REPUBLIC OF SOUTH AFRICA

IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Case number: 475/2002
Reportable

In the matter between:

GREGORY JOSEPH PAOLA **APPELLANT**

and

JAIVADAN JEEVA N.O **FIRST RESPONDENT**
TARULATA JEEVA N.O **SECOND RESPONDENT**
NORTH AND SOUTH CENTRAL LOCAL COUNCIL **THIRD RESPONDENT**

CORAM: HOWIE P, FARLAM, LEWIS, HEHER JJA et MOTATA AJA

HEARD: 4 SEPTEMBER 2003

DELIVERED: 26 SEPTEMBER 203

SUMMARY: Building plans – National Building Regulations and Building Standards Act 103 of 1977, ss 5, 6 and 7 – building control officer, non-appointment of – derogation of value caused by impairment of view – Town Planning Regulations, Durban, regulation 19, 'rear space', meaning of.

JUDGMENT

FARLAM JA

INTRODUCTION

[1] This is an appeal from a judgment delivered by Kondile J in the Durban and Coast Local Division of the High Court, dismissing an application brought by the appellant for an order reviewing and setting aside a decision of the third respondent, the North and South Central Local Council. The first and second respondents are trustees of a trust, which sought the approval of plans submitted in respect of alterations and additions to be carried out on the trust's property in Queen's View Place, Umgeni Heights, Durban. In what follows I shall refer to this property as 'the trust property'.

FACTS

[2] The appellant is the owner of two adjacent erven situated in McMahon Avenue, Umgeni Heights: in what follows I shall refer to these erven as 'the appellant's property'. The trust property is situated on the southern side of, and somewhat lower than, the appellant's property, which is at the top of a hill. The trust property is contiguous to the appellant's property with its north-eastern corner marked by a boundary peg which also marks the southern-eastern corner of the appellant's property. The trust property's north-western corner is marked by a peg placed on the appellant's property's southern boundary some distance to the west of the peg which is at the southern end of the line which separates the appellant's two erven. At the southern end of the trust

property's western boundary is a peg which demarcates the south-western corner of the trust property, which is on Queen's View Place. The south eastern corner of the trust property is what may be described as a splayed corner because Queen's View Place, after having proceeded for most of its extent from west to east, turns northeastwards at the bottom end of the splayed corner before proceeding northwards from the top end of the corner towards the property situated immediately to the east of the trust property. The western boundary of the trust property's eastern neighbour runs from the peg which demarcates the south-eastern corner of the appellant's property and the north-eastern corner of the trust property to a point about halfway to the top end of the splayed corner.

[3] The appellant's house, constructed about twenty years ago at a time when the existing house on the trust property had already been built, was specifically designed and positioned to maximize the outlook and surroundings, taking into account the development on the trust property. As a result it has, as appears from the photographs annexed to the papers in this case, what the appellant describes as an 'unsurpassed view covering Burman Bush, the City Centre, the Umgeni River, the Bluff, the harbour entrance, the sea and the north of Durban'. If the alterations set forth in the approved plan are constructed, the appellant's exceptional view will be substantially impaired. In addition, the size and bulk of the proposed development and the fact that its nearest point will be located a

mere nine metres from the appellant's living room, combine to create an intrusive obstruction on the outlook from that room and the south side of the appellant's house generally.

[4] Affidavits were filed, deposed to by an estate agent and a valuer, who expressed the view that the market value of the appellant's property will be significantly diminished by the proposed developments on the trust property. No attempt was made by the respondents to place evidence before the court to rebut this evidence, which must accordingly be accepted as correct for the purposes of this case.

[5] The distance between the proposed building to be erected on the trust property and the northern boundary of that property is about three metres although the relevant clause of the applicable Town Planning regulations provides for rear space between a dwelling house and the rear boundary of the site of not less than five metres in width unless the owner of the adjoining property has consented in writing to a lesser rear space (which has not happened in the present case).

THE APPELLANT'S ATTACK ON THIRD RESPONDENT'S DECISION TO APPROVE THE PLANS

[6] The appellant's attack on the third respondent's approval of the building plans in question was originally based on three grounds, viz:

(a) that due to its size, proximity and position relative to his own house and its effect on his amenities the proposed development would

probably or in fact derogate from the value of his property, with the result that the third respondent was by virtue of the provisions of section 7(1) (b) (ii) (aa) (ccc) of the National Building Regulations and Building Standards Act 103 of 1977 (to which I shall refer in what follows as 'the Act') precluded from approving the plans;

(b) that the relevant official failed to apply her mind properly to the consideration of the plans; and

(c) that the plans were approved in breach of the provisions of the Town Planning Regulations because the rear space between the rear of the building and the rear boundary of the trust property was less than five metres.

[7] Subsequently, after judgment had been given by the court *a quo,* the appellant discovered that at the relevant time the third respondent did not have a building control officer, as is required by section 5(1) of the Act. It had accordingly made its decision to approve the plans relating to the trust property development without considering a recommendation made by its building control officer as is provided for in section 7(1) of the Act. The appellant then applied to this Court for leave to adduce evidence relating what it had discovered in this regard. This application was not opposed by the respondents who contended, however, that the respondent's failure to have a building control officer at the relevant time and to consider a recommendation from such officer had not prejudiced

the appellant.

RELEVANT STATUTORY PROVISIONS

[8] Before the contentions of the parties are considered it is desirable to set out the relevant provisions of the Act and the Town Planning Regulations, as far as they are material.

[9] Sections 5(1), 6(1) and 7(1) of the Act read as follows:

'5(1) … [A] local authority shall appoint a person as building control officer in order to exercise and perform the powers, duties or activities granted or assigned by or under this Act.'

'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) …'

'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 reasons for such refusal …'

[10] Regulation 19(1) of the third respondent's Town Planning Regulations, which is headed 'Side and Rear Space', reads as follows:

'(1) Every dwelling house … shall have between the external rear wall of the building and the rear boundary of the site a space free of all buildings of:-

(a) not less than 5 metres in width …'

Sub-regulation (2), the terms of which need not be quoted, speaks of the front and side boundaries of sites.

THE FAILURE TO APPOINT A BUILDING CONTROL OFFICER

[11] I turn now to consider the appellant's attack on the approval by the third respondent of the plans submitted by the first and second respondents. It will be convenient to consider first the appellant's contention that the approval was invalid by reason of the fact that the third respondent had not at the relevant time appointed a building control officer and did not consider a recommendation made by a building

control officer before it approved the plans. In this regard the appellant's counsel submitted that the appointment of a building control officer and the recommendation by such officer to the local authority are necessary pre-conditions to the exercise by the local authority of its powers to approve or reject building plans. They contended that each of these pre-conditions constitutes a jurisdictional fact, the existence of which is a necessary pre-requisite to the exercise of the statutory power, and relied in this regard on the judgment of Corbett J in *SA Defence and Aid Fund v Minister of Justice* 1967 (1) SA 31(C), which, as the Constitutional Court pointed out in *President of the Republic of South Africa v South African Rugby Football Union* 2000 (1) SA 1(CC) at 76, para [168], footnote 132, remains the leading case in our law on jurisdictional facts. Counsel for the appellant contended further that as the plans were not considered by a building control officer and no recommendation was made by such officer for consideration by the local authority it was not empowered to approve them.

[12] Counsel for the first and second respondents contended that the purpose of the relevant provisions of the Act regarding building control officers and their recommendations had substantially been complied with as the plans were approved on the basis of recommendations made by people who had the qualifications and experience required of a building control officer by regulations promulgated under the Act and that the

third respondent's decision to approve the plans was not invalid.

[13] Counsel for the third respondent submitted that while it could not be disputed that the lack of a building control officer means that a condition precedent to the exercise by the third respondent of its discretion had not been fulfilled, nevertheless this amounted to what was described as 'a mere irregularity of no real consequence'. This was because, so it was argued, the third respondent had expert advice available to it when it made its decisions and the formal appointment of a building control officer would have made no difference to its decision. In particular the official who had since been appointed to that post had actually approved the plans. Accordingly, counsel argued, the appellant had not been prejudiced by the lack of a formally appointed building control officer with the result that the principle approved by this court in *Rajah and Rajah (Pty) Ltd and Others v Ventersdorp Municipality and Others* 1961 (4) SA 402(A) at 407H - 408A that a court will not interfere on review with the decision of a quasi-judicial tribunal where there has been an irregularity if the complaining party has suffered no prejudice.

[14] I cannot agree that the third respondent's decision to approve the plans without considering a recommendation from a duly appointed building control officer can be regarded as valid, or that the fact that a necessary condition precedent to the exercise by the third respondent of its discretion to approve plans was not fulfilled can be regarded as 'a

mere irregularity of no real consequence'. I agree with counsel for the appellant's contention that jurisdictional facts necessary for the exercise of the statutory power were not present. It is not possible, in my view, to interpret sections 5, 6 and 7 of the Act in any other way.

[15] The *Rajah* case, *supra,* is clearly distinguishable because it was not suggested that the irregularity complained of in that case in any way related to the power the municipality had to issue the certificate which it later sought to have set aside. No authority was cited to us, nor am I aware of any, which lays down that the purported exercise of power, the existence of which depends on the presence of a jurisdictional fact which is absent, will be validated or not able to be attacked because the party complaining has not been 'prejudiced'.

[16] The simple facts are that a power to approve plans was purportedly exercised, which, in the absence of the necessary jurisdictional facts, did not in law exist. There was therefore no valid approval. It follows that the appellant's attack on the third respondent's approval of the plans must succeed and the decision concerned must be set aside.

THE APPELLANT'S OTHER CONTENTIONS

[17] We were requested by counsel for all the parties, if the appeal were to succeed on the jurisdictional fact point, also to state our views on the first and third points as they were fully argued and it was probable that they would still be the subject of dispute between the parties: the third

respondent has since appointed a building control officer and the first and second respondents are still desirous of developing the trust property in accordance with the plans invalidly approved by the third respondent. We were also asked to embody our views on these points in the form of declarations in our order. In the circumstances it seems appropriate to accede to counsel's first request. I do not think it necessary or appropriate to accede to their second.

DEROGATION FROM VALUE

[18] I accordingly proceed to consider the first basis for the appellant's attack on the third respondent's decision, viz that the construction of the alterations and extensions depicted on the plans will derogate from the value of the appellant's property.

[19] In this regard the appellant's counsel contended that it was clear on the uncontested facts that the value of the appellant's property would be significantly diminished if the proposed developments on the trust property went ahead and that what would cause this diminution in value would be the nature and appearance of the proposed structure, both as to its position and as to its height, which would drastically impair one of the major attributes of the appellant's property, namely the view which can be enjoyed from it. Accordingly, so it contended, on the ordinary meaning of the provisions of s 7(1)(b)(ii)(aa)(ccc) of the Act, the third respondent was precluded from approving the plans. In this regard it was

argued that the word 'value' bears its ordinary meaning of market value. For this submission reliance was placed on the decision of this Court in *Pietermaritzburg Corporation v South African Breweries* 1911 AD 501. Counsel for the appellant stressed that the appellant was not contending that he had a right to a view that was being infringed but that he did have a right not to have plans passed in respect of an adjoining erf in circumstances where a statute prohibited the passing of such plans.

[20] Counsel for the first and second respondents submitted that for the purposes of s 7 of the Act the loss of a view is not something that should be taken into account in determining whether there will be a derogation from the value of adjoining or neighbouring properties. It was stressed in this regard that the appellant did not have a servitude of prospect over the trust property and that the proposed development on the site was to the extent permitted by the Town Planning Regulations. It was argued further that what was contemplated by 'adjoining or neighbouring properties' in S 7(1)(b)(ii)(aa)(ccc) was all the adjoining or neighbouring properties and not simply one of them.

[21] The third respondent's counsel argued on this part of the case that the derogation from value contemplated by the section is a diminution of value of the neighbouring properties as a group. It was also submitted that the reference to value in the section referred to value assessed on the basis that no value is attributed to a view for planning purposes.

[22] Counsel for the appellant answered the submissions of counsel for the respondents that the use of the plural 'adjoining or neighbouring properties' by reference to s 6(b) of the Interpretation Act 23 of 1957 which provides that in every law, unless the contrary intention appears, words in the plural include the singular.

[23] In my view it is not possible to interpret the section so as to give the word 'value' a meaning other than its ordinary meaning, namely market value. The proposed exclusion for planning purposes of value flowing from a view which can be enjoyed from a property is not one which can be based on the words used by the legislature. Nor can the use of the plural (which normally, as s 6 of Act 23 of 1957 indicates, includes the singular) indicate an intention to refer to all adjoining or neighbouring properties. What if there is only one adjoining property, such as an erf by the seaside surrounded by one other property? Does the section only begin to apply if that other property is subdivided so that there is a group of adjoining or neighbouring properties from whose value there will be a derogation? Once it is clear, as it is on the facts presently before us, that the execution of the plans will significantly diminish the value of the adjoining property then on its plain meaning the section prevents the approval of the plans. Whether an insignificant diminution (not so slight as to bring the *de minimis* principle into operation) is to be regarded as a derogation for the purposes of the section need not be considered at this

stage. In the circumstances I am satisfied, on the facts presently before us, that the appellant's first ground of attack on the third respondent's approval of the plans must be sustained.

REAR SPACE

[24] The final point to be considered is that relating to the rear space. The respondents contended that the trust property constitutes a corner stand with two street frontages and side space but no rear space. Alternatively it was contended that because the new entrance foyer and formal lounge to be constructed on the trust property will face east, the rear boundary of the trust property is on the western side and not the northern side as alleged by the appellant.

[25] In my view both these contentions are manifestly without substance. I do not think that the Town Planning Regulations can be so interpreted that the identity of the rear boundary of a site can change according to the design of the building to be erected on it. As I have pointed out the regulations clearly indicate that a site is regarded as having a front boundary, side boundaries and a rear boundary. In the present case the western and eastern boundaries are clearly the side boundaries.

[26] Normally the front boundary of a property will be the boundary between the property and the street on which it abuts: *cf Kingsford v Phillips and Jutsum* [1931] St R Qd 122 at 132, cited in *Words and*

Phrases Legally Defined, 3 ed, vol 2, *s.v.* 'front' p 296, and the seventh definition of 'front' given in the *Oxford English Dictionary,* 2 ed, vol VI. In this case the matter is complicated by the splayed corner and the portion of street frontage to the north of that corner but this does not make it difficult to identify the rear boundary, which is clearly the northern boundary. That was the position before a house was built on the property, and nothing done or proposed to be done by the owners of the trust property can, as I have said, change the identity of the rear boundary. On a proper construction of the regulations the expression 'external rear wall' can only mean the wall closest to the rear boundary. That being so, it is clear that the appellant's contentions on this part of the case must also be upheld.

ORDER

[27] The following order is made:

1. The appeal is upheld with costs, such costs to include the out-of-pocket expenses of the appellant's two counsel.

2. The order of the court *a quo* is set aside and replaced by the following:

> '(a) Third respondent's decision on or about 13 April 2000 to approve the amended plans submitted by the J Jeeva Family Trust under plan number 0503/02/99/7 in respect of certain alterations to be carried out on the immovable property described as portion 5 of erf 219 Durban

North and situated at 9 Queen's View Place, Umgeni Heights, Durban is set aside.

(b) Respondents are ordered to pay the costs of the application jointly and severally, one paying the others to be absolved.'

……..

IG FARLAM
JUDGE OF APPEAL

CONCURRING:

HOWIE	P
LEWIS	JA
HEHER	JA
MOTATA	AJA