IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

12/3/2015

Case number: A299/2012

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED

9/3/2015 .....
DATE SIGNATURE

In the matter between:

MARIA M KRUSE	**First Appellant**
ALETTA M M KRUSE, N.O.	**Second Appellant**
MARIA E C BEZUIDENHOUT, N.O.	**Third Appellant**
HESTER ISABELLA LOTZ, N.O.	**Fourth Appellant**

and

CITY OF TSHWANE METROPOLITAN MUNICIPALITY	**First Respondent**
T M ROSSOUW	**Second Respondent**
C M FROELING	**Third Respondent**

Heard: **27 November 2013**

Delivered: **June 2014**

JUDGMENT

A.A.LOUW J

Introduction

[1] On the southern side of Lys Street in Rietondale, Pretoria, four adjoining residential properties are situated. These properties as well as a servitude of right of way in respect thereof are at the centre of this dispute. The owners of these properties as well as the City of Tshwane Metropolitan Municipality (Tshwane) are the litigating parties. A sketch, annexure "K2" to the founding affidavit, shows the situation of the four properties as well as the servitude road. There are two streetfront properties between which runs the servitude road. On the eastern side thereof is the second respondent's property whilst on the western side is situated the third respondent's property. This servitude of right of way is five metres wide and is constituted by two servitudes each 2,5m in width. These servitudes were registered simultaneously in 1993. The servitude area according to K6277/1993S runs along the western boundary of the second respondent's property. The servitude area according to K6278/1993S runs along the eastern border of the third respondent's property.

[2] At the back of these two properties, i.e. to the south thereof, the properties of the appellants are situated. The first appellant is the owner of the western property whilst the eastern property (the trust property) is owned by two trusts of which all four the appellants are trustees. These two properties at the back came into being as a result of subdivisions of the

second and third respondents' properties. The registration of the servitudes of right of way was therefore an essential precondition to the subdivisions as this right of way is the only access of the properties at the back to Lys Street.

[3] Lastly, as regards the servitude, in 2008 the second and third respondents granted each other a right of way over the 2,5m servitude area on the other party's property. Two notarial deeds of servitude were registered simultaneously on 1 September 2008. Of this fact the appellants could not have been aware before the institution of this application as these were registered thereafter, namely on 26 August 2008.

The dispute

[4] During December 2007 the second respondent submitted plans to Tshwane in respect of a carport which she wanted to construct on the south-western corner of her property. The plans show that the carport will be situated on the rear boundary line i.e. the boundary between the second respondent's and the trust's property. On the western side they show that the carport is to be constructed right on the servitude boundary line. The entrance to the carport will be from that side and therefore the only access to the carport will be along the servitude road.

[5] It is common cause that the building restriction line at the rear of the property is 3m and a side boundary is 2,25m. It is therefore clear that the carport is to be constructed within the building restriction areas. The question to be discussed hereunder is whether in regard to the building restriction

areas the second respondent's plans qualify for any of the exceptions in clause 15A of the Pretoria Town Planning Scheme 1974 (the Scheme).

[6] Without the appellants having been invited to make any input or representations the plans were approved on 27 March 2008 under reference number RE3/3269/07. It is this decision which the appellants seek to have reviewed and set aside.

[7] The issues raised by the appellants can be broadly categorised in three categories namely:

a) Whether the second respondent is allowed to use the servitude of right of way for the purpose of driving on it to have access to the new carport erected on her property or whether the appellants have an exclusive right of use of such right of way.

b) Whether the administrative decision by the first respondent's official to approve the building plans was properly taken. In this regard the appellants rely on various grounds in section 6 of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) as follows:

(i) section 6(2)(b) of PAJA namely that a mandatory and material procedure or condition prescribed by an empowering provision was not complied with;

(ii) the action was procedurally unfair as contemplated in section 6(2)(c) of PAJA;

(iii) the action was materially influenced by an error of law as per section 6(2)(d) of PAJA;

(iv) the action was taken arbitrarily or capriciously as stated in section 6(2)(e)(vi) of PAJA;

(v) the grounds in section 6(2)(f) of PAJA namely that the action itself contravenes a law or is not authorised by the empowering provision. Furthermore that the action is not rationally connected to the purpose for which it was taken, the purpose of the empowering provision, the information before the administrator and the reasons given for it by the administrator.

c) whether Tshwane's official who approved the building plans was properly authorised to make such a decision. This ground is provided for in section 6(2)(a)(i) of PAJA.

[8] The court a quo refused the application with costs. This appeal is with the leave of the court a quo.

Legislative provisions

[9] Administrative action like the present is governed primarily by the National Building Regulations and Building Standards Act 103 of 1977 (the Building Standards Act) as well as the Scheme.

[10] The Legislative scheme of the Building Standards Act was extensively considered by the Constitutional Court in *Walele*[1]. I quote para 47 of the judgment:

> *"[47] The Building Standards Act, as the long title proclaims, promotes uniformity in the law relating to the construction of buildings within municipal areas, by prescribing general requirements and building standards which must be adhered to. Section 4 of the Building Standards Act requires approval by a local authority of building plans before any construction can commence. Section 5 obliges every local authority to appoint a Building Control Officer whose powers and functions are specified in the Building Standards Act. This officer is given extensive powers and plays a critical role towards achieving the objectives of this Act. Once an application for the approval of plans is lodged with a local authority, the Building Standards Act authorises the Building Control Officer to enter the land to which the plans in question apply, prior to the approval of the plans by the decision-maker. He or she is entitled to inspect the site in preparation for consideration of the application for the approval of the plans by the relevant decision-maker."*

[1] *Walele v City of Cape Town and others* 2008(6) SA 129 (CC).

[11] Section 6 of the Act provides:

" (1) A building control officer shall -

(a) make recommendations to the local authority in question, regarding any plans, specifications, documents and information submitted to such local authority in accordance with s 4(3);"

[12] The process of approving building plans is governed by section 7 of the Building Standards Act which provides:

" (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;

(b) (i) is not so 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 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"

[13] In regard to the building restriction lines clause 15A of the Scheme provides as follows:

"BUILDING RESTRICTION AREAS

15A.(1) Subject to any other provisions of this Scheme, no person shall –

(a) erect a building of a class as specified in column 1 of Table B1 hereto or make any alteration, extension or addition to an existing building belonging to such class, in such a manner that such building or any part thereof projects over or encroaches on a building restriction area;

(b) erect any other building or structure on any building restriction area.

(2) Notwithstanding the provisions of Sub-clause (1) or any by-law –

...

(d) *a single storey garage; car-port or shelter; laundry; private swimming bath; change room for a private swimming-bath; tennis court; squash court; or storeroom may be erected on any portion of a building restriction area other than where such structures are adjacent to a street boundary:*

Provided that:

(i) *the position thereof is not detrimental to the amenities of the adjoining property or properties;*

(ii) *the height thereof shall not exceed 3,00 metres;*

(iii) *the external face of the boundary wall shall be of face brick, unless an alternative durable finish is agreed to in writing by the owner or owners of the adjoining property or properties;*

(iv) *the distance between the main building and such other building is a minimum of 2,25 metres;*

(v) *Deleted;*

(vi) *any car-port, shelter, which is attached to the main building and*

which is built on any boundary other than a street boundary, shall be completely open on two sides, and the length thereof shall not exceed 7,50 metres;

(vii) *it be erected on or directly against the erf boundary or at least 1 metre from the boundary."* (my emphasis)

[14] I proceed to deal with the arguments advanced by the appellants and which appear from the founding affidavit and the supplementary affidavit in terms of rule 53(4).

The approval of the building plans is in violation of the rights enjoyed by the appellants and consequently in violation of section 7(1)(a) of the Building Standards Act

[15] It is argued that Tshwane could not have been satisfied that the application complied with "any other applicable law". The argument continues to state that the applicable law which is violated is that of the Scheme.

[16] The Scheme expressly provides for an exception in respect of carports in clause 15A(1)(d) thereof. It is then provided in clause 15A(1)(d)(vii) that if such approval is granted a structure like a carport has to be erected either on the border of the property or at least 1m from the it. Appellants' contention is that the exception cannot be applied as the first proviso namely that the

position thereof should not have a negative aesthetical impact on the adjoining properties is not satisfied. In this regard the answering affidavit made by the building control officer (BCO) denies that there would be any negative aesthetical impact on the appellants' properties. He states that this was not a ground upon which the plans could be rejected.

[17] The appellants invited the court to have a look at annexure "N" to the supplementary affidavit. There are five photographs showing the carport as it has been erected. I can see nothing that will impact negatively on the aesthetics of the area. In fact everything seems very neat and fits in with the pre-existing building of the second respondent.

[18] The appellants also make mention of the proviso in section 15A(1)(d)(iii) namely that the outside of the border wall has to be of facebrick unless the owners of the adjoining properties have consented in writing to another quality finishing. There is nothing in the building plans that state that the boundary walls do not have to be of facebrick. The focus in this application is obviously the approval of the building plans and not what has happened subsequent thereto.

[19] It is also argued that the application falls foul of section 7(1)(b)(2)(ccc) of the Building Standards Act as the building erected consequent to such approved plans will probably or in fact derogate from the value of adjoining or neighbouring properties.

[20] There is not a shred of evidence supporting this and this is in any event denied by Tshwane. The affidavits by Mr van Aswegen, a sworn valuator, simply makes the following bold statement: "*Ek bevestig spesifiek dat ek vertroud is met die ligging van die eerste, tweede en derde applikante en van die tweede en derde respondente se eiendomme. Ek bevestig verder spesifiek dat die oprigting van 'n dubbel motorhuis en die toelaat van 'n tweede toegang op die tweede respondent se eiendom soos beplan deur die tweede respondent die waarde van die genoemde applikante se eiendomme wesenlik sal verlaag.*"

[21] This affidavit is useless as it is totally unmotivated. The valuator does not state how or why the value of the properties will be affected. There is furthermore no valuation of the relevant properties before and after the construction.

Infringement of the appellants' servitudal rights

[22] The deed in respect of the servitude over the second respondent property contains the following provisions:

> "
> 2.
>
> *Die pad op die serwituutgebied moet deur die 'Heersende Eienaars' op hulle eie koste gebou word en te alle tye in stand gehou word. Die voormelde werke word uitgevoer op sodanige wyse en met gebruikmaking van sodanige material as wat die*

Heersende Eienaar of sy gevolmagtigde nodig, dienstig of gerieflik mag vind.

3.

Die Dienende Eienaar sal nie geregtig wees om enige geboue of ander strukture binne of op die serwituutgebied op te rig of enige grootwortelbome te plant of toe te laat dat dit geplant word nie of enige grond of rommel daarop aflaai of toelaat dat dit afgelaai word nie of enigiets doen of toelaat dat dit in of op die serwituutgebied of in die onmiddellike nabyheid daarvan gedoen word en wat sal inmeng met die regte verleen aan die 'Heersende Eienaars' ingevolge hierdie Akte." (my emphasis)

[23] Firstly the plans do not provide for construction in or on the servitude area but instead right on the border thereof. The second disqualification namely that such construction has to interfere with the rights of the dominant tenement has also not been proved.

[24] The appellants also argue that they are entitled to the exclusive use of the servitude road. This contention is made without any basis in fact or in law. This argument is legally unsustainable. The correct position is that an owner has full dominium in respect of his or her property. This dominium is only affected to the limited extent that other parties have a right of way over the servient properties. There is nothing that prohibits the owner of the servient property from travelling over his own property.

[25] Coupled with this is the appellants' contention in the founding affidavit that the second respondent is not permitted to use the 2,5m servitude over the third respondent's property. For the reasons stated in para 3 above, this argument is also devoid of merit. In any event the appellants do not have any standing to take this point as such use was always with the consent of the third respondent.

The approval of the carport as depicted on the plans is in violation of the Scheme and the appellants were not afforded an opportunity to note objections

[26] This is in essence a complaint that *audi alteram partem* was not applied. In *Walele* this principle and the applicability thereof to the approval of building plans was described as follows:

> *"The most important component of procedural fairness is the one expressed by the* audi alteram partem *principle (the audi principle) which requires that parties to be affected by an administrative decision be given a hearing before the decision is taken. What gives rise to the right to be heard is the negative impact of the decision on the rights or legitimate expectations of the person claiming to have been entitled to a hearing before the decision was taken."*[2]

[2] *Walele* supra para 27

[27] The judgment of the majority in *Walele* is clear namely that in a case like the present, that is where no relaxation of the town planning scheme is requested and no devaluation of the neighbouring property is proved the objector has no right to be heard prior to the decision being taken. Counsel for the appellants argues that *Walele* was not a matter where exemption provisions were before the court but that this case is.

[28] He proceeds to rely on *JDJ Properties CC & Another v Umngeni Local Municipality & Another*[3] and argues that that case is in all respects comparable with the relevant facts in this matter. This submission is not correct. In *JDJ Properties* two exemptions from provisions of the town planning scheme were applied for and granted namely a relaxation of the parking space requirement as well as the relaxation of the side space requirement, allowing for the building to abut the neighbouring erf.[4]

[29] In the present case no relaxation of any requirement of the Scheme was granted. Clause 15A(2)(d) of the Scheme was simply applied.

[30] I therefore find that the appellants did not have a right to be heard before the decision was taken.

---

[3] 2013(2) SA 395 (SCA)
[4] See para 5

The recommendation by the BCO to Tshwane was not motivated

[31] From the record of proceedings it appears from the cover of the building control file that the plans were circulated to three departments. These are the water and sanitation, fire prevention and roads and stormwater departments. At the bottom of the file cover appears the signature of Mr Magagula dated 25 January 2008 recommending the approval of the plans.

[32] According to the answering affidavit the decision-maker Mr Marandela acted on the recommendation and approved the plans on 27 March 2008.

[33] The rest of the building control file does not shed further light on the reasons for the approval. The documents in the file are formal in nature.

[34] In *Walele* it was decided (by a six/five majority that the procedure to merely circulate the file to the different departments and obtain the approval signatures thereon is insufficient for the decision-maker to be satisfied of the requirements in section 7(1)(b)(ii) of the Building Standards Act. In *Walele* the documents that served before the decision-maker were the same as in this case. In para 59 the following is stated:

> *"As mentioned earlier, when asked to furnish the list of documents placed before the decision-maker, the City mentioned the application for the approval of plans, the form endorsed by various departments and a document titled 'Land Information System - Ratepayers Data'. It was asked to confirm*

if these were the only documents placed before the decision-maker and the City confirmed this to have been the position."

[35] The crux of this decision is in para 60 of the judgment:

"There can be no doubt that these documents could not reasonably have satisfied the decision-maker that none of the disqualifying factors would be triggered. None of these documents refers to those factors. If indeed the decision-maker was so satisfied on the basis of these three documents, his satisfaction was not based on reasonable grounds. The documents fall far short as a basis for forming a rational opinion. Nor does the mere statement by the City to the effect that the decision-maker was satisfied suffice. In the past, when reasonableness was not taken as a self-standing ground for review, the City's ipse dixit *could have been adequate. But that is no longer the position in our law. More is now required if the decision-maker's opinion is challenged on the basis that the subjective precondition did not exist. The decision-maker must now show that the subjective opinion it relied on for exercising power was based on reasonable grounds. In this case, it cannot be said that the information, which the City admitted had been placed before the decision-maker, constituted reasonable grounds for the latter to be satisfied."*

[36] The judgment then continues to analyse the meaning of "recommendation" in the context of sections 6 and 7 of the Building Standards Act. It states that a proper interpretation of "recommendation" is to be based on the purpose of the recommendation which is to furnish the decision-maker of a basis for his or her opinion, one way or the other. I quote from para 69:

> *"The decision-maker must, however, assess and be satisfied of these issues himself or herself. He or she is not expected to accept without more the proposal of the Building Control Officer. Nor is he or she expected to infer from the word 'recommend' that none of the disqualifying factors will be triggered. Section 7(1) requires the decision-maker to be 'satisfied' before making a decision on whether to grant or refuse the application."*

[37] The majority judgment found that the endorsement and signature of the BCO in itself did not constitute a recommendation as envisaged in sections 6 and 7 of the Building Standards Act. It upheld the review.

[38] The minority judgment of O'Regan ADCJ in which Langa CJ, Kroon AJ, Van der Westhuizen J and Yacoob J concurred in effect found that the process of approval of plans hitherto was sufficient.[5]

[39] The *Walele* judgment will significantly increase the administrative burden of local authorities. The BCO states that Tshwane receives

---

[5] See inter alia paras 119 of her judgment

approximately 3000 new building applications per month. Whatever my view may be on the correctness of the *Walele* decision or otherwise, is irrelevant.[6]

[40] Therefore, because a proper "recommendation", so it is argued, did not serve before the decision-maker the impugned decision constitutes unlawful administrative action. The insurmountable problem that the appellants have in this regard is that this ground was not raised in either the founding affidavit or the supplementary affidavit in terms of rule 53(4).[7] Although the court a quo dealt with this point to a limited extent, it was not raised in the papers and it cannot be the subject matter of an appeal.

The decision-maker who approved the plans was not authorised to do so.

[41] The appellants wrongly state in para 5.4 of the supplementary affidavit in terms of rule 53(4) that the plans were approved by the chief plan examiner. As appears from the answering affidavit the chief plan examiner is Mr Magagula who only recommended the plans for approval. The plans were in fact approved by a plan examiner, Mr Marandena. In any event, as will

---

[6] *Walele* has since been followed in *De Jong v Trustees, Simcha Trust* 2014(4) SA 73 (WCC). Interestingly, Rogers J noted that in the period of 6 months following the *Walele* decision (to which case the Cape Town Municipality was a party) it approved approximately 20 000 building plans in accordance with the procedure which *Walele* had found to be inadequate. The following was stated in para 30: *"For my part, I think the City's approval of Simcha's building plans and those of thousands of other applicants during the second half of 2008, in violation of the* Walele *judgment, was a serious dereliction of duty. The City should, in my view, either have placed a moratorium on the approval of building plans or at least put in place a provisional procedure for complying with* Walele *until final guidelines could be formulated. The one thing the City must have known would not pass muster was the perpetuation of the procedure which was found in* Walele *to be unlawful."*
In *Turnbull-Jackson v Hibiscus Coast Municipality* 2014 (6) SA 592 (CC) the *Walele* decision was confirmed and the SCA criticised for not following precedent in the case of *True Motives 84 (Pty) Ltd v Mahdi and Another* 2009 (4) SA 153 (SCA). Instead the SCA criticised *Walele* and did not follow it.

[7] This point was expressly taken in Walele – see para 9.

appear hereunder, both had the authority to approve building plans. I proceed to set out the process of delegation.

[42] In terms of section 6(1)(a) of the Building Standards Act the BCO shall make recommendations to the local authority in regard to *inter alia* plans. Section 7(1) then provides that on receipt of such a recommendation the local authority has to either approve the plans or refuse approval.

[43] The BCO of Tshwane reports to the Strategic Executive Officer: Housing, City Planning and Environmental Management, Mr Oupa Nkoane (the SEO). Annexure "J" to the answering affidavit sets out the powers of the SEO as approved by the council of Tshwane on 24 August 2006. The first five paragraphs of this document are especially relevant. From these paragraphs it is clear that the BCO reports to the SEO and that the SEO may approve or refuse any plans under the Building Standards Act and approve or refuse applications for the erection of any buildings in terms of section 7 of the Building Standards Act. The SEO also has the power to take any action incidental to exercising the powers laid down in the Building Standards Act.

[44] Section 59(1) of the Local Government: Municipal Systems Act, 32 of 2000, enjoins a municipal council to develop a system of delegation that will maximise administrative and operational efficiency. Section 59(1)(a) states that in accordance with such a system appropriate powers may be delegated. Section 59(2)(b) requires such a delegation to be in writing. Annexure "J" to which I have referred is clearly in accordance with this requirement. Section

59(2)(d) states that such a delegation may include the power to sub-delegate a delegated power. The appellants argue that because the power to sub-delegate is not included in annexure "J" the SEO was not empowered to sub-delegate to either Mr Marandena or Mr Magagula.

[45] In the answering affidavit it is stated that the SEO is entitled to delegate the relevant tasks to Mr Magagula and Mr Marandena. Annexure "F2" evidences that Mr Magagula was with effect from 30 April 2004 appointed as chief plan examiner. Annexure "F1" is a very detailed document setting out inter alia his duties, powers and authorities.

[46] Two of his duties are the examining and approval of all building plans. Para 3 lists as his legal obligation the following:

"3.1. Approval of all residential and business building plans"

on a daily basis. Mr Marandena was appointed as plan examiner with effect from 1 April 2007. His duties and powers as set out in annexure "H" are the same as that of the chief plan examiner. These annexures clearly satisfy the requirement of a delegation in writing.

[47] The argument of the appellants go further, namely that because the SEO's power to sub-delegate is not proved by any document annexed to the answering affidavit, he did not have the power to sub-delegate. Obviously the SEO cannot perform all his duties as listed in annexure "J" all by himself. The department of Housing, City Planning and Environmental Management is obviously a huge department. It speaks for itself that he has to sub-delegate

his powers in order to satisfy section 59(1) that administrative and operational efficiency be maximised. The answering affidavit clearly states that the SEO is entitled to delegate the task to approve building plans to a chief plan examiner and a plan examiner. The appellants did not file a replying affidavit and has no basis for disputing this allegation. In any event, I am of the view that it is not a requirement that the section 59(2)(d) power to sub-delegate should itself be in writing. What we have in writing are the multitude of powers delegated to the SEO. It speaks for itself that he cannot perform all these tasks himself

[48] I therefore find that this point also does not have any merit.

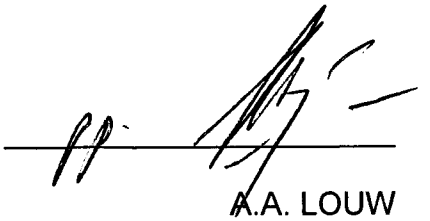
Conclusion

[49] The appeal cannot succeed. Costs should follow the event.

Order

[50] The following order is made:

1. The appeal is dismissed with costs.
2. In the case of the third respondent this includes the costs of senior counsel.



A.A. LOUW

Judge of the High Court

I agree

F.G. PRELLER

Judge of the High Court

I agree

N. KOLLAPEN

Judge of the High Court

For the Appellants	:	Adv. M.P. van der Merwe
Instructed by	:	ROESTOFF & KRUSE ATTORNEYS
For the First Respondent	:	Adv. I.J. Smuts SC
Instructed by	:	MODUKA MORE ATTORNEYS