

SOUTH AFRICA / JUDGMENT

Sanderlings Home Owners Association and Others v Module Controls CC (A365/2013) [2014] ZAWCHC 37 (19 March 2014)

[2014] ZAWCHC 37

COURT

Western Cape High Court, Cape Town

BEFORE

N P Boqwana, D V Dlodlo, J M Hlophe

CASE / FILE NUMBER

A365/2013

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IN THE HIGH COURT
OF SOUTH AFRICA
(WESTERN CAPE
DIVISION, CAPE TOWN)

Case

No: A365/2013

DATE

19 MARCH 2014

In the matter

between:

THE SANDERLINGS
HOME
OWNERS
ASSOCIATION.....First
Appellant
JOHANN
VICTOR.....Second
Appellant
ENISE ANNE
LEATHWHITE.....Third
Appellant
And
MODULE CONTROLS
CC.....Respondent
Court: HLOPHE JP
et DLODLO J et BOQWANA J

JUDGMENT

DELIVERED ON 19 MARCH 2014

BOQWANA, J

Introduction

[1] This is an appeal against the judgment of Yekiso J dated 31 January 2013 in which he gave an order setting aside the decision of the first appellant, taken through its executive committee, purportedly refusing to approve the respondent's amended building plans or refusing to recommend the approval of such amended building plans by Bitou Municipality ('the municipality'); and directing the municipality to consider a matter of approval of such amended building plans in terms of Section 7 of the National Building Regulations and Building Standards Act, 103 of 1977; and lastly ordering the first appellant to pay the respondent's costs, on a party and party scale, duly taxed or as approved. The court a quo granted the first appellant leave to appeal on certain limited grounds.

Background Facts

- [2] The first appellant is an association with a constitution established at the instance of the Plettenberg Bay Municipality in terms of Section 29
- (1) of the Land Use Planning Ordinance 15/ 1985 ('LUPO'). It has the capacity to sue and to be sued in its own name. The management and administration of the association vests in the executive committee. The second and third appellants were members of the executive committee. In the proceedings before the court a quo the appellants were respondents.
- [3] The respondent (applicant in the court a quo) is the owner of the immovable property known as Erf 555 Keurboomstrand in the Bitou municipality, Division of Knysna, Western Cape Province situated in the Sanderlings Estate, a development on the banks of the Keurboom River, Plettenberg Bay, Western Cape ('the property'). Such property is the subject of this appeal. The respondent lodged the application in the Eastern Circuit Local Division.
- [4] The municipality is a local authority in whose jurisdiction the property is situated. It was cited as the fourth respondent in the application before the court a quo but did not participate in the proceedings.
- [5] On 29 November 2010, the municipality approved a building plan submitted by the respondent's architect for the construction of a house and outbuildings ('Plan 1').

- [6] When Plan 1 was originally submitted to the municipality it was referred back to the respondent's architect for amendment of the building lines to bring them in line with those listed in the Sanderlings Architectural Guidelines. The building lines were accordingly corrected and re-submitted.
- [7] The respondent was however informed by the municipality that a formal departure application in terms of LUPO was required in respect of building lines on the plans. The respondent submitted an application for departure from the section 8 of the Zoning Scheme Regulations ('Scheme Regulations') to permit the relaxation of the Southern Lateral building lines restriction from 3.0m to 1.5m in terms of LUPO.
- [8] During late August 2010 the respondent's architect was advised by the municipality that the Sanderlings Estate had its own special development parameters stipulated in their Design Manual as well as additional development restrictions imposed by the Mayoral Committee in a meeting held on 31 March 2010. Evidence shows that the year reflected in the Council letter to the respondent is incorrect. The Mayoral Committee resolution was adopted on 31 March 2005. The respondent was advised to obtain the necessary information regarding these restrictions from the body corporate or responsible trustees of the first appellant.
- [9] During September 2010, the respondent submitted a revised plan to the municipality for departures to permit the relaxation of the northern, eastern and southern lateral building line restrictions from 4.5m to 1.5m in terms of LUPO and to relax the permissible bulk from 0.75 to 0.77. This building plan was approved in November 2010 as indicated in paragraph 5 above.
- [10] In January 2011, the respondent and its architect came to a conclusion that it would make sense to add two bedrooms and a bathroom on top of the garage within the 'permissible' height of 8.5m. An amended building plan ('Plan 2') was drawn and submitted to the first appellant by the respondent for approval. In terms of section 18 of the first appellant's constitution no member shall submit plans to the municipality unless the plans have first been submitted to the first appellant and approved by it, in accordance with the procedures set forth in the Design Manual. The Design Manual is defined as the Architectural Guidelines annexed to the first appellant's constitution.
- [11] Trustees of the first appellant refused to approve Plan 2 based on the following

reasons:

'Sanderlings originally had a limitation on the size of homes erected. This appeared to be 175m² as the coverage with a loft of 50m². A departure application was approved in order to allow development to occur in accordance with the following parameters:

Coverage: 50%

Bulk: 0.75

Height: 8.5m above natural ground level.

After careful consideration and discussion on the above points, the Trustees have taken a decision not to approve the additions that you have requested, due to bulk exceeding over the limit to 0.86. The Trustees and your neighbours have already compromised in the relaxation of the building guidelines on your property. A number of large dwellings, including this one, have altered the character of the complex considerably.

Also, the Trustees wish to point out that the existing infrastructure regarding electricity supply, water and sewerage is already under severe pressure, especially during the holiday season.

In the light of all of the above, your application for the additional 2 bedrooms and bathroom has been turned down.’ (Own emphasis)

[12] As can be seen from the above the respondent’s Plan 2 was declined on the basis of three reasons, which are that: the bulk would increase to 0.86; the proposed alterations would negatively impact on the character of the estate (‘the aesthetic reason’) and the proposed alterations would negatively impact on the electricity supply, water and sewerage supply (‘the electricity reason’).

[13] It is this decision of the first appellant’s trustees that the respondent took on review before the court a quo.

The appellants’ grounds for appeal

[14] The appellants submit that the court a quo erred in its decision on various grounds. The first ground of appeal is that the court a quo erred in fact and in law by holding that: by reason of the fact that the development parameters imposed by the municipality in 2005 were not contained in the applicable Scheme Regulations followed by promulgation thereof, they were invalid. According to the appellants, the erven in Sanderlings Estate are not zoned as Residential Zone 1 as alleged by the respondent but Resort Zone II. The area in which the estate is situated falls within the jurisdiction of the section 8 Scheme Regulations (‘Scheme Regulations’) and not Plettenberg Bay Zoning Scheme Regulations. The appellants however concede that the Scheme Regulations do not contain any development parameters with regard to Resort Zone II. They however argue that the importance of the Scheme Regulations in not prescribing land use restrictions in the case of Resort Zone II is that this zoning is specifically subject to conditions of rezoning approval as opposed to land use restrictions already prescribed in the Zoning Scheme Regulations and that means no further promulgation or similar action is required for it to have legal effect.

[15] The appellants contend that in 2005 and as a result of a letter requesting a relaxation of the development parameters, the municipality approved the development parameters imposing, inter alia, a bulk restriction of 0.75 thereby amending the original conditions of approval. Appellants submit further that the 2005 application should have been for an amendment of the conditions of subdivision approval in terms of section 42 of LUPO and not for a departure in terms of section 15 of LUPO. The end result, according to the appellants, is

however the same in that the development parameters that apply to the estate were amended in accordance with this approval. Thus, the appellants argue that the departure cannot lapse after two years (as stipulated in section 15(5) of LUPO) as it represented an amendment to the conditions of subdivision approval, which amendment is permanent or remains permanent until it is again amended.

- [16] The appellants submit that even if the bulk restriction imposed by the municipality in 2005 was unlawful for some or other reason, it was a restriction which existed as a fact at the time of the executive committee's decision and remains valid until such time as it has been set aside on review by a competent court. The appellants refer to the decisions of *Oudekraal Estate (Pty) Limited v City of Cape Town and Others* 2004
- (6) SA 222 SCA at 241 -242 and at 243 – 244 and *City of Johannesburg and Another v AD Outpost (Pty) Ltd* 2012 (4) 325 SCA at 333.
- [17] The appellants' second ground of appeal is that the court a quo erred in holding that the Design Manual did not contain a bulk restriction and that it was only the local authority which had the power to have regard to these parameters if regard be had to paragraphs 5(d), 8 (c) (viii) and 18 of the first appellant's constitution. In terms of section 5(d) the first appellant is obliged to ensure compliance by its members, including the respondent, with the conditions of establishment of any subdivision with particular reference, inter alia, to building restrictions and requirements but also where necessary to ensure that the municipality enforces such conditions of establishment.
- [18] The appellants submit further that there was no evidence to support a finding that the Design Manual had to be approved by the municipality and that in any event was not the respondent's case. The appellants further contend that the court a quo erred in law in holding that the development parameters were not reflected in the respondent's Title Deed and that precluded the first appellant from relying upon the parameters imposed by the municipality.
- [19] As regards to the aesthetic reason, the appellants argue that the decision of the executive committee was justified because the proposed alterations on the street frontage of the dwelling would represent a monolith and therefore impact on the entire street frontage of the properties and therefore on the estate as a whole. The electricity reason is no longer in issue due to a report of Tuniqua Consulting Engineers (Pty) Limited.

Analysis

Bulking developmental parameters

- [20] It is evident from the papers that the Scheme Regulations, the Title Deed, the Design Manual and the constitution of the first appellant did not contain any bulk restrictions per se. The appellants relied on the Council resolution of 31 March 2005 to justify their decision to turn down respondent's Plan 2.

- [21] The court a quo found that the relationship between the parties was based on contract. It held that the first appellant's Design Manual (which ought to have been approved by the municipality to have any legal effect) and the Deed of Transfer did not contain any clause restricting the bulk for the proposed dwelling to 0.75. With regard to the Scheme Regulations the court found that 'resolution of the Municipal Council adopted on 31 March 2005 was not inserted in the applicable Scheme Regulations followed by promulgation thereof as contemplated in section 9(2) of the Land Use Planning Ordinance. Thus, the Municipal Council resolution of 31 March 2005, in the absence of promulgation thereof in the manner suggested above, does not constitute a law of general application on the basis of which the applicant's right to develop its property could be limited in the manner suggested in the Municipal Council resolution.' Accordingly, it found that there was no statutory or contractual base enabling the first appellant to enforce the resolution.
- [22] The appellants accept that the Scheme Regulations contain no bulk restriction but submit that Regulation 3.20.2(b) which governs Resort Zone II does not require prescription of land use restrictions by regulation, it simply subjects Resort Zone II to conditions of rezoning approvals by a local authority. Reg.3.20.2(b) stipulates as follows:
- ‘
- (b) With regard the rezoning of land to resort zone II, conditions shall be laid down with regard to density, layout, landscaping and building design, and a layout plan shall be approved by and filed with the local authority, clearly indicating the position of all structures, stands and internal roads.’
- [23] The parties differ with regard to the zoning of the erven. The appellants argue that the zoning of the estate is Resort Zone II whilst the respondent contends that the estate is zoned as Single Residential. In both instances the Scheme Regulations do not contain any development parameters. Two issues arise from the appellants' submission. The first issue to be determined, which in my view is crucial, is whether the 2005 municipal resolution constitutes 'conditions' for the purposes of Reg. 3.20.2(b) or an amendment to the restrictive conditions of 1995 in terms of section 42(1) of LUPO as the appellants contend. The starting point in my view is the wording of the resolution itself and the context in which such a resolution was obtained. The second issue is that if indeed an amendment occurred whether that was required to be promulgated to have any legal effect.
- [24] From the reading of the recommendation document prepared by the municipal manager in 2005, approval was granted in terms of section 15 of LUPO for a departure from prescribed development restrictions in respect of Portion 52 of the Farm Matjesfontein No.304 ("Sanderlings Phase 1") for the following parameters to be applicable:

‘Coverage: 50%

Bulk: 0.75

Height: 8.5m above natural ground level.’

[25] Section 15(1) stipulates as follows:

‘15. (1) (a) An owner of land may apply in writing to the town clerk or secretary concerned, as the case may be—

(i) for an alteration of the land use restrictions applicable to a particular zone in terms of the Scheme Regulations concerned, or

(ii) to utilise land on a temporary basis for a purpose for which no provision has been made in the said regulations in respect of a particular zone.

(b) Either the Administrator or, if authorised thereto by Scheme Regulations, a council may grant or refuse an application referred to in paragraph (a)

.....

(2) The said town clerk or secretary shall—

(a) cause the said application to be advertised if in his opinion any person may be adversely affected thereby;

(b) where objections against the said application are received, submit them to the said owner for his comment;

(c) obtain the relevant comment of any person who in his opinion has an interest in the application..;

....

(5) A departure in respect of which the application has been granted under this section, shall lapse if and in so far as it is not exercised within two years or within such further period as either the Administrator or, if authorised thereto by the Scheme Regulations concerned, the council concerned may on the application of the owner concerned determine, after the date on which the date on which the application was granted.’

[26] What is clear from the above provisions is that the application is made at the instance of an owner, such application is for departure or alterations applicable to a particular zone in terms of the scheme regulation and it lapses if not exercised within two years or further authorised period.

[27] In the present matter, the document of the municipal manager indicates that an application was made by a person referred to as applicant in the document. It is stated in the document that a comment was made that the ‘suggestion of the applicant is supported..’. This presumably led to the recommendation that followed which allowed development to occur within certain parameters. From this, it is clear that the resolution was not an amendment to the restrictive conditions that existed before, at least as couched in the wording of the resolution and as appears from the context outlined in the municipal manager’s

recommendation document.

[28] The appellants' view is that the approval by Council amounted to an amendment of the restrictive conditions in terms of section 42 of LUPO. Section 42 provides, inter alia, as follows:

‘ 42. (1) When the administrator or a council grants authorisation, exemption or an application or adjudicates upon an appeal under this Ordinance, he may do so subject to such conditions as he may think fit.’

[29] Whilst the Council resolution did not refer to a specific Erf, but to portion 52, it clearly came about as a result of an application by a certain applicant and was a departure application in terms of section 15 and approved in terms of that section. The appellants seem to concede that the application should have been for an amendment of the conditions of subdivision and approval should have been in terms of section 42 of LUPO and not a departure in terms of section 15 of LUPO.

[30] Another crucial point is that under both sections 15 and 42, the administrator shall cause the application (in terms of section 15(2)) or the amendment of conditions (in section 42(4)) to be advertised if in his/her opinion the application or the amended conditions may adversely affect any (interests of) person. Whilst there exists a discretion on whether or not to advertise the application or amended conditions for objections or comments, that discretion should in my view be seen to have been exercised objectively and transparently. The municipality did not participate in these proceedings. There is no evidence to suggest that the municipality considered whether or not other owners would in its opinion be adversely affected by the 2005 resolution.

[31] In addition to the above, even if it is held that the departure granted applied to Erf 555 as well, it had not been exercised within two years (or within a further determined period) by the respondent and therefore it lapsed in terms of section 15(5). For the reasons stated above the appellants' submission that the 2005 Council resolution constituted an amended condition must be rejected. Having found that the Council resolution did not amount to an amended subdivision, it does not seem to be necessary to consider the issue of whether or not conditions for Resort Zone II did not need to be promulgated to have legal effect. Furthermore, the documents regulating the contract between the first appellants and respondent (i.e. the Title Deed, read with the first appellant's constitution and the design manual) do not contain restrictive bulk conditions of 0.75 and the Design Manual refers to applicability of regulations. As was correctly held by the court a quo, the decision of the council is not a regulation

. The reasoning of the court a quo referred to in paragraph 21 above cannot be faulted, in my view.

- [32] Turning to the Oudekraal argument, in my view the principle does not arise in this instance simply on the basis that, to the extent that the Council resolution was said to be applicable to Erf 555, it lapsed in or about 2007, whether or not the municipality decision was lawful. Furthermore, the first appellant as a second actor did not have legal powers to act validly (based on contract or statute), notwithstanding the lawfulness or otherwise of the municipality's decision. Oudekraal therefore does not find application in this instance, in my view. In this regard see Cora Hoexter: Administrative Law in South Africa, Juta, Second Edition, 2012 at page 548.
- [33] In any event, the issue before this Court is not the lawfulness or otherwise of Council's decision. Parties could still challenge the lawfulness or otherwise of the decision of the Council in appropriate proceedings.
- [34] Insofar as the aesthetic reason is concerned, I am in agreement with the court a quo that this issue can be dealt with by the municipality when it considers the respondent's Plan 2.
- [35] Turning to the order made by the court a quo. The appellants' criticism of the court a quo's order is that, by virtue of the provisions of section 18 of the first appellant's constitution, which required submission of building plans to the first appellant's executive committee for approval before being submitted to the municipality, the court a quo should have either referred the matter back to the first appellant or substituted the first appellant's decision with its own approval of the plans prior to directing the municipality to consider the matter of the plans.
- [36] Whilst the appellants' submission would ordinarily have merit, it would not make sense to remit the matter back to the first appellant for re-consideration whilst it had been found that there was no statutory or contractual base enabling it to enforce the Council's resolution. It would also not have been necessary for the court a quo to substitute the decision of the first appellant, made through its executive committee, with its own for the same reason. The court's finding was that there was no legal basis for the first appellant to approve plans in Sanderlings Estate but only a local authority in whose jurisdiction the respondent was situated could. I find no misdirection from the court a quo in this regard as its order to direct the municipality to consider the plan directly without substituting the first appellant's decision accords with its findings that I have outlined above.
- [37] As regards the issue of costs, this is a complex matter and use of two counsel was justified. Costs should accordingly follow the result, including costs of two counsel.
- [38] In the result I would dismiss the appeal with costs including costs of two counsel.

N P BOQWANA

Judge of the High Court

I agree

D V DLODLO

Judge of the High Court

I agree and it is so ordered.

J M HLOPHE

Judge President of the High Court

APPEARANCES:

For the appellants: Advocate P.P.J van der Berg

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For the respondent: Advocate A de Vos SC

with Advocate A F Schmidt

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