

Dear Colleagues

We have prepared a summary of the facts and judgment, for those who have not yet had the opportunity to read the whole judgment.

WALELE v CITY OF CAPE TOWN & OTHERS with the City of Johannesburg as *amicus curiae*
Constitutional Court Case CCT 64/07 [2008] ZACC 11
Judgment date: 13 June 2008

The facts giving rise to this judgment are briefly as follows:

Dr Walele is the owner of Erf 168217 in Walmer Estate, Cape Town. In September 2006 he became aware of building activities on the erf adjoining his (Erf 168218) and upon investigation, ascertained that his neighbour is in the process of erecting a 4 storey block of flats on the adjoining erf 168218. Upon enquiry with the City of Cape Town Municipality (hereinafter the 'CCT Municipality') he was advised (a) that both erven was situated in a zoned general residential area and that the erection of a block of flats as high as 7 storeys was allowed 'as of right'; (b) that the plans complied with the zoning scheme requirements; and that (c) the building plans had accordingly been approved by them.

From the judgment it appears that the process of approval firstly involved approval by the CCT municipality's Zoning Plans Examiner. The latter examiner expressed the opinion that the plans in question complied with zoning requirements and that the erf fell within the area where property owners were entitled to erect blocks of flats of up to 7 storeys. The plans were thereafter passed to various departments for consideration and comment for which process a pro forma form was used. Each of the departments had indicated on the pro forma form that it had no objection to the plans. Finally the plans were sent to the Building Control Officer (hereinafter 'BCO') who endorsed the building plans and then sent them to the relevant decision-making official for final approval.

Dr Walele was dissatisfied with the reasons furnished by the CCT Municipality and was concerned that the proposed building place will adversely affect the value of his property. He accordingly instituted review proceedings in the High Court (Cape Provincial Division). This court dismissed his application and subsequently also refused his application for leave to appeal. Dr Walele then unsuccessfully petitioned to the Supreme Court of Appeal. His last recourse was to the Constitutional Court and it is this judgment that is discussed below. (The application to the Constitutional Court requires the raising of a constitutional issue. In this matter it was held that the application for judicial review of the administrative decision of the municipality, falls within the scope of The Promotion of Administrative Justice Act (hereinafter PAJA); and, since PAJA codifies section 33 of the Constitution which guarantees just administrative action, the court was satisfied that Dr Walele's application for review of the administrative decision by the municipality raised a constitutional issue.)

The City of Johannesburg municipality was admitted as *amicus curiae* to the proceedings in the Constitutional Court.

Questions before the court:

- The central issue in this judgment relates to the question whether the CCT Municipality *properly* approved the building plans.

Held:

(Only the aspects of the judgment dealing with the municipality's handling of the application are discussed here. The bulk of the 93 page judgment deals with administrative law aspects and have not been included in the discussion.)

- **That the CCT Municipality failed to comply with mandatory procedural requirements as prescribed by the Building Standards Act.**

Jaffa AJ, writing for the majority (Madala J, Mokgoro J, Ngcobo J, Nkabinde J, and Skweyiya J), held that the CCT Municipality had failed to comply with mandatory procedural requirements as set out in the The National Building Regulations and Building Standards Act, 103/1977 (hereinafter 'The Building Standards Act') when read together with PAJA.

- **Sections 6 and 7 of the National Building Act** were considered and the relevant parts of these sections read as follows:

“Section 6

(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 section 4(3);*
- (b) *ensure that any instruction give in terms of this Act by the local authority in question be carried out;*
- (c) *inspect the erection of a building, and any activities or matters connected therewith, in respect of which approval referred to in section 4(1) was granted;*
- (d) *report to the local authority in question, regarding non-compliance with any condition on which approval referred to in section 4(1) was granted.*

(2) *When a fire protection plan is required in terms of this Act by the local authority, the building control officer concerned shall incorporate in his recommendations referred to in subsection (1)(a) a report of the person designated as the chief fire officer by such local authority, or of any other person to whom such duty has been assigned by such chief fire officer, and if such building control officer has also been designated as the chief fire officer concerned, he himself shall so report in such recommendations.”*

Section 7

“(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 reason for such refusal ...”

- Interpreting section 7, the court noted that it revealed 4 key issues that relate to the process of exercising the power to approve building plans. First, the decision-maker must consider the BCO's recommendation made in terms of section 6. Secondly, if he is satisfied that the application for approval complies with the requirements of the Building Standards Act and other applicable law, he or she must grant the approval unless he or she is also satisfied that the erection of the building to which the plans apply will trigger one of the disqualifying factors in section 7(1)(b)(ii). Thirdly, if the decision-maker is satisfied that the disqualifying factors will be triggered he or she 'shall refuse to grant approval in respect thereof and give written reasons for such refusal.' Lastly, if the decision-maker is not satisfied that the application complies with the necessary requirements, he or she shall refuse to grant approval and he must then give reasons for the refusal.
- In other words, the decision-maker must ultimately be satisfied that (1) there is compliance with legal requirements and (2) none of the section 7 disqualifying factors exist. For example, any approval of plans facilitating the erection of a building which devalues the neighbouring properties (section 7(1)(b)(2)(ccc)), is liable to be set aside on review. In fact, an approval can be set aside on this ground irrespective of whether or not the decision-maker was satisfied that none of the disqualifying factors applied. All that is needed for an applicant is to prove to the satisfaction of the reviewing court that the erection of the building will reduce the value of his property. This interpretation of the sections is consistent with the spirit, purport and objects of the Bill of Rights and demonstrates that it is not only the landowner's right of ownership which must be taken into account, but also the rights of owners of neighbouring properties which may be adversely affected by the erection of a building authorized by the approval of plans in circumstances where they were not afforded a hearing.
- Upon an inspection of the documents that the municipality had before it when it made the decision, the court found that it was clear that these could not reasonably have satisfied the decision-maker that none of the disqualifying factors would be triggered. None of the documents even referred to the section 7 factors.
- With regard to the content of the requirements of 'recommendation' (as referred to in section 7(1)) the court held that section 7 requires the decision-maker to *consider* the BCO's recommendation. This would imply that the decision-maker must have a basis for his decision by assessing the issues himself. He is not expected to accept, unquestioningly, the BCO's proposals, nor should he infer from the BCO's 'recommendation' that none of the disqualifying factors apply. In the present case it was mentioned that the BCO had certain information concerning the very issues which the decision-maker was required to consider, but that this information was never placed before the decision-maker. As a specialist, the BCO is best suited to advise the decision-maker about disqualifying factors. The recommendation therefore is the proper means by which information on disqualifying factors should have been placed before the decision-maker. The endorsement and signature placed before the Building Control Officer in this case did therefore not constitute a recommendation as envisaged in section 6 and 7 of the Building Act.
- The court added that '(a)lthough the Building Act does not strictly require this, it will be helpful and enhancing to the process if the BCO at the stage of compiling the recommendation invites, from owners of neighbouring properties, representations about the impact the proposed building might have on their properties.'
- The court held accordingly that the BCO must ensure that adequate information is placed before decision-makers so that they can consider applications for approval of building plans properly and in a balanced way. The recommendations they make must serve this purpose. The approval of plans in the absence of such commendation means that the

necessary jurisdictional element was lacking. The approval was accordingly invalid and must be set aside.

(In a separate judgment, but concurring with the majority judgment, O'Regan ADCJ held that the decision-maker, in deciding whether or not to approve the building plans, was entitled to rely upon the recommendation of the BCO, as long as the decision-maker was also independently satisfied that the requirements of the Act had been met. O'Regan found that it is sufficient if the decision-maker is satisfied that the BCO properly took these factors into account when making the recommendation. On the facts of this case, the information placed before the decision-maker was sufficient to enable him to make an informed decision, and that he did make such a decision and this was all that the Act required.)

Implications

The finding has serious implications for the approval of building plans by local authorities. The process that the court envisages would require either that:

(1) The recommendation by the BCO to the decision-maker sets out relevant facts which will enable the decision-maker to ascertain whether the disqualifying factors listed in section 7 applies. This would require the BCO to compile a report with the information and to submit this to the BCO. A mere signature will no longer suffice;

Or that

(2) If the BCO does not furnish a report, the decision-maker will need to obtain the relevant information so as to enable him to come to a conclusion and he may not merely accept the signature of the BCO as sufficient recommendation.

In both instances, the process of compiling a report to investigate the section 7 disqualifying factors, will take time and effort in a process which is already notorious by virtue of the long periods involved to have building plans approved. This was also one of the concerns raised with the court by the Johannesburg City Council (as *amicus curiae*) and one which now directly affect everyone who has submitted building plans and who are waiting on municipal approval, countrywide.

Moreover, the recommendation by Jafta AJ that BCO's should as a rule request representations by owners of neighbouring properties on the impact of the proposed building, will most likely impact severely on the process: surely the majority of owners of residential erven will object strongly to the erection of a block of flats on an erf adjoining theirs.

This case highlights the ever-present potential for conflict between residential home-owners when it comes to building works or improvements on neighbouring properties. Usually the developer would like unfettered freedom to do as he pleases, while residents would generally prefer that no property development activity takes place on their property borders. It is accordingly necessary to strike a balance between the needs and rights of the various landowners in a neighbourhood.

Some would argue that for too long the position of neighbours have been neglected in building processes: if one thinks about it, it is sometimes one 'little old lady' who is up against the professional team of her neighbour (consisting of his architect, attorney, engineer, town planner, and more). No one is better positioned than the Planning and Building Development department of a municipality to evaluate the merits and the impact of proposed building activity on neighbours.

Although the practical difficulties that implementation of this judgment will bring about are certainly serious (especially given the current state of existing delays), the rationale behind the

judgment, namely to give due consideration to the impact on value of neighbouring properties, ought to be welcomed.

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