

3.b 110/86
183/85/AV

IN THE SUPREME COURT OF SOUTH AFRICA
(APPELLATE DIVISION)

In the matter between:

CITY COUNCIL OF JOHANNESBURG

Appellant

AND

ASHLEY TUGENDHAFT

1st Respondent

DAPHNE RAWICZ

2nd Respondent

WILLIAM LANE

3rd Respondent

IRWIN RABINOWITZ

4th Respondent

DAPHNE VALERIE MURTAGH

5th Respondent

CORAM: CORBETT, GROSSKOPF, SMALBERGER, JJA, NICHOLAS et
NESTADT, AJJA

HEARD: 16 September 1986

DELIVERED: 25 September 1986

J U D G M E N T

NICHOLAS, AJA

Cheltondale ...

Cheltondale Park lies between the Johannesburg suburbs of Cheltondale, Orchards and Gardens, which comprise mainly private dwelling houses. It is an open grassy expanse, some five hectares in extent, with the appearance of a village green. A low, ranch pole fence forms a barrier to vehicles, but allows easy access on foot. On the south and east sides are six blocks of flats, which enjoy an uninterrupted view across the park. There is a corner shop. In the park children play on swings, kick a ball about, play informal cricket, and fly kites; and their seniors walk their dogs and generally enjoy the amenities offered by a large and attractive open space.

In 1978 Cheltondale Park came under threat. The

erection

erection of the hypermarket, the site of which adjoins the park on its northern boundary, was nearing completion: it was due to open on 14 June 1978. Because it was thought that considerable traffic congestion in the vicinity of the hypermarket was likely, the developer of the hypermarket site was anxious that a link road, which would bisect the park, should be built to provide additional means of access. The developer made an offer to the City Council of Johannesburg to pay all costs of constructing such a road. The Council's Management Committee was agreeable and, with a fine disregard for legality, decided on 30 May 1978

"... that the developer could proceed with the roadworks at its own risk prior to the completion of the legal requirements."

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The developer lost no time. Early the following day, Republic Day, a bulldozer moved into the park and levelling of the ground in preparation for the construction of the road was begun.

Local residents immediately sprang to arms in defence of their suburban peace and tranquillity. The Management Committee retreated before the threat of interdict proceedings. On 5 June 1978 it rescinded its previous resolution and resolved to accept the developer's offer on condition that road construction across the park would be undertaken only after compliance with the legal formalities.

Foreseeing that the proposed road would seriously interfere with the amenities of the park, and would create

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a safety hazard to their children in the form of speeding motor cycles, cars and heavy delivery vehicles, militant residents (among them Mr. Ashley Tugendhaft, who was to lead the opposition to the road through all its stages) formed an Action Committee at a public meeting, attended by more than 300 people, which was held on 19 June 1978.

Acting in terms of s. 68 of the Local Government Ordinance, No 17 of 1939 (T), the City Council next advertised its intention to permanently close a section of the park for road purposes. Several hundred objections were lodged. In terms of s. 67 (7) of the Ordinance, the Administrator of the Transvaal appointed a one-man commission to enquire into the propriety of the proposed closing. The Action Committee

made

made representations at the enquiry which was held on 8 and 9 July 1980. It is not known what the commission reported, but in May 1981 the Administrator authorized the closing.

There remained another legal obstacle: under the Johannesburg Town Planning Scheme, Cheltondale Park is zoned as a public open space and it was necessary that the scheme be amended so as to rezone the land to be used for the road to "existing public road". A proposed amendment to the Johannesburg Town Planning Scheme (Amendment Scheme 624) was accordingly advertised on 4 November 1981. Several hundred objections to the scheme were lodged by residents in the area. On 2 April 1982, a number of objectors, including

cluding Tugendhaft, were present at a hearing before the town-planning committee and made representations to it. The upshot was that the committee made a recommendation that the amendment scheme be adopted.

The rezoning was then considered by the Council's Management Committee, and it was included as item 31 in the Committee's report submitted to the Council at its ordinary meeting held on 27 April 1982. The report contained the following:

"IT IS RECOMMENDED

1. That the draft amendment scheme prepared by the Council for the rezoning of:

- (1) the closed part of Erf 88 Cheltondale from Public Open Space to Existing Public Road;
- (2) parts of Portion 1 R.E. of Farm Klipfontein 58 I.R. from Public Open Space and Residential 1 to Existing Public Road and Public Open Space; and

(3)

(3) parts of Erf 197 The Gardens from Business 1 and Public Open Space to Existing Public Road be adopted as an interim scheme in terms of Section 29(6) of the Town-planning and Townships Ordinance, 1965.

2. That the interim scheme be submitted to the Director of Local Government in terms of section 29(8) of the Ordinance."

The Town-planning and Townships Ordinance, No 25 of

1965 (T), which was referred to in the recommendation, makes provision in sections 26 to 28 for the giving of notice of a draft town-planning scheme and for the lodging of objections with and making representations to the local authority. Subsections (1) to (4) of s. 29 provides for a public hearing of any objection or representations. In terms of sub-sections (5) and (6):

"(5) After the expiry of the period referred to in section twenty-eight and after such hearing, if any, the local authority

concerned

concerned shall consider any objection and representations which have been received by it.

- (6) After consideration of any objection or representations, if any, in terms of sub-section (5), the local authority shall either reject or adopt such scheme and, in adopting such scheme, it may do so subject to such amendment as it may deem fit whether as a result of any such objection or representations or on its own initiative."

It appears from the Council's minutes of the meeting of 27 April 1982 that after debate the recommendation was put to the vote. A division having been called for, there voted on division "FOR (23)" and "AGAINST (24)". The minute recorded the result as follows:

"RESOLVED: That the recommendation of the Committee contained in item 31 of Appendix A be not approved."

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The proponents of the link road did not accept defeat. The amendment scheme was again included in a monthly report of the Management Committee together with a recommendation in the same terms as previously. This report was considered by the Council at its meeting held on 30 November 1982, and, after a debate, the recommendation was adopted.

The residents now had recourse to law. By a notice of motion dated 3 May 1983, Tugendhaft and five other applicants, who were residents and property owners in the area, launched an application in the Transvaal Provincial Division of the Supreme Court, citing the City Council as first respondent and the Director of Local Government as second respondent. They sought an order inter alia,

"1. Declaring invalid and setting aside the resolution which was passed by the First Respondent on the 30th November 1982 in terms of which it was resolved:

'1. That the draft amendment scheme (No. 624) prepared by the Council for the rezoning of:-

(1) Portion 1 of the Erf 88 Cheltondale from Public Open Space to Existing Public Road;

(2) Parts of Portion 1 RE of Farm Klipfontein 58 I.R. from Public Open Space and Residential 1 to Existing Public Road and Public Open Space;
and

(3) Parts of Erf 197 The Gardens from Business 1 and Public Open Space to Existing Public Road

be adopted as an interim scheme in terms of Section 29(6) of the Town Planning and Townships Ordinance of 1965.

2. That the interim scheme be submitted to the Director of Local Government in terms of Section 29(8) of the Ordinance.'

2. Directing the First Respondent to pay the costs of this Application on the scale as between

attorney

attorney and own client."

The main ground for the relief sought was that the purported adoption of the scheme was a nullity, in that the Council, having rejected the scheme on 27 April 1982, was functus officio. It is unnecessary to refer to the other grounds.

The application was heard by KIRK-COHEN J, who granted an order in terms of prayer 1 of the notice of motion and ordered the Council to pay the costs including those consequent upon the employment of two counsel.

An application for leave to appeal was refused by the Court a quo, but leave to appeal was subsequently granted by this Court in terms of s. 20(4)(b) of Act No 59 of 1959.

In his judgment KIRK-COHEN J said:

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"In my view the provisions of Section 29(6) are peremptory - as are the obligations laid upon a local authority to arrange a hearing of objections and to consider them (see Sections 29(1), (4) and (5)). Subject to the right of postponement, a local authority, acting in terms of sub-section (6), is enjoined and obliged either to reject or adopt the draft scheme. If it votes to adopt the draft scheme, with or without amendment, then it becomes an interim scheme (Section 29(7)) and the procedure set out in Section 29(8) and (9) and 29(A) comes in operation.

If, however, the local authority rejects the draft scheme in terms of Section 29(6), then cadit quaestio. The draft scheme comes to an end. There is no provision or procedure whereby a draft scheme, once rejected, may be reconsidered by the local authority. The local authority, being a creature of statute, only has such powers and rights as are conferred upon it. As far as the rejection or adoption of a draft scheme is concerned, a local authority has only those powers granted to it in terms of Section 29(6) - either to reject or

adopt

adopt (with amendments) the draft scheme after the hearing and consideration of objections and representations in regard thereto. There exists no right to reverse a decision already taken and, in particular, to adopt a draft scheme already rejected."

(Clearly, the learned judge was not dealing with the case of an amendment scheme in which proceedings had been taken ab initio.)

In arguing the appeal before us, the Council's legal representative conceded (correctly in my opinion) that the consequence of a rejection of a draft scheme were as set out in the judgment of the Court a quo. Their submission was the narrow one: that the resolution of 27 April 1982 did not constitute a rejection of the draft scheme in terms of sec 29(6) of the Town-planning and Townships Ordinance, No 25 of 1965 (T).

The question is accordingly one as to the correct interpretation of that resolution.

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The main submission on behalf of the Council was

that -

"In order to be effective, the exercise of a decision-making power, such as that conferred by section 29(6), must be unequivocal. If the wording of the resolution is not plain, then the inference to be drawn from the recommendation and the resolution must leave no room for doubt. However, on 27th April 1982, the resolution which the Council passed was limited to a non-approval of the Management Committee's recommendation. That recommendation did not require the Council to consider whether the draft scheme should be rejected. It demanded only a vote upon whether the draft scheme should be approved and thereby converted into an interim scheme. The Council did not even purport to reject the scheme. By passing the resolution which it did the Appellant merely maintained the status quo of the draft scheme and left its future open for consideration at a later time."

In interpreting the resolution, regard must be had

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to substance, not form or semantic niceties, and it must be considered in the light of the relevant sections of the Council's Standing Orders, and in the context of s. 29(6), under which the Council was acting.

There is no special significance in the use of the word "recommended". It is the equivalent, in matters emanating from the Committee, of "moved" in the case of resolutions put forward by members of the Council. That appears from various provisions in the Council's Standing Orders:

"11. The monthly report of the Management Committee shall be divided into items which shall be numbered consecutively, and unless an item is reported merely for information of the Council, every item shall contain a recommendation or recommendations for adoption by the Council. The Management Committee shall be required to indicate its ap-

proval

proval or disapproval of every item submitted by it on behalf of another committee."

"14. (1) The Chairman of the Management Committee or other member bringing up the report of that committee shall be held to move each recommendation contained in the report."

"16. Any motion, other than a recommendation of the Management Committee, having the effect of increasing or decreasing the expenditure or income of the Council, shall take the form of a reference to the Management Committee for consideration."

"20. (1) No motion shall be properly before the Council until such motion has been duly moved and, in the case of motions other than motions in terms of sections 13,14,15,21(1), 38 and 47, until such motion has also been seconded: Provided that the Chairman of the Council may, without a seconder, move as unopposed a motion of condolence or congratulations in circumstances which he deems appropriate, but if such motion is in fact opposed it shall fall away."

(The only motion referred to in section 14 is the "recommendation" of the Management Committee.)

Under s. 29(6), the duty was imposed upon the Council either to reject or adopt the scheme. Plainly, if the Council had accepted the recommendation (or, what is the same thing, passed the motion), it would have adopted the scheme. It did not do that: it disapproved the recommendation (negatived the motion). I cannot see by what logic it can be said that the Council did not thereby reject the scheme. When a motion to adopt a scheme is negatived, that necessarily implies in the context of s. 29(6) that the scheme is rejected. There is no room in that provision for the consignment of a scheme to limbo, there to lie, possibly

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for years, until it should be resurrected and again brought before the Council. In its terms s. 29(6) requires finality. The reason is obvious. The giving of notice of an amendment scheme is calculated to produce uncertainty regarding the proprietary rights and interests affected thereby, which uncertainty should not be allowed to continue indefinitely.

In my opinion, therefore, there is no merit in the main submission made on behalf of the Council.

In an alternative argument, it was submitted that under section 16 of the Standing Orders,

"... it was not legally possible for the Council to reject a draft townplanning scheme in circumstances such as were applicable to this draft scheme, unless the Management Committee itself either recommended the rejection, or, if a motion of rejection

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tion were moved by a councillor in the Council, such motion had first been referred to the Management Committee for consideration."

This argument is misconceived. Section 16 is quoted above. The only motion before the Council was the recommendation of the Management Committee; there was no other. It was argued, however, that the scheme could be rejected only in terms of an amendment to that effect which would have had to be referred to the Management Committee.

I do not agree. An amendment for the rejection of the scheme was not necessary, and it would not have been competent. In Berman v Chairman, Cape Provincial Council,

1961 (2) SA 412 (C) at 423 C, DE VILLIERS AJ said:

"Amendments are not allowed which merely

negative

negative the terms of a proposed question, the correct way of expressing a contrary opinion being to vote against the question when put (May, p. 391)."

See also The Law of Meetings, by Mr Justice Sebag Shaw and

Judge Dennis Smith, 4th ed., at the pages indicated:

"The object of amendment being to modify the proposal before the meeting while preserving its main purport, a motion which obliterates the original motion entirely is not a true amendment." (p. 77)

"Where amendment is possible, it must not purport merely to negative the original motion. Such an amendment does not in any way alter the question before the meeting, but simply inverts the presentation of the issues which the meeting is to consider: it invites the answers 'no' or 'yes' instead of the alternatives 'yes' or 'no', to the same substantial question. To frame an amendment in the form of a negative

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is thus futile and ineffectual, for supporters of such an amendment can accomplish their object with greater facility by voting against the motion in its original form." (pp 78-79)

In the present case a proposed amendment would, presumably, have been to delete the word "adopted" and substituted the word "rejected". In substance, if not in form, such an amendment would have obliterated the Committee's recommendation, and would have purported to negative it.

In my opinion, therefore, KIRK-COHEN J's decision was clearly right.

The appeal is dismissed with costs.

H C NICHOLAS, AJA

CORBETT, JA
GROSSKOPF, JA
SMALBERGER, JA
NESTADT, AJA

} Concur