IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL LOCAL DIVISION: DURBAN

CASE NO: D9680/2019

In the matter between:

POLEDOR TIMVEOS	**APPLICANT**
and	
ETHEKWINI MUNICIPALITY	**FIRST RESPONDENT**
ZORTZIKO (PTY) LIMITED	**SECOND RESPONDENT**
ALTAF HASSAM AND NADIM HASSAM N.N.O. (In their capacities as the Executors of the estate of the late MOHAMMED ZUKERIA HASSAM)	**THIRD RESPONDENT**
SHAHIDA BANOO HASSAM	**FOURTH RESPONDENT**

ORDER

The following order is granted: -

1. **To the extent necessary, in terms of s 9 of the Promotion of Administrative Justice Act No 3 of 2000, the period in terms of s 7(1) of the said Act for the**

bringing of this application for the relief in these proceedings is extended to the commencement date of this application.

2. The decision of the first respondent taken on 13 March 2015 to approve building plans number 1420215 in respect of the immovable property known as Portion 1 of Erf 2107 Durban is reviewed and set aside.

3. The first and second respondents are directed to give notice to the applicant of any future application for the approval of plans for the development of Erf 2107 Durban (or that Erf consolidated with any other immovable property), such notice to be accompanied by a full set of the plans submitted for approval, and any representations made on behalf of the second respondent in support of such approval. The applicant shall be entitled to make representations concerning the application for the approval of such plans and these shall be properly considered by the first respondent prior to making its decision on the application.

4. The applicant's costs are to be paid by the first respondent.

JUDGMENT
Delivered on: Wednesday, 24 March 2021

OLSEN J

1. This judgment will be brief, considering the material put up in the papers. Its purpose is more to explain what I am not deciding and why that is so, than it is to explain my reasons for granting this application.

2. The applicant, Ms Poledore Timveos resides at 8 Kinnord Place, Berea, Durban. The second respondent, Zortziko (Pty) Limited, owns property which fronts onto Stephen

Dlamini Road, Berea, Durban. That property slopes more or less from west to east down to Stephen Dlamini Road. The applicant's property lies on the western boundary of the second respondent's property.

3. The first respondent, eThekwini Municipality, approved plans for the construction of a building on the second respondent's property comprising two units. The main structure of that building appears already to have been erected, and there is an interdict in place preventing further work on the project.

4. In this application the applicant seeks an order reviewing and setting aside the first respondent's approval of the plans for the structure on the second respondent's property. There are two other respondents, the third and fourth. It is questionable as to whether they are necessary respondents. The third respondent is the executor of the estate of his late father who, together with the fourth respondent (the third respondent's mother), originally applied for the approval of the building plans for the property which is now owned by the second respondent. The third respondent is a director of the second respondent.

5. The applicant contends that the approval of the building plans was unlawful for non-compliance with the applicable town planning regulations and controls, specifically in three respects, that is to say coverage, rear space and height (measured in storeys). It is also contended that the building control officer of the first respondent could not possibly have been satisfied that the disqualifying features referred to in s 7(1)(b) of the National Building Regulations and Building Standards Act, 1977, did not require the application for approval to be refused.

6. The second, third and fourth respondents do not oppose the relief sought. The coverage allowed on the site is forty percent (40%), and they concede that the plans depict a structure which exceeds the allowable coverage. These respondents contend that the other complaints are not justified, but offer no reason for taking that view.

7. The first respondent opposes the application. The first ground of opposition is that the review proceedings should be dismissed because they were brought out of time.

8. The argument for the applicant is that these proceedings, being of a technical nature, are vitally affected by the content of the drawings depicting the proposed development and that the applicant was unable to launch review proceedings (as opposed to the interdict proceedings which were instituted earlier) without access to the plans. It is contended by the applicant that the 180 day period commenced to run only when her attorney was given a set of plans by the attorneys representing the second, third and fourth respondents. That happened on 18 September 2019, prior to which date the applicant's requests for a copy of the plans from the first respondent were rebutted. The first respondent contends that the 180 day period must run from 24 April 2018, the date upon which the first respondent permitted an engineer engaged by the applicant to peruse, but not take copies of, the plans. I agree with the applicant's argument that such a perusal is hardly sufficient to put a litigant like the applicant in a position to decide whether the plans were reviewable for non-compliance with the law. However, to put matters beyond doubt, I propose to grant the extension sought on the footing that the relief is there if it is needed. In my view the unlawful state of affairs which exists because of the approval of the plans cannot be allowed to continue to subsist.

9. As far as the merits of the matter are concerned, counsel for the first respondent has conceded that in effect the first respondent has done little more in answer to the applicant's claim than assert that each of the departments whose responsibility it was to approve the various aspects of the plans made a decision favouring approval, and that their decisions must be taken to be correct. A perfect example of this unsatisfactory approach to this case is evident from the first respondent's attitude to the issue of coverage. The first respondent's argument is that there is a square on the top left hand corner of the site plan where the architect has placed some calculations which are said to reveal that the coverage used is 39.7% of the area of the property. The briefest perusal of the site plan illustrates that those calculations cannot possibly be correct. By my rough

calculations, based on the site area actually depicted on that drawing, the coverage is very substantially over 40%. No quibbling about marginal issues can change that.

10. The relief sought by the applicant accordingly has to be granted.

11. Counsel for the applicant has argued that it is appropriate to make findings against the first respondent concerning the other bases upon which the approval of the plans is sought to be reviewed and set aside. It is also argued that I ought to make a finding that there is clear evidence of dishonesty and collusion on the part of the officials employed by the first respondent to consider applications for approval of building plans.

12. Dealing first with the other grounds of review, there is strong evidence before me that by reason of an excess of storeys the height restrictions to which the site is subject have been breached by a considerable margin. There is also some evidence that the rules relating to space around the building have been breached. Both the plans and photographs that have been put up with the founding papers suggest strongly that the effect of the construction is disastrous for the applicant's property and its value. It looks very much like the first respondent ought to have held that approving the plans would have involved a breach of s 7(1)(b) of the Standards Act.

13. Notwithstanding these observations I am concerned that these aspects of the case deserve more interrogation than has proved possible on the papers before the court. The first respondent, as well as the other three respondents, bear some responsibility for that lack of interrogation, because they have in effect confined themselves to broad allegations that those criticisms of the decision to approve the plans are not well founded. Given the manner in which the case on these issues was presented on the papers by the applicant, the respondents have said just sufficient to be regarded as having raised a dispute which would have justified a referral to oral evidence for the purposes of a proper interrogation of the plans in order to resolve the disputes. Such a referral is not appropriate in the circumstances of this case. An order setting aside the plans means that new plans will have to be submitted and considered as if they were the first to be submitted for the

development of the site. The second respondent has applied for the consolidation of neighbouring properties with the one in issue in this case, by which means the second respondent hopes to overcome the problem with coverage. If it is overcome (or thought to be overcome) fresh plans for the development of the site will need to be delivered. Counsel agreed during argument that, given that there is already a structure on the property, not all of which, presumably, will be abandoned, the applicant has a right to have notice of the submission of the new plans for development on the site, and the first respondent an obligation to consider any representations the applicant may wish to make in opposition to the approval of the new plans. (See *Walele v City of Cape Town and others* 2008 (6) SA 129, para 52.) It was agreed that an order in this regard should be made.

14. Finally, I decline the request made by counsel for the applicant, that I should make a finding that the deviations between the approvals granted by the various officials responsible for the different aspects of these plans, and what was required of them, are so egregious that the conclusion must be that they acted corruptly (to put it plainly). Putting aside the issues as to whether a judge should be making such a finding when it is not necessary for purposes of granting the relief sought, the position is that the persons who would be affected by such a finding are not parties to this litigation. When this was put to counsel for the applicant his answer was that they have signed affidavits confirming that in the exercise of their powers they made the decisions which led to the approval of the plans. The difficulty with that answer is that those affidavits were drafted at the instance of the municipality, in order to further its aim of advancing the case that because all of the officials granted their respective approvals, the plans must have been properly approved. It seems clear that had the individual officials been parties, to protect their own interests their affidavits would have gone considerably further in attempting to explain why the decisions they made should be regarded as *bona fide*. That was not the line that the municipality took.

15. Nevertheless it must be observed that the best that can be said about the conduct of the first respondent in connection with these plans is that it evidences a diligent

indulgence in ignorance. The line which the first respondent took in opposing this application suggests that there is little that the first respondent could have said to contradict that proposition.

I make the following order.

1. **To the extent necessary, in terms of s 9 of the Promotion of Administrative Justice Act No 3 of 2000, the period in terms of s 7(1) of the said Act for the bringing of this application for the relief in these proceedings is extended to the commencement date of this application.**

2. **The decision of the first respondent taken on 13 March 2015 to approve building plans number 1420215 in respect of the immovable property known as Portion 1 of Erf 2107 Durban is reviewed and set aside.**

3. **The first and second respondents are directed to give notice to the applicant of any future application for the approval of plans for the development of Erf 2107 Durban (or that Erf consolidated with any other immovable property), such notice to be accompanied by a full set of the plans submitted for approval, and any representations made on behalf of the second respondent in support of such approval. The applicant shall be entitled to make representations concerning the application for the approval of such plans and these shall be properly considered by the first respondent prior to making its decision on the application.**

4. **The applicant's costs are to be paid by the first respondent.**

OLSEN J

APPEARANCES

Date of Hearing:	Friday, 12 March 2021
Date of Judgment :	Wednesday, 24 March 2021
Applicant's Counsel:	Mr SR Mullins SC
Instructed by:	Norman Brauteseth & Associates Applicant's Attorneys 4 Caefron Avenue Westville…3630 (Ref: Mr B Cheves/NT0072) (Tel: 031 – 266 9300) (Email: bob@nbalaw.co.za)
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