

SOUTH AFRICA / JUDGMENT

Habitat Council v BPH Properties (Pty) Ltd (A388/17) [2018] ZAWCHC 98 (17 August 2018) [2018] ZAWCHC 98

COURT

Western Cape High Court, Cape Town

BEFORE

Ndita, Rogers, Savage

CASE / FILE NUMBER

A388/17

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THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

JUDGMENT

CASE NO: A388/17 In the matter between HABITAT COUNCIL APPELLANT and BPH PROPERTIES (PTY) LTD RESPONDENT

Coram: NDITA, ROGERS AND SAVAGE JJ

Heard: 30 JULY 2018

Delivered: 17 AUGUST 2018

ORDER

On appeal from: The Western Cape High Court (Samela J sitting as court of first instance)

(a) The appeal is upheld with costs, including the costs of the application for leave to appeal in the court a quo and the application for leave to appeal brought in the Supreme Court of Appeal.

(b) The order of the court a quo is set aside and replaced with an order the following terms:

‘The application is dismissed with costs.’

Rogers J (Ndita and Savage JJ concurring):

- [1] The appellant, the Habitat Council (Habitat), a voluntary association concerned with conservation of the built environment, appeals against the judgment and order of the court a quo (Samela J) by which that court upheld an application, at the instance of the present respondent, BPH Properties (Pty) Ltd (BPH), for the review and setting aside of a decision of an independent appeal tribunal (IAT) established in terms of s 49(2) of the National Heritage Resources Act 25 of 1999 (the Act).
- [2] In August 2011 BPH applied for permission, in terms of s 34 of the Act, to demolish a seaside cottage known as Highclere located on a property in Blaauwbergstrand belonging to BPH. A demolition permit was required because the cottage is more than 60 years old. In November 2011 Heritage Western Cape (HWC), a provincial heritage resource authority established in terms of s 23 of the Act and acting in this instance through its Built Environment and Landscapes Committee (BELCom), granted the permit. In March 2012, and at the instance of interested neighbours, the HWC appeals committee, acting in terms of s 49(1) read with the provincial regulations governing appeals to HWC's council, reversed BELCom's decision. In terms of s 49(2) BPH filed a further appeal to the IAT which dismissed the appeal on 31 October 2013. That is the decision which BPH successfully applied to have set aside. Among the parties cited or joined as respondents were the City of Cape Town (the City) and Habitat. The City filed explanatory affidavits broadly in support of the IAT's decision. Habitat actively opposed the review.
- [3] It is common cause that the IAT's decision is 'administrative action' as defined in the Promotion of Administrative Justice Act 3 of 2000 (PAJA). The review application was issued on 2 March 2016, slightly more than 28 months after the IAT's decision. The 180-day period referred to in s 7(1) of PAJA began to run on or shortly after 31 October 2013. BPH's delay in issuing the review application was thus per se unreasonable (*Opposition to Urban Tolling Alliance & others v The South African National Roads Agency Limited & others* [2013] 4 All SA 639 (SCA) para 26). A threshold question in the court a quo was whether the 180-day period should be extended in terms of s 9(1).

In terms of the latter section the court may exercise the power of extension 'where the interests of justice so require'.

One of Habitat's grounds of appeal is that the court a quo erred in granting an extension.

- [4] The court a quo considered that BPH had provided a reasonable explanation for the delay. BPH had attempted, in protracted correspondence with HWC and the City, to resolve the dispute. Although the period within which the application was instituted far exceeded 180 days, the delay was not, in the court a quo's opinion, unreasonable.
- [5] The finding that the delay was not unreasonable cannot be sustained in the light of binding authority that a delay exceeding 180 days is per se unreasonable. The court a quo probably meant that there was a reasonable explanation for the delay and that it was thus in the interests of justice to extend the period. I respectfully disagree.

[6] As explained by Nugent JA in *Gqwetha v Transkei Development Corporation Ltd & Others* 2006

(2) SA 603 (SCA) paras 22-23, the rationale for the delay rule (now embodied in PAJA) is twofold:

(1) Failure to bring a review within a reasonable time may cause prejudice to respondents.

(2) More importantly, there is a

public interest element in the finality of administrative decisions. Although the potential for prejudice to respondents is inherent in the second of these considerations, actual prejudice is not a precondition for refusing to entertain a late application though the extent of actual prejudice is a relevant factor which may even be decisive where the delay has been relatively slight.

[7] In *Aurecon South Africa (Pty) Ltd v Cape Town City* 2016

(2) SA 199 (SCA) Maya JA said that whether it is in the interests of justice to condone an unreasonable delay 'depends entirely on the facts and circumstances of each case' (para 17). She listed among relevant considerations: (i) the nature of the relief sought;

(ii) the extent and cause of the delay; (iii) its effect on the administration of justice and other litigants; (iv) the reasonableness of the explanation for the delay, which must cover the whole period of delay; (v) the importance of the issue to be raised; and (vi) prospects of success.

[8] To understand BPH's case on delay, I must deal briefly with the question of the property's heritage grading. The IAT, in agreement with the appeals committee, found that Highclere had sufficient heritage value to justify its conservation as a heritage resource. It is clear from the IAT's reasons that this conclusion formed the basis of its dismissal of BPH's appeal. After dismissing the appeal, the IAT proceeded

(i) to 'recommend' that HWC 'attend to the formal protection' of the property; (ii) to find that BPH had wilfully neglected the maintenance of the property, HWC thus being 'advised' to serve on BPH an order in terms of s 45 to repair and maintain the property.

[9] HWC can only issue a compulsory repair order in terms of s 45 if the property in question is a 'heritage site'. By virtue of the definition of the latter expression in s 1, only a site which has been declared a national or provincial heritage site qualifies as a 'heritage site'. The property in the present case has not been so declared.

[10] In terms of HWC's grading policy, which HWC adopted in July 2012, national and provincial heritage sites are classified as Grade I and Grade II respectively. Grade III applies to other heritage resources worthy of conservation. Generally the responsible authority for Grade III resources is the relevant local authority. The Grade III classification is divided into three sub-categories. Grade IIIA applies to 'buildings and sites that have sufficient intrinsic significance to be regarded as local heritage resources; and are significant enough to warrant any alteration being regulated' (emphasis in the original). Grade IIIB applies to buildings or sites of 'marginally

less significance' militating against the regulation of internal alterations. Grade IIIC applies to buildings or sites 'whose

significance is, in large part, a significance that contributes to the character or significance of the environs'. These buildings or sites should thus 'only be protected and regulated if the significance of the environs is sufficient to warrant protective measures' (emphasis in the original).

- [11] The grading policy has not been promulgated by regulation in terms of s 7 of the Act but appears nonetheless to be a document which heritage authorities and heritage practitioners follow. When the IAT made its decision Highclere had not yet been graded. The IAT's 'advice' to HWC to serve a s 45 order could only be implemented if the property were declared a national or provincial heritage site; and in terms of the grading policy such a property would be accorded a Grade I or Grade II grading as the case might be.
- [12] In its review application BPH criticised the IAT for reaching its decision despite the absence of a formal grading of the property. Following the decision, BPH sought to obtain a formal grading of the property. BPH's counsel submitted that it was reasonable for BPH to delay its review application for this purpose. If HWC had accorded the property a Grade II classification there would have been no practical point in pursuing a review because, if the matter were remitted to the IAT, it would inevitably reach the same conclusion and could lawfully instruct the HWC to serve a s 45 order. Conversely, if the property were found not to have any conservation significance or were only classified as Grade III, the IAT's decision could not be implemented and would be exposed as fatally deficient.
- [13] Subsequent to the IAT's decision, both HWC and the City graded the property. In October 2014 HWC classified it as Grade IIIC. Shortly thereafter, seemingly in January 2015, the City classified it as Grade IIIA. On the papers we must find that the City was a competent authority to classify the property; Grade IIIA should thus be taken to be its current grading. The City has no competence to accord the property a higher grading. HWC, which could declare the property a provincial heritage site (Grade II), has evidently concluded that it does not warrant such a classification.
- [14] There are a number of difficulties with BPH's reliance on its subsequent attempts to obtain a grading of the property. First, the grading of the property did not have the significance for which BPH contends. Section 34, which requires a permit to alter or demolish a structure which is more than 60 years old, is a self-standing source of protection for buildings with heritage significance. A property need not have been graded for this protection to apply (*Qualidental Laboratories (Pty) Ltd v Heritage Western Cape & another*
- [2007] ZASCA 170; 2008 (3) SA 160 (SCA) para 12; see also *Gees v Provincial Minister of Cultural affairs and Sport, Western Cape & others* [2016] ZASCA 136; 2017 (1) SA 1 (SCA)). When the IAT concluded that Highclere had sufficient heritage significance to make demolition inappropriate, it was not purporting to accord the property a particular grading. It did not have to pigeonhole its conclusion within HWC's grading

system.

- [15] Second, BPH's attempt to forge an inextricable link between the dismissal of its appeal and the IAT's 'recommendation' and 'advice' to HWC rests on an incorrect reading of the IAT's decision. The IAT in the course of its reasoning emphasised that the sole consideration in deciding whether to uphold or dismiss the appeal was Highclere's heritage significance. BPH's alleged wilful neglect of the property was only considered by the IAT to be germane to the question whether a compulsory repair order would be appropriate following the dismissal of the appeal. The IAT did not, however (as BPH's counsel put it), 'instruct' the HWC to take any particular action. The IAT made a recommendation and gave advice. HWC was not obliged to heed the recommendation and advice; and of course it could only implement the advice if it was lawful to do so. If Highclere did not qualify for protection in terms of s 45, a compulsory repair order could not be issued. This does not taint the IAT's decision to dismiss the appeal (ie its agreement with the appeals committee that demolition was inappropriate).
- [16] BPH's counsel argued that the recommendation and advice reflected an erroneous assumption by the IAT that the property was classified, or would in due course be classified, as Grade II; and that this misconception tainted its assessment of the property's heritage significance. I disagree. Since there was no evidence before the IAT to the effect that the property had been declared a national or provincial heritage site or that it had been formally graded, there is no reason to infer that the IAT wrongly assumed any such declaration or grading to be in place. On the contrary, the IAT had before it the appeals committee decision recommending that HWC take steps to grade the property and investigate its provisional protection. The IAT had submissions on behalf of BPH and objectors as to whether Highclere warranted a classification as Grade II or Grade III. In its reasons the IAT mentioned BPH's submission that Highclere did not warrant a Grade II classification and the objectors' submission that BPH had not provided sufficient information 'upon which to base or oppose a grading'. The IAT did not by its decision purport to resolve this dispute; it stated its findings on the heritage value of the site without reference to grading.
- [17] One possibility – the most likely, in my opinion – is that the IAT overlooked the limited scope of s 45. The IAT may mistakenly have thought that 'formal protection' at the instance of HWC would result in Highclere automatically being a 'heritage site', without appreciating the distinctions between the levels of protection (in particular the distinction between Grades II and III).
- [18] Another possibility is that the IAT considered the property worthy of declaration as a provincial heritage site and assumed that in due course, pursuant to 'formal protection', the property would be classified as Grade II. This is unlikely because, if it had been present to the IAT's mind, I would have expected it to be articulated in its reasoning. But even if this had been the IAT's view, the subsequent history shows no more than that other agencies have accorded Highclere a somewhat lesser heritage significance than the IAT did. The fact that agencies differ from each other does not mean that one of them has committed a

reviewable irregularity. The only importance of the subsequent classification is that the IAT's 'advice' cannot be implemented.

- [19] In short, it is difficult to see how subsequent grading could strike at the essence of the IAT's decision, namely that Highclere's heritage significance made demolition inappropriate. If the property had subsequently been classified as Grade II, this would only have affected the IAT's 'advice'. But in any event, there is no reason to believe that BPH would have taken a Grade II classification lying down. BPH's counsel acknowledged, at the hearing of the appeal, that BPH would probably have challenged that classification by way of internal appeal and if necessary on review. A Grade II classification would thus not have resolved anything; it would simply have added a further decision for BPH to attack. A Grade III classification would also not have resolved the case. For reasons I have explained, it would only have rendered the IAT's 'advice' incapable of implementation.
- [20] It appears from the record that the solution BPH had in mind was to persuade the authorities to accord Highclere no, or the lowest possible, heritage classification, so that BPH could lodge a fresh demolition application on the strength of such grading. In principle, BPH was entitled to follow this course. Indeed it did so. Following HWC's classification of the property as Grade IIIC, BPH submitted a fresh demolition application to HWC. It also needed approval for demolition from the City in terms of the National Building Regulations and Building Standards Act 103 of 1977. The City, which classified Highclere as Grade IIIA, refused a demolition permit. On the papers, BPH's fresh application for a demolition permit from HWC is still pending. Be that as it may, this 'solution' was not directed at the IAT's decision. On the contrary, it is a solution which entirely bypassed the IAT's decision. While it was open to BPH to embark on a fresh process, it did so at its peril in so far as the IAT's decision is concerned.
- [21] Third, and even if BPH in good faith believed it was following a legitimate process which might avoid the need for litigation, it fell far short of providing a reasonable explanation for the whole period of delay. In assessing this question, one must remember that the IAT's decision of October 2013 represented the culmination of an administrative process which had started as early as August 2011 and which had been the subject of decisions by BELCom in November 2011 and by the appeals committee in March 2012. This gave the need for finality added point. I should add that the demolition application of August 2011 had been preceded over the years by several others which had been refused.
- [22] Following the publication of the IAT's decision on 31 October 2013, BPH waited until 19 December 2013 – more than a month and a half – before asking HWC whether it intended to implement the IAT's decision. Even then, BPH did not ask HWC to grade the property. On 31 January 2014 HWC notified BPH that it had resolved to appoint a heritage specialist to undertake an assessment of the property with a view to grading the site. The next step – again more than a month and a half later – was BPH's attorneys' letter of 18 March 2014 to HWC stating that it held instructions to launch a review and asking about progress in the grading of the property. The attorneys asked HWC to confirm that the 180-day period for

launching a review would be extended by agreement, failing which BPH would have to apply for an extension. HWC was asked to revert as a matter of urgency.

- [23] After a further month – on 16 April 2014 – BPH’s attorneys sent a letter to the objectors’ consultant, stating that BPH intended to institute review proceedings but was unable to do so until HWC graded the property.
- [24] On 23 April 2014 BPH’s attorneys again told HWC that its client would be taking the IAT’s decision on review and that unless it received a satisfactory proposed programme for investigating the property’s grading within 30 days it would consider an application to compel. An exchange of correspondence between HWC and BPH during May 2014 did not take the matter further. Despite having received no response from HWC regarding the request to extend the 180-day period, BPH did not launch the review. BPH did not seek an extension of time from other interested parties.
- [25] On 25 June 2014, more than a month after their last letter to HWC, BPH’s attorneys complained to the provincial minister about the way its applications relating to the property had been dealt with. About two months later there was a meeting between BPH and her HWC from which it was apparent that HWC had not yet prepared the brief for its heritage consultant. Eventually, on 29 October 2014, HWC classified the property as Grade IIIC. Instead of launching its review application (on the basis that the IAT’s supposed misconception had now categorically been demonstrated), BPH instead submitted a fresh demolition application to HWC. On 28 January 2015 HWC’s consideration of the fresh application was postponed to 10 March 2015 on which occasion it seems to have been further postponed to June 2015.
- [26] In the meanwhile, and in January 2015, the City issued a provisional protection notice to BPH in terms of s 29(2), based on its classification of the property as Grade IIIA. The City also, as noted earlier, refused to issue a demolition permit in terms of Act 103 of 1977. It was thus clear that neither of the potentially competent grading authorities was going to classify the property as Grade II yet no review application followed. Instead, BPH began to cross swords with the City, alleging in a letter of 18 February 2015 that the City’s officials were not acting in good faith but stating that BPH would meet with the City without prejudice regarding the provisional protection.
- [27] In March 2015 the City wrote to BPH, explaining why it considered Highclere to be conservation-worthy, emphasising that it had reached its own conclusion rather than relying on the IAT’s decision. The City was willing to explain its reasoning more fully in a meeting. BPH’s attitude was that it required the City to provide it with various documents before such a meeting.
- [28] Following a flurry of correspondence, there was a site meeting between representatives of BPH and the City on 28 May 2015. BPH’s representative said that no new information was contained in the City’s latest assessment, that the company was ‘past spending money’ on the property, and that its options were either to abandon the property or litigate on the basis

that the administrative decisions made in respect of the property were irrational. Nothing that happened there could have led BPH to believe that the City was relenting. The combative tone of BPH's attorneys' letters of 3 and 9 June 2015 is consistent with parties at loggerheads. Indeed, in the second of these letters BPH's attorneys said that any belief by the City that 'negotiation and consultation would turn the tide' was 'wholly unreasonable', particularly in the light of the meeting between the parties on 28 May.

- [29] Pursuant to a BELCom meeting on 17 June 2015, at which BPH's new demolition application was considered, the City on 24 June 2015 submitted to HWC its objections to the application. The City emphasised that the IAT's decision remained in place until set aside by a court. It complained of BPH's recourse to multiple demolition applications without any intervening change in circumstances. The City also contested HWC's right to grade the property, contending that this was a local authority function. The City contended that HWC's IIIC grading was contradictory to its own policy guide and ignored 'multiple layers of significance' and that in the City's view Highclere warranted 'at least' a IIIA grading 'based on age, rarity, representivity and intactness', being 'a rare example of calcrete constructed flat-roofed seaside cottage with a relatively intact stone boundary wall'. The City's position, as articulated in this document, must have made it obvious to BPH that a review application would now have to be launched. At any rate, a belief that a practical solution was likely would have been divorced from reality.
- [30] There was further correspondence between the City and BPH in July 2015 in which the City said that there was no point in meeting if BPH persisted in its stance that no amount of negotiation and consultation could save the derelict dwelling. The City made it a precondition for further discussion that BPH should agree in good faith to consider proposals for Highclere's conservation. BPH's response of 22 July 2015 was that the question of restoration was irrelevant because BPH had no resources to do so. BPH's suggestion of a meeting presupposed, it said, that the City would take 'cognizance of the realities of the situation'. From the perspective of a non-litigious resolution, this exchange of correspondence was hardly encouraging. Indeed, it is difficult to know what resolution BPH had in mind at this stage, short of trying to persuade the City that demolition was the only feasible course, something the City showed no signs of accepting.
- [31] The correspondence which passed between the parties from August to October 2015 did not bring them closer together. The last letter in this sequence was the City's letter of 22 October 2015 to BPH's attorneys, disagreeing that its documentation failed adequately to address the derelict state of the dwelling. Nearly a month later, on 17 November 2015, there was a meeting between representatives of BPH and the City in what BPH describes as a 'last ditch effort' to avoid a review application. It could have come as no surprise to BPH's representatives that the City maintained the position that Highclere's essence still existed and that a 'sympathetic rehabilitation' of the interior remained possible.

- [32] BPH's attorney, who met separately with the City, floated the idea of BPH's donating the property to the City. According to the City's deponent, the attorney stated that no formal offer could be made until the matter had been considered at BPH's board meeting in December. BPH did not revert to the City. It thus seems that BPH did not go into the meeting of 17 November 2015 with a mandated position to resolve the issue on the basis of a donation. This was simply a tentative idea which went nowhere.
- [33] There was no further interaction between the parties until, about three and a half months later, BPH issued its review application. BPH claimed that this further delay was caused by obtaining further expert reports which came to hand on 8 February 2016. BPH does not explain how further expert reports could affect an enquiry into a decision made by the IAT in October 2013 or when it commissioned the reports. If BPH thought that further expert reports were necessary, they should have been sought in 2014 when it was threatening review proceedings.
- [34] The last interaction between BPH and HWC appears to have been in June 2015. Apart from BPH's attorneys' letter to the objectors' consultant on 16 April 2014, BPH did not communicate with the objectors. They were interested parties who would have wished to maintain the IAT's decision. A case cannot sensibly be resolved unless all interested parties are involved. Endeavours to avoid litigation may well in appropriate circumstances be grounds for condoning non-compliance with the 180-day period but such endeavours must have a realistic and identifiable goal which will avoid litigation; should involve all interested parties; and must be conducted with reasonable expedition.
- [35] In the light of this discussion, I return to the relevant factors identified by Maya JA in Aurecon:
- (i) Nature of relief sought: BPH was seeking the setting aside of a decision reached by an adjudicative body which had received evidence and heard

submissions.

Although BPH sought a substituted decision, the court a quo remitted the matter to the IAT, which is the usual position in the absence of exceptional circumstances. BPH's delay meant that the IAT would be called upon to reconsider the matter three or

more years after it originally decided the case, by which time memories would have dimmed. Since the IAT is an ad hoc body, there

might be difficulty in reassembling the panel. Witnesses and representatives who were involved in the original hearing might no

longer be available.

- (ii) Extent and cause of delay: The delay was gross and wholly unjustified by the alleged causes.

(iii) Effect on administration of justice and other litigants: Apart from the considerations alluded to in point (i), there is no evidence of actual prejudice but that may be because objectors who had an interest in the IAT's decision did not wish to become embroiled in litigation so that their views are not now before the court. For reasons I have explained, the interests of finality loom large, even in the absence of actual prejudice.

(iv) Reasonableness of explanation for delay: The explanation is not reasonable and does not cover the whole period. Even during phases of active correspondence, BPH allowed weeks to intervene from one step to the next. The part of the founding affidavit which addresses condonation is terse to a fault.

(v) Importance of issues to be raised: The review does not raise any issues of general or great importance. It concerns the IAT's heritage assessment of a single seaside cottage, based on that structure's particular and unique attributes. Insofar as the IAT's 'recommendation'

and 'advice' are concerned, there is no legal dispute between the parties as to the limited circumstances in which a compulsory restoration order can be issued. The matter may be important to BPH but then it should have acted more promptly. And if subsequent developments justify demolition, BPH is not precluded from submitting a fresh application. Indeed such an application seems to be pending. (This is not said by way of encouragement to BPH.)

(vi) Prospects of success: We were not addressed at any length on the IAT's assessment of Highclere as having sufficient heritage significance to make demolition inappropriate. Although BPH's submission was that the IAT paid insufficient regard to the derelict state of the

cottage and to its evidence that restoration would result in a 'replica' rather than an authentic Cape vernacular beach

cottage, BPH's counsel said that his main point was that the 'advice' (described, erroneously, as an 'instruction')

tainted the decision as a whole. Since the heritage authorities may hereafter need to consider afresh the merits of the heritage

questions, it is undesirable to say more than that I am unpersuaded that BPH has a particularly strong case for the review of the IAT's decision on its merits, having regard to the material before the IAT in October 2013. As to its decision being tainted by the 'recommendation' and 'advice', BPH's prospects must be regarded as poor.

[36] It follows that the court a quo erred in finding that it was in the interests of justice to extend the period for bringing the review from 180 days to 852 days (the period calculated by the parties and the court a quo). I would thus make the following order:

(b) The order of the court a quo is set aside and replaced with an order in the following terms:

Ndita J:

[37] I concur and it is so ordered.

Savage J:

[38] I concur.

Ndita J

Rogers J

Savage J

APPEARANCES

For Appellant A D Maher Instructed by Neil Barton Attorneys Wynberg c/o Heyns & Partners
Cape Town For Respondent N C de Jager Instructed by Thomson Wilks Inc Cape Town

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Prepared on 10 October 2026 · Esheria