question was demolished, albeit to be replaced with a new exterior staircase, which it appears no longer attracts the disapproval of Mrs. Bell. In my view, the probability exists that the Trust was notified of the decision of the Appeals Tribunal, for otherwise why would the staircase in question have been demolished? For reasons which will become apparent, it is however not necessary for me to decide this point.

[11.1] I will assume in favour of the applicant, that the Trust was notified of the ruling of the Appeal Tribunal, with the result that the application is not premature.

[11.2] I will assume in favour of the respondent, that the demolition of the staircase took place within six months of the Trust being so notified.

[12] I make these assumptions in the light of the fact that it is common cause that the condition, that access to the upper floor of the building, be limited to the inner staircase leading to and from the front of the building facing on to Ridge Road (Peter Mokoba Road)

has not been complied with. The allegation, made by Bridget Kerr in support of the application, that access to the first floor is through an exterior staircase, the interior staircase was demolished and there has been no construction of the inner staircase, is not disputed by the respondent. The respondent is content to rely upon the withdrawal of Mrs. Bell's objection to the presence of the newly constructed exterior staircase, as justification for its conduct, arguing that the imposition of the original condition by the Appeals Tribunal was done so specifically, to protect the privacy of the Bells. Be that as it may, the fact remains that there is on the papers, no interior staircase, which limits access to the upper floor by way of such a route.

[13] It is therefore clear that the conditions laid down by the Appeals Tribunal were not fulfilled, within the stipulated period, with the consequence that the authorisation granted to the Trust and therefore the respondent, to use the whole of the building for office purposes, has lapsed and is of no force and effect.

[14] It seems to me that a necessary consequence of this conclusion, is that the conditions imposed by the Appeals Tribunal, in the grant of such authorisation, must inevitably suffer the same fate. The conditions are inextricably linked to the survival of the authority granted to the Trust, to use the whole building for office purposes. The conditions have no independent juridical status, apart from the authority granted. The failure to fulfil the conditions,

results not only in the demise of the authority granted, but of the conditions themselves. A consequence of this reasoning is that the conditions which the applicant seeks to enforce against the respondent in this application, are no longer in existence.

[15] When I put the above proposition to Mr. Van Niekerk S C, who together with Mr. Sibiya, appeared for the applicant, he submitted that the applicant had waived the lapsing of the authority granted to the respondent to use the property as offices, but had not waived compliance by the respondent, with the conditions imposed by the Appeals Tribunal. In this regard Mr. Van Niekerk S C points to the following statement of Bridget Kerr in her affidavit:

“15

- (a) However, despite all of the above, the applicant accepts that it would be impractical, at this stage, that the property reverts to maisonettes.
- (b) Consequently the applicant waives its rights to restoration of the property to maisonettes and consents to its use as offices, subject to the respondent's compliance with the applicable restrictions imposed by the Town Planning Appeals Board”.

[16] The conclusion I have reached however, that the existence of the conditions are inextricably linked to the existence of the authority granted, precludes a waiver of the sort contended for by Mr. Van Niekerk, with the preservation of the conditions independently of the demise of the authority granted.

[17] Mr. Van Niekerk also argued that the application should not be viewed in the narrow sense, of an attempt by the applicant to enforce the conditions imposed by the Appeals Tribunal, but in the the broader context of the applicant fulfilling its role of compelling compliance with the conditions of zoning of the property, in accordance with the Durban Scheme. This is a scheme adopted by the applicant to regulate the use of land, falling within the jurisdiction of the scheme in terms of Section 47 bis of the Town Planning Ordinance 1949, read with 13 (i) (a) of the KwaZulu-Natal Planning and Development Act 2008.

[18] It is however quite clear that the purpose of the whole application was to compel compliance by the respondent, with the conditions imposed by the Town Planning Appeals Tribunal. This is spelt out in the notice of motion, as well as expressly in the applicant's founding affidavit of Alisande Bradshaw, in the following words:

“11.

It is the applicant's contention that the trust failed to comply with the further conditions laid down by the Town Planning Appeals Board. The details of their failure to comply are set out in the affidavit of Bridget Kerr filed evenly herewith.

12.

This application seeks to compel the respondent to comply with such conditions, as the respondent is presently in violation of the Appeals Board decision.

13.

The applicant submits that for the reasons set out in that affidavit the applicant is entitled to an order directing the respondent to comply with the conditions imposed by the Town Planning Appeals Board”.

This theme is repeated in the supporting affidavit of Bridget Kerr where the following is stated:

“2.

The purpose of this affidavit is to set out the grounds upon which the applicant believes that it is entitled to compel compliance with a decision of the Town Planning Appeals board as set out in the founding affidavit of Alisande Bradshaw herein in respect of the premises situated at 524/526 Peter Mokaba Road (formerly Ridge Road), Durban (“the property”).

and which concludes with the following submission:

“16.

The applicant submits that for the reasons set out herein the applicant is entitled to an order compelling the respondent to comply with the conditions imposed in sub-paragraph 10 (a) above by the Town Planning Appeals Board”.

[19] Although the grant of the order sought by the applicant, may have as its consequence, compliance by the respondent with the provisions of the Durban Scheme, this cannot in itself justify the grant of an order enforcing compliance by the respondent with conditions, which are no longer of any force and effect.

[20] As regards the issue of costs of the application, Mr. Van Niekerk submitted that if the application was refused, in the light of the conduct of the respondent, in blatantly constructing a further exterior staircase, without authority and failing to construct an interior staircase, as required by the Appeals Tribunal, the respondent should be deprived of its costs in successfully opposing the application.

[21] I have given consideration to this submission, but the fact remains that the basis for the application, for the reasons set out above, was from the outset misconceived.

In the result the order I make is the following:

- (a) The application is dismissed.
- (b) The applicant is ordered to pay the
the respondent's costs.

K. SWAIN

J

Appearances /**Appearances:**

For the Applicant : Mr. G. O. Van Niekerk S C

Instructed by : Naidoo Maharaj Inc.
Durban

For the Respondent : Mr. R. Mohamed

Instructed by : Mohamed Hassim Attorneys
Durban

Date of Hearing : 02 March 2011

Date of Filing of Judgment : 04 March 2011