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**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION PRETORIA**

CASE NO: 031793/2023

- (1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

.....
SIGNATURE

.....
DATE

ADOWAY (PTY) LTD

FIRST APPLICANT

JAN GERHARDUS de WAAL

SECOND APPLICANT

KAREE ONTWIKKKELAARS (PTY) LTD

THIRD APPLICANT

ZERANZA 12 (PTY) LTD

FOURTH APPLICANT

PETRUS BENJAMIN WIESE

FIFTH APPLICANT

MELANIE WIESE

SIXTH APPLICANT

ROBYN VAN AARDT

SEVENTH APPLICANT

GIDEON FERREIRA

EIGHTH APPLICANT

and

TSHWANE METROPOLITAN MUNICIPALITY

FIRST RESPONDENT

Mr. P MACHETTE

SECOND RESPONDENT

Mr. A.F JANSEN

THIRD RESPONDENT

Mr. JASON NGOBENI

FOURTH RESPONDENT

This Judgment was handed down electronically and by circulation to the parties' legal representatives by way of email and shall be uploaded on caselines. The date for hand down is deemed to be on 27 March 2025.

JUDGEMENT

MALI J

[1] This is an application for the review and setting aside of the decision taken by the first, second and third respondents recommending and or rejecting the final building plans in respect of the second to eighth applicants' full title properties. The application is brought in terms of section 6 of the Promotion of Administrative Justice Act, 2000 ("PAJA").

The parties

[2] The first applicant is Adoway (Pty) Ltd (Adoway), a company duly registered in terms of the company laws of the Republic of South Africa. The first applicant, Adoway was the owner of Erf 8[...] which was rezoned from "Residential 2" with a density of 16 dwelling units to "Residential 2" with revised density of 30 dwellings. The second to eight applicants are owners of individual portions in Erf 8[...].

[3] The first respondent is the Tshwane Metropolitan Municipality, a Municipality (the City), established pursuant to the provisions of section 62 of the Local Government: Municipal Systems Act, 32 of 2000. The second respondent is Mr P Machette in his capacity as Deputy Director, Building Plans and Inspection, Region 3, employed by the City.

[4] The third respondent is Mr AF Jansen in his capacity as Building Control Officer, Economic Development & Spatial Planning, employed by the City. The fourth respondent is Mr Jason Ngobeni in his capacity as Municipal Manager, employed by the City. The respondents will be referred to as City or respondents interchangeably.

The Relief

[5] The structure of the relief sought per the applicant's notice of motion and founding affidavit is as follows:

1. *The purpose of this application is:*
 - a. *The review and setting aside of the administrative decision taken by the first, second and third respondents on or about 25 July 2022, recommending and/or rejecting the final building plans in respect of the second to seventh applicants full title properties;*
 - b. *To substitute the impugned administrative decisions with an approval of the final building plans in respect of the second to seventh applicants' full title properties, alternatively to remit the decision to the first respondent to reconsider it within 30 days;*
 - c. *Alternatively, to "a" and "b" above the reviewing and setting aside the administrative decision by the fourth respondent in failing to take a decision in respect of the applicant's appeal in terms of section 62 of the Local Government: Municipal Systems Act, 32 of 2000 ("the systems*

Act”), that the fourth respondent be ordered to consider the appeal within 30 days.

2. Apart from the aforesaid the applicants will also seek the following relief:

a. A declaratory order that the first and fourth respondents’ conduct in allowing the full title site development plan and sectional title building plans to be approved, on the one hand, and disallowing the full title building plans to be approved in respect of the full title properties, on the other hand, is contrary to:

i. The provisions of the Tshwane Town-planning Scheme, 2008 (revised 2014), as amended by Amendment Scheme 4211T; (no specific provision to quote, this is a large document with difference provisions)

ii. The principles of section 9 (equality), section 25 (property) and section 33 (just administrative action) all being part of the rights contained in the Bill of Rights of the Constitution of the Republic of South Africa, 1996 (“the Constitution”).

9. (1) Everyone is equal before the law and has the right to equal protection and benefit of the law.

25. (1) No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.

33. (1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.

b. An order, consequent upon declaring the conduct of the first to fourth respondents unconstitutional, that the first to fourth respondents be ordered to recommend and approve the final building plans in respect of the full title properties belonging to the second and seventh applicants, in

terms of section 7 of the National Building Regulations and Standards Act, 103 of 1977 (“the Buildings Standards Act”).

c. That insofar as the court finds that the applicants failed to comply with section 7(1) of the Promotion of Administrative Justice Act, 3 of 2000 (“PAJA”), that same be condoned in terms of section 9 of PAJA;

d. That insofar as the applicants failed to comply with section 7(2) of PAJA, that same be condoned in terms of PAJA;

e. An order that first respondent pays the costs of the application on an attorney and client scale, inclusive of the costs of two counsel, if applicable.”

Background

[6] Pursuant to the application for the rezoning, on 13 May 2019 the City’s relevant department sent a letter to Adoway’s Town Planner approving the application with certain conditions to be complied with within a period of 12 months from the date of notification and approval. Adoway prepared a site development plan (SDP) which indicated 6 **full title** residential stands, and the same was approved on 14 September 2020. Subsequently Adoway was issued with approval for the subdivision under certain conditions imposed by the City. **[own emphasis]** The SDP included the building plans in respect of the residential dwellings to be erected on Erf 8[...], which building plans included windows on the first story’s units 1 to 5.

[7] The conditions are as follows:

“B. CONDITIONS TO BE COMPLIED WITH PRIOR TO THE DEVELOPMENT PLANS BEING APPROVED

(a) All the conditions in section A above must be complied with;

(b) An engineers' report for site services (roads and stormwater) must be accepted by the department;

(c) An engineer's layout plan must be accepted by the department, based on the report required in condition 8(b) above. The engineer's layout plan must comply with the minimum requirements of the department, and must include:

(i) Detailed internal stormwater layout;

(ii) Detailed access arrangements;

(d) The proposed roads and stormwater services as accepted by the department must be indicated on the site development plan layout;

(e) The following condition must be included as a condition of title to the subject property:

(i) The erf shall not be transferred without the written consent from the City of Tshwane, with reference to the function and maintenance of the internal stormwater system.

(f) The following condition must be included in the statute of the Body Corporate with respect to the scheme:

(i) The owner(s) shall remain responsible for functional maintenance and operation of the stormwater management system, as prescribed in the engineer's report (as compiled by Messrs. PVA Consulting Engineers cc (#3261 Rev B, dated March 2017);

(g) The following must be provided on the SDP and building Plans files respectively:

(i) A signed copy of the report;

(ii) A signed copy of the drawing #3261-CIV-100 Rev A, as included in the report;

(iii) The site stormwater management interventions as indicated on the above-mentioned drawing must be shown on the general site plan (SDP), in accordance with the engineers' report;

(h) A detailed maintenance schedule must be included in the submission, based on the engineers' report. The maintenance schedule must be signed by the owner, must include an acceptance by the owner to maintain the stormwater in functional order as per the maintenance schedule and engineers' report;

C. CONDITIONS TO BE COMPLIED WITH PRIOR TO BUILDING PLANS BEING APPROVED

- (a) A Site Development Plan must be submitted and accepted for the land development area;*
- (b) The site services (roads and stormwater) must be indicated on the Building Plan layout and must comply with the minimum requirements of the Department;*
- (c) A wayleave application must be approved for all work within the public road reserve. Please visit <https://wayleave.tshwane.gov.za> in this regard;*
- (d) No encroachment over any servitudes will be allowed.”*

[8] It is common cause that the City allowed Adoway to submit building plans for **sectional title** development for the six units. At the time when the Council considered and approved the six **sectional title** units, such approval was given to accommodate the Developer because of the time span between the approval or the subdivision by the Regional Spatial Planning in terms of the relevant laws.

[9] The **sectional title** building plans were approved by the City on 24 June 2021. The approval was for group housing units 1- 6 for the occupancy of sectional title units not full title portions. At the stage of the approval of the plans Adoway had already entered into a sale agreement for the sale and transfer of all **6 full title** portions with the second to eight applicants.

[10] On 3 August 2021 the City issued an occupational certificate in respect of **sectional titles**, for all 6 dwellings in terms of the provisions of section 14 (1) of the National Building Regulation and Building Regulation and Building Standards Act, 103 of 1977 (the NBRBS Act), which provides:

“(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 of 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 a certificate issued in terms of the provisions of subsection (2) in respect of such building has been submitted to it; (b) in writing notify such owner or person that it refuses to issue such certificate of occupancy if it is not so satisfied or if a certificate has not been so issued and submitted to it.”

[11] On 24 August 2021 the City received an application for the approval of building plans for six **full title** portions. Upon the evaluation of the plans, the council did not approve the building plans of such full title portions due to the windows that are fitted on the boundary lines, especially on Units 1 to 5.

[12] On 22 June 2022 the **sectional title** building plans were approved by the City without any amendment to the designs, and nothing on the layout of the dwelling units was altered. On 25 July 2022 the City communicated that the **full title** Building Plans were refused. Adoway was advised that no building plans in respect of Portions 1 to 5 will be approved for as long as any of the windows on the boundary line are overlooking adjacent properties. The letter further advised that any window on a boundary line should be bricked up and alternative means of ventilation should be installed before the full title building plans are considered for approval.

[13] Two of the six transferees, being the second and fourth applicant, have since disposed of their portions. At the time of the hearing of this application they were in the process of giving transfer. The second applicant has launched an application in the High Court to compel the City’s Building Control Division to issue the required consent. The trigger for this application is the City’s refusal to approve the **full title** building plans despite several negotiations between the City and Adoway.

Condonation of delay

[14] It is common cause that the applicants did not bring the application within a period of 180 days, the application is 97 days out of time. According to the applicants the proverbial clock started ticking during December 2022. This is after they had commenced with meetings from June 2022 followed by approximately consistent monthly meetings and exchange of correspondence with the City, pertaining to the approval of plans.

[15] It became clear on 14 December 2022 to the applicants that a solution would not be forthcoming, they lodged internal appeal, which was also not entertained by the City. The applicants then brought an urgent application on 22 December 2022, which was struck from the roll. This application was launched on 12 April 2023.

[16] Section 7 of PAJA provides as follows:

“7. (1) Any proceedings for judicial review in terms of section 6(1) must be instituted without unreasonable delay and not later than 180 days after the date—

(a) subject to subsection (2)(c), on which any proceedings instituted in terms of 15 internal remedies as contemplated in subsection (2)(a) have been concluded;

(b) ~here no such remedies exist, on which the person concerned was informed of the administrative action, became aware of the action and the reasons for it or might reasonably have been expected to have become aware of the action and 20 the reasons.”

[17] It is trite that the 180 day period can be extended by the court in terms of section 9(1)(b) and 9(2) of PAJA where the interest of justice so require.

Whether it is in the interest of justice to grant an extension depends on the facts of each case.¹

[18] The City alleges that the delay is self-made as the applicants wasted time in invoking the appeal process which is not provided in the law. There is no domestic remedy for appeal. Section 62 of the Systems Act provides: *(1) A person whose rights are affected by a decision taken by a political structure, political office bearer, councillor or staff member of a municipality in terms of a power or duty delegated or subdelegated by a delegating authority to the political structure, political office bearer, councillor or staff member, may appeal against that decision by giving written notice of the appeal and reasons to the municipal manager within 21 days of the date of the notification of the decision.*

[19] The applicants relied on the above provision. Whether they were entitled or not to do so, the diligence displayed by the applicants in trying to find amicable solution since 9 June 2022 is overwhelming. The court is persuaded that the applicants were not supine at all. The application implicates property rights which are protected by the Constitution. It is therefore in the interest of justice that the period for review be extended.

Applicants' case

[20] The applicants' case is that the decision of the City is reviewable in terms of section 6 of PAJA. Section 6 is very wide; the applicants contend that they have brought the application on a number of grounds prescribed by section 6. What becomes clear is that the main attack is that the decisions of the City are irrational and unreasonable.

[21] The applicants later supplemented their grounds for review subsequent to receipt of the City's record for a decision delivered on 25 October 2023. The supplementary grounds for review are as follows:

¹ Camps Bay Ratepayers and Residence Association v Harrison [2010] 2 All SA 519 (SCA) par 54.a

“The action was taken for a reason not authorised by the empowering provision [Section 6(2)(e)(i)]; the action was taken because irrelevant considerations were taken into account or relevant considerations were not considered [section 6(2)(e)(iii)]; the action itself contravenes a law or is not authorised by the empowering provision [section 6(2)(f)(i)]; the action itself is not rationally connected to the purpose of the empowering provision [section 6(2)(f)(bb)] and the action itself is not rationally connected to the reasons given for it by the administrator [section 6(2)(f)(ii)(dd)].”

“The action was taken because irrelevant considerations were taken into account or relevant considerations were not considered [section 6(2)(e)(iii)]; the action itself was taken arbitrarily or capriciously [section 6(e)(vi)]; the action itself is not rationally connected to information before the administrator [section 6(2)(f)(ii)(cc)] and the action itself is otherwise unconstitutional [section 6(2)(i)].”

[22] The correspondence of 25 July 2022 which forms subject of this review reads as follows:

*“RE: EVALUATION PLANS ON PORTION 1,2,3,4 &5 OF ERF 8[...]
M[...] P[...]*

Sirs

Our meeting of the 8th June 2022 between Mr. S Willie and the writer: P M Machete refers.

Kindly accept our apology on the tardy nature of this reply. Our delayed to respond to your enquiry is a resultant of work load and other office commitments.

After a joint meeting with as (sic) Council officials, we resolved that: no structure will be approved with any window on a boundary line overlooking into any adjacent property.

We advise that any window on a boundary line should be bricked up and provide means of ventilation such as the skylight or any means of

ventilation prior (sic) the subject applications could be considered for approval.”

[23] The applicants at page 10-21, paragraph 4.11 of the supplementary affidavit summarises the reasons advanced by the City by reading together the reasons of 25 July 2022 with the City’s Economic Development and Spatial Planning report by the City of 6 December 2022, as follows:

“Evidently the City’s only reasons for refusing to grant the Full Title Building Plan approval seems to be that the windows constructed on a boundary line overlooks adjacent properties and a problem arises when sectional units become full title portions whereby windows are not allowed on erf boundaries”

[24] According to the applicants, on 9 June 2022 subsequent to a meeting being held between the second, third respondents and Adoway’s town planner, a letter was addressed confirming that it was *inter alia* agreed that the second respondent will prepare a letter recommending for approval of the **full title** building plans in respect of the relevant erven.

[25] The applicants’ argument amongst others is that they were entitled in terms of the development controls adopted and approved by the City as depicted in Annexure “T” annexed to the founding affidavit as Annexure “O” to construct windows on a storey above the ground floor facing adjacent residential properties subject thereto that such windows are non-transparent and are in line with the height restrictions imposed.

[26] They say neither the scheme nor the conditions of approval [as shown above] in respect of the development prohibits windows to be constructed on the first floor overlooking adjacent properties. The SDP depicting the windows were approved by the City. The sectional title building plans for portraying the windows were approved by the City. All six residential dwellings have already been constructed in accordance with the approved SDP, the approved **sectional title** building plans and an occupation certificate was issued in

respect of the dwellings in terms of section 14 of the NBRBS Act; and considering the fact that the windows are non-transparent, poses no safety risk and also considering all other facts advanced herein above, none of the circumstances provided for in section 7 of the NBRBS Act are triggered that could justify the refusal.

Respondents' case

[27] The respondents' case is that the City has refused the applicant building plans after it was satisfied that the building plans do not meet the legal requirements. Section 4(1) of the National Building Regulations and Building Standards Act 103 of 1977 (NBRBS Act) prohibits construction of buildings within a municipal area without prior approval by the local authority. The reason for the refusal is that there is a window on the boundary line, therefore the window will probably or in fact disfigure the adjoining property.

[28] The City's submission is that the window in question is objectionable and makes the adjoining properties to be unsightly. Furthermore, if the building plans were to be approved with a window on the boundary line, same will derogate the value of the adjoining neighbouring properties.

[29] The respondents further submit that the approval for SDP does not automatically mean that the building plans are also approved. The building plans follow a separate procedure. It was made unequivocal clear that any approval for the SDP must construe to be approval of building plans.

[30] The City denies that it explicitly or tacitly accepted and acquiesced to the eventualities. It did not give Adoway the impression that it would be in order to erect the structures in terms of the adopted scheme documents. The approved full title site development plan and approved sectional title with structures would ultimately be the same structures that would be approved for construction in respect of the full title stands. The eventualities were misconstrued by the applicants.

Analysis

[31] Section 4(1) of the National Building Regulations and Building Standards Act 103 of 1977 (NBRBS Act) prohibits construction of buildings within a municipal area without prior approval by the local authority.

[32] It is trite law that building plans are only approved or assessed in terms of Section 7 of the NBRBS Act. The respondents are empowered in terms of the Act to either refuse or approve the plans. Section 7 NBRBS Act provides:

“Approval by local authorities in respect of erection of buildings

(1) If a local authority, having considered a recommendation referred 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;

(b) (i) is not satisfied; or

(ii) Is satisfied that the building to which the application in question relates-

(aa) is to be erected in such manner or will be of such nature or appearance that –

(aaa) the area in which it is to be erected will probably or in fact be disfigured thereby;

(bbb) it will be probably or in fact be unsightly or objectionable;

(ccc) it will probably or in fact derogate from the value of adjoining or neighbouring properties;

(bb) will probably or in fact be dangerous to life or property, such local authority shall refuse to grant its approval in respect thereof and give written reasons for such refusal.

[33] The applicants decry that the City is making the case for section 7 for the first time in the answering affidavit in that they were given different reasons. This ignores the fact that they do not dispute that they were informed of the window boundary line problem on 25 July 2022. In reading section 7 it is clear

that, whatever was communicated on 25 July 2022 was and is still based on law. They are not submitting that the conditions set out in the letter of 25 July 2022 are illegal. The conditions are clear, they refer to ventilation of the windows amongst others. The Rule of Law trumps the applicant's argument about irrational and unreasonable decision of the City.

[34] Furthermore, the applicants' unsubstantiated submission that the process of approving SDP; the sectional title building and full title building plans is indivisible is not supported by any legal basis. It is akin to saying there is no difference between **sectional title and full title** approval process, of which the City made it clear that there is one in terms of what type of windows are required in a **full title** as opposed to a **sectional title**.

[35] The rationale in the City's version is crystal clear, that the boundary line of a **sectional title** unit is not an issue, however, a **full title** portion cannot have a window on the boundary line in that it will be dangerous to life or properties of the adjoining neighbour in that it poses a risk in case of a fire and it also poses a privacy issue for adjacent properties.

[36] The applicants correctly state that *a “problem” arises when sectional units become full title portions whereby windows are not allowed on erf boundaries. Evidently the City's only reasons for refusing to grant the Full Title Building Plan approval seems to be that the windows constructed on a boundary line overlooks adjacent properties and a problem arises when sectional units become full title portions whereby windows are not allowed on erf boundaries.”*

[37] On the applicants own version they admit that the City did not approve the **full title** building plans for the reasons which relate to the windows that are fitted on the boundary line of Units 1-5, despite that the applicants insist that the decision was irrational. I am risking repetition, the applicants' major reasoning is: the decision of the City is irrational because it had already approved SDP, sectional title building plans and accepted that windows on the first storeys would be part of the design and construction dwellings.

[38] The applicants' submission defies the logic. There is a purpose² for separate processes pertaining to **sectional title and full title**. The approval of SDP followed by **sectional title** building plan approvals cannot be equal to **full title** building plans. The approval of the sectional title was no automatic right for the approval of the full title. The City disputes that it ever issued certificate of occupation for the **full title** and the applicants are not taking this point further. In fact, the applicants' interpretation is unbusinesslike, it is against the cardinals of modern-day interpretation which seek to promote purposive interpretation.³

[39] The applicants misconstrue the issue raised pertaining to the adjacent windows. They make it as if it is about their satisfaction and or should meet their own requirements. The issue is about the legal compliance and that in particular that the neighbours of the adjacent properties will be prejudiced by the unsightly scene and devaluing of their properties. Furthermore, same is also not in accordance with SANS 10500 Building Regulations Standard, a fact not disputed by the applicants. The applicants did not dispute these probabilities as advanced by the City, except to hold on to the SDP approval and sectional title building plan approval.

[40] The City afforded applicants an opportunity to mitigate the risk by bricking the windows, instead of doing same they launched an application and engaged in court proceedings. They are not instructed to demolish the units which they built without approvals, something they want to brush aside.

[41] In conclusion, I find that the impugned decision by the City was taken within the parameters of law, it is rational and reasonable and was taken for the correct purposes. The applicants have failed to prove that the decision of the

² *AfriForum v University of the Free State* 2018 (4) BCLR 387 CC, para 44 Similarly, where it is necessary to resort to a purposive interpretation, the purpose of a provision might not always be readily apparent from the words or expressions sought to be understood.

³ *Natal Pension Fund v Endumeni* (920/2010) [2012] ZASCA 13; [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA) (16 March 2012) A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used.

Respondents is irrational, offending the provision of PAJA, thus susceptible to review. In the result the application must not succeed. In the result the following order is granted:

ORDER

1. The application is dismissed with costs on Scale C.

N P MALI
JUDGE OF THE HIGH COURT

APPEARANCES:

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