THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Case number: 719/07

In the matter between:

THE MUNICIPALITY OF THE CITY OF CAPE TOWN — **APPELLANT**

v

MARINA GUILIETTA READER — **FIRST RESPONDENT**
IAN DONALD PEPLOE — **SECOND RESPONDENT**
JULIA PATRICIA IKIN — **THIRD RESPONDENT**
ETHEKWINI MUNICIPALITY — **AMICUS CURIAE**

Neutral citation: *City of Cape Town v Reader* (719/2007) [2008] ZASCA 130 (14 November 2008)

Coram: Cameron JA, Lewis JA, Jafta JA, Mlambo JA et Combrinck JA

Heard: 21 August 2008

Delivered: 14 November 2008

Summary: Interpretation of s 62 of the Local Government: Municipal Systems Act 32 of 2000 – the provision does not afford an appeal to objectors to grant of planning permission.

ORDER

On appeal from: Cape High Court, (Davis J, NC Erasmus J and H Erasmus J sitting as the Full Court on appeal from a single judge).

(1) The appeal is dismissed with costs, including costs occasioned by the employment of two counsel.

JUDGMENT

JAFTA JA (MLAMBO JA concurring)

[1] The issue in this appeal is whether s 7(2)[1] of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) precluded the first and second respondents (the applicants) from seeking an order reviewing and setting aside a decision of the appellant (the municipality) until they had exhausted internal remedies. The applicants instituted review proceedings in the Cape High Court for an order setting aside the municipality's approval of the third respondent's building plans. The challenged approval was granted in terms of s 7 of the National Building Regulations and Building Standards Act 103 of 1977.

[1] Section 7(2) provides: '(2) (a) Subject to paragraph (c), no court or tribunal shall review an administrative action in terms of this Act unless any internal remedy provided for in any other law has first been exhausted. (b) Subject to paragraph (c), a court or tribunal must, if it is not satisfied that any internal remedy referred to in paragraph (a) has been exhausted, direct that the person concerned must first exhaust such remedy before instituting proceedings in a court or tribunal for judicial review in terms of this Act. (c) A court or tribunal may, in exceptional circumstances and on application by the person concerned, exempt such person from the obligation to exhaust any internal remedy if the court or tribunal deems it in the interests of justice.'

[2] The municipality and the third respondent opposed the application. Relying on s 7(2) of PAJA, the municipality argued *in limine* that the application ought to be dismissed on the basis that the applicants had failed to invoke the municipality's internal appeal procedure in terms of s 62 of the Local Government: Municipal Systems Act 32 of 2000 (the Systems Act). Veldhuizen J upheld this argument and dismissed the application without considering the merits.

[3] On appeal to the Full Court the order issued by Veldhuizen J was reversed. The Full Court held that the provisions of s 7(2) of PAJA do not apply to the present case because the internal appeal in question did not constitute a 'viable internal remedy' for the applicants. The judgment of the Full Court is reported sub nom *Reader & another v Ikin & another* 2008 (2) SA 582 (C). The present appeal is with special leave of this court.

[4] In this court Ethekwini Municipality was admitted as an *amicus curiae*. Counsel addressed useful argument to the court on the proper interpretation of s 62 of the Systems Act. The court appreciates the assistance derived from all submissions presented in the case.

[5] The facts are common cause. The applicants and the third respondent are owners of adjoining immovable properties in Sea Point, Cape Town. The third respondent's property lies to the north of the first applicant's property and the second applicant's property is located on the eastern side. These properties are located in an area zoned for single dwelling units. There is one house built on each property.

[6] In terms of the municipality's zoning scheme regulations, it is

permissible to build a three-storey house in the area. Before the approval of the third respondent's building plans, her house was a single storey building. Having decided to extend it in 2003 and convert it into a double storey house, she submitted plans to the municipality for approval. On 20 February 2003 the municipality approved her plans and construction commenced on her property.

[7] The construction on the third respondent's property attracted the attention of the applicants and led to an enquiry at the municipality. They were informed that the construction was lawful and that the building plans relating thereto had been approved. The municipality's building control officer – Mr Neil Moir – informed the first applicant that the third respondent would be adding a 'second storey' to her house. The first applicant was unhappy as she held the view that the proposed building would 'obliterate [her] view of the sea'; compromise the privacy of her home; and reduce the value of her property by the amount of R350 000.

[8] The applicants, as already mentioned, instituted review proceedings challenging the validity of the approval mainly on the ground that jurisdictional facts necessary for the exercise of the power to approve building plans did not exist at the time of the approval. They contended that the decision–maker ought to have considered a recommendation to grant approval by the building control officer and that he must have been satisfied that the erection of the building in question would not probably or in fact disfigure the area; be unsightly or objectionable; and would not derogate from the value of neighbouring properties.

[9] The building was completed while the application was pending in the court of first instance. The applicants asked, in addition to the order

setting aside the approval, that the third respondent be directed to demolish the building in question. As stated earlier, the court of first instance dismissed the application on the basis that the applicants had, in contravention of s 7(2) of PAJA, prematurely approached it before exhausting internal remedies.

[10] In this court counsel for the municipality attacked the Full Court's interpretation to the effect that s 62 of the Systems Act did not provide a 'viable internal remedy' for the applicants and that as a result s 7(2) of PAJA did not apply to their case. The Full Court's conclusion was based on the effect s 62(3) has on the scope of an appeal under the section. The Full Court held that in terms of s 62(3) once a right had accrued as a result of the impugned decision, that 'decision cannot be reversed on an appeal if the reversal takes away the right initially granted'.[2]

[11] Having observed that an unlawful administrative action may, in appropriate cases, give rise to a legal consequence, the Full Court said:

'For these reasons, s 62(1) read with s 62(3) of the Systems Act does not appear to provide any viable internal remedy to an aggrieved party such as appellant in the present dispute. The mechanism created by ss 62(1) and 62(3) of the Systems Act provides an appeal for a party aggrieved by the initial decision but does not extend to third parties who contend that their rights or legitimate expectations have been adversely affected by the decision. The latter group, however, has a right of access to a court to set aside such a decision. In my view Veldhuizen J erred in holding that appellants were required to exhaust an internal remedy in terms of s 62 before approaching a court, as the section did not provide appellants an internal remedy, as envisaged in terms of s 7(2) of PAJA.'[3]

[12] Generally speaking s 7(2) excludes, albeit temporarily, the court's

[2] *Reader v Ikin* 2008 (2) SA 582 (C) (above) para 25.
[3] Id para 32.

jurisdiction on review proceedings where there is provision for an internal remedy. In those circumstances the aggrieved person's right of access to courts or other independent and impartial tribunals is denied until he or she has exhausted the internal remedy. The subsection is couched in peremptory terms which oblige every reviewing court to decline to hear a review application brought under PAJA until the aggrieved party has exhausted internal remedies.[4] Recently in *Nichol* this court said:

'Under the common law, the mere existence of an internal remedy was not, by itself, sufficient to defer access to judicial review until the remedy had been exhausted. Judicial review would in general only be deferred where the relevant statutory or contractual provision, properly construed, required that the internal remedies first be exhausted. However, as is pointed out by Iain Currie and Jonathan Klaaren, "by imposing a strict duty to exhaust domestic remedies, [PAJA] has considerably reformed the common law". It is now compulsory for the aggrieved party in all cases to exhaust the relevant internal remedies unless exempted from doing so by way of a successful application under s 7 (2) (c). Moreover, the person seeking exemption must satisfy the court of two matters: first, that there are exceptional circumstances, and second, that it is in the interest of justice that the exemption be given.'[5]

[13] The issue of exemption from exhausting an internal remedy does not arise in the present case simply because no application therefor was made to the reviewing court. As a result it is not necessary to consider whether the requirements for an exemption have been met. The validity of s 7(2) was not challenged in these proceedings and therefore I proceed on the assumption that it is consistent with the Constitution. The question for consideration is whether s 62 of the Systems Act affords the applicants an internal remedy contemplated in s 7(2) of PAJA. The answer to this question lies in the interpretation of s 62.

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[4] *Nichol & another v Registrar of Pension Funds & others* 2008 (1) SA 383 (SCA).
[5] Id para 15.

[14] Section 62 of the Systems Act provides:

‘(1) A person whose rights are affected by a decision taken by a political structure, political office bearer, councillor or staff member of a municipality in terms of a power or duty delegated or sub-delegated by a delegating authority to the political structure, political office bearer, councillor or staff member, may appeal against that decision by giving written notice of the appeal and reasons to the municipal manager within 21 days of the date of the notification of the decision.

(2) The municipal manager must promptly submit the appeal to the appropriate appeal authority mentioned in subsection (4).

(3) The appeal authority must consider the appeal, and confirm, vary or revoke the decision, but no such variation or revocation of a decision may detract from any rights that may have accrued as a result of the decision.

(4) When the appeal is against a decision taken by –

(a) a staff member other than the municipal manager, the municipal manager is the appeal authority;

(b) the municipal manager, the executive committee or executive mayor is the appeal authority, or, if the municipality does not have an executive committee or executive mayor, the council of the municipality is the appeal authority; or

(c) a political structure or political office bearer, or a councillor –

(i) the municipal council is the appeal authority where the council comprises less than 15 councillors; or

(ii) a committee of councillors who were not involved in the decision and appointed by the municipal council for this purpose is the appeal authority where the council comprises more than 14 councillors.

(5) An appeal authority must commence with an appeal within six weeks and decide the appeal within a reasonable period.

(6) The provisions of this section do not detract from any appropriate appeal procedure provided for in any other applicable law.’

[15] Section 62(1) lays down two threshold requirements. The first is that the decision appealed against must have affected the rights of the appellant. The second is that such decision ought to have been reached in the exercise of a delegated power. In this matter it is common cause that

the building plans concerned were approved in terms of a delegated power. What needs to be considered is whether the present applicants satisfied the first requirement. If not, it cannot be held that there was an internal remedy which they ought to have exhausted before approaching the high court.

[16] On the construction of s 62(1) it must be shown that the decision to approve the plans itself affected the rights of the applicants. Since the issue in the present case was raised as a point *in limine*, I accept that a mere allegation of this fact will suffice. Absent such allegation, however, the finding that the approval affected the rights of the applicants cannot be made.

[17] In their papers the applicants have not alleged that the approval itself affected their rights. All that they have alleged in challenging the approval is that its subsequent execution – the erection of the building – affected their rights. Hence the complaint that the value of their properties was diminished by the building in question. If the third respondent had not erected it after obtaining approval, the applicants' sea view could not have been obliterated and there could not have been a derogation from the value of their properties. This must be borne in mind in determining whether it has been shown that the approval had affected the applicants' rights.

[18] As it was the municipality which raised the issue that the applicants were obliged to invoke the remedy in s 62 before approaching the court, it is necessary to look for the essential allegation in its answering affidavit. It does not make the allegation that the decision affected the applicants' rights. On the contrary, Mr Craig Thomas Rolfe –

the municipality's Principal Plans Examiner – states:

'41. As stated before, as [the municipality's] decision to approve [third respondent's] application did not materially and adversely affect the Applicants' rights, they had no right to be heard either in terms of the Act, or the Constitution, before the building plans were approved.'

And later he repeats the same allegation:

45.2 Applicants were not given notice as [the municipality] was satisfied that its decision to approve [third respondent's] application would not materially and adversely affect any of the Applicants' rights.'

[19] The above allegation by the municipality is correct in the light of the finding made in *Walele v The City of Cape Town & others.*[6] In that case the Constitutional Court considered whether objectors such as the present applicants were entitled to a pre-approval hearing, in the context of s 3 of PAJA.[7] The Constitutional Court interpreted s 3 and said:

'On a proper construction of section 3, the applicant's claim to a hearing can only succeed if he establishes that the decision to approve the building plans materially and adversely affected his rights or legitimate expectations. The parties involved in the application for the approval were the respondents and the City. The applicant was not a party to that process nor was he entitled to be involved. The building plans concerned were drawn at the instance of the respondents who wanted to erect the four-storey block of flats on their own property. The granting of the approval could not, by itself, affect the applicant's rights.'

[20] Before us, counsel for the municipality argued that the finding in *Walele* turned closely on the interpretation of PAJA. That finding, said counsel, does not mean that the unlawful approval of building plans did not give a neighbour affected thereby a right of appeal in terms of s 62 of the Systems Act.

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[6] 2008 (6) SA 129 (CC); [2008] ZACC 11.

[7] Section 3(1) of PAJA provides: 'Administrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair.'

[21] Although the finding in *Walele* was based on the interpretation of s 3 of PAJA, there are similarities between that section and s 62(1) in so far as the requirements for invoking each section are concerned. The language used in these sections is similar and the requirement common to both sections is that the challenged decision must affect the rights of the aggrieved party. Since in this case the impugned decision is the approval of the third respondent's building plans, it must be shown in the manner mentioned above that this decision has affected the applicants' rights.

[22] There can be no doubt that on the authority in *Walele*, it cannot be said that the impugned approval affected the applicants' rights for purposes of founding a claim for a pre-decision hearing. The question that arises, therefore, is whether it can be said that the same decision affects their rights for purposes of an appeal in terms of s 62(1). To hold that it does will introduce an illogicality. In my view, if the decision concerned does not affect the applicants' rights for purposes of a hearing, it must equally not affect their rights for purposes of an appeal. It is difficult – if not impossible – to imagine a situation where an approval of building plans does not affect the objectors' rights for purposes of a pre-decision hearing while at the same time it affects their rights for purposes of an appeal.

[23] Moreover, s 62(1) requires that the person whose rights are affected by the decision be notified of it so that he or she can note an appeal within 21 days from the date of notification. Notification must follow a decision which affects the aggrieved party's rights. In this matter notification was not given presumably because the municipality held the view that the approval did not affect the applicants' rights. This view is

inconsistent with the requirement of s 62(1). This is a further indication that s 62 was not designed to apply to cases of objectors to the approval of building plans, whose objection is ordinarily raised against the execution of the plans and not the approval itself. Therefore, I conclude that s 62 does not apply to cases such as the present.

[24] But even if the section applied to such cases, the present application ought not to have been dismissed because one of the threshold requirements was not met. As mentioned earlier, it was not alleged that the decision which is challenged by the applicants affected their rights. This makes it unnecessary to interpret the other parts of s 62 and as a result I decline the invitation by the parties that we should construe the whole section. It is also not necessary to consider whether the reasons given by the Full Court for its decision are correct or not. Suffice it to say it reached the correct decision. It follows that the appeal must fail.

[25] Lewis JA rejects the construction of s 62(1) which ascribes to it the meaning that before a party can invoke the section, it must be shown that the decision appealed against has affected the rights of the appellant (para 33) and concludes that a successful appeal under s 62(1) 'would necessarily entail the outcome that the decision would be revoked or varied – contrary to s 62(3)' (para 34). I disagree. Section 62(3) does not insulate the decision forming the subject matter of the appeal, itself, from variation or even revocation. What is protected by the subsection is the rights which have accrued as a result of such decision. The subsection stipulates that no variation or revocation of the decision may detract from accrued rights. In other words, once the appeal authority contemplates revoking or varying the decision appealed against, s 62(3) comes in to play and such revocation or variation ought not to affect the rights which

accrued as a result of the impugned decision. For example, in this case the revocation or variation of the approval granted would not affect the third respondent's right to build. Whether this could constitute appropriate relief for the applicants is a different matter, and the answer thereto lies in what is meant by an internal remedy contemplated in s 7(2) of PAJA.

[26] In the result the appeal is dismissed with costs, including costs occasioned by the employment of two counsel.

C N JAFTA
JUDGE OF APPEAL

LEWIS JA (CAMERON JA and COMBRINCK JA CONCURRING)

[27] I have had the benefit of reading the judgment of my colleague Jafta and agree with him that the appeal should be dismissed. However, I write separately because I consider that there is a narrower and more direct path to that outcome, based on a construction of what seems to me to be the clear meaning of s 62 of the Systems Act. In my view, that provision cannot be invoked at all by neighbours, such as the applicants in this case, who have not been party to a municipal planning permission application.

[28] The essential dispute between the parties is whether s 62 of the Systems Act confers on the applicants a viable right of appeal. I shall refer to the parties and the legislation in the same way as Jafta JA has

done. The applicants argue that, once the municipality approved the neighbour's plans to which they object, their only right of appeal lay to a review board constituted under s 9 of the National Building Regulations and Building Standards Act 103 of 1977 (the NRB Act). Section 9(1) of that Act provides that a person who feels aggrieved by the refusal of a local authority to grant approval in respect of the erection of a building may appeal to a review board. The section is plainly inapposite to this case. The municipality contends instead that s 62 of the Systems Act afforded the applicants a right of appeal, and that, having failed to exercise it (for it is common cause that they did not), s 7(2) of PAJA blocks their right to challenge the approval in a court of law.

[29] The resolution of this question will, as the amicus ably demonstrated, and the parties agreed, have immense practical implications for local governance in this country; for, if s 62 affords a right of appeal – any right of appeal – to those aggrieved by municipal planning decisions, their exercise of those rights must be accommodated before the decision can be implemented.

[30] But s 62 clearly gives no general right of appeal to those who object to municipal planning permissions and decisions. As I see it, s 62 (1) gives only one whose rights are directly affected by a decision, taken by a person delegated to make such decision, a right to appeal against that decision within the strictures of s 62. That raises the question as to who has a right directly affected by the decision. Although on an initial reading it might appear that anyone who is in some way affected by a decision to grant permission to build (a neighbour, say, who believes that his or her property rights are in some way diminished) may appeal, that cannot be. How can a person not party to the application procedure itself

appeal against the decision that results? And the Constitutional Court held in *Walele*, to which Jafta JA refers (para 19 of his judgment), that neighbours in the position of the applicants (although they may later challenge the lawfulness and regularity of the permission accorded) have no entitlement to be party to the approval process itself.

[31] This interpretation, that objecting neighbours and others have no right of appeal at all under s 62, is borne out by s 62(3):

'The appeal authority must consider the appeal, and confirm, vary or revoke the decision, *but no such variation or revocation of a decision may detract from any rights that may have accrued as a result of the decision*' (my emphasis).

It seems plain that the purpose of s 62 as a whole is to give to the dissatisfied applicant for permission – and to no one else – an opportunity for the matter to be reheard by a higher authority within the municipality. It is only the aggrieved applicant, who has failed to secure the permission sought in his or her application, who is afforded a right of appeal under s 62. For if it were otherwise any appeal would be pointless: only those affected by the grant of permission, or a decision favourable to an applicant, would wish to apply and they could not succeed if the appeal resulted in a revocation or variation of a right that has accrued to the applicant.

[32] Section 62 thus grants no viable appeal at all to a person not party to the planning permission application (or, for that matter, by any other section in the Systems Act). It makes no difference, in my view, whether the objection is to the decision itself, or to the implementation of the decision – for instance by starting building works – or to the completion of that process. It is the decision made by the municipality or its delegee

in the case of the application itself that may be appealed against – but only if the outcome of the appeal does not detract from the rights of the successful applicant.

[33] For this reason, I find myself regretfully unable to accept the construction of the section suggested by Jafta JA (paras 17 and 23). He states that the applicants had not objected to the decision itself but to the execution of the building works pursuant to it. The fact that the third respondent had actually not only started, but also completed, the building work for which permission was granted is not, in my respectful view, relevant. The third respondent acquired a right from the municipality and it is of no consequence to the question whether objecting neighbours and others had a right of appeal under s 62 that she acted on it.

[34] A successful appeal against the grant of planning permission by the municipality under s 62(1) would necessarily entail the outcome that the decision would be revoked or varied – contrary to s 62(3). The fact that the beneficiary of the decision acted on the decision by building, and the extent of the building, thus cannot be relevant in determining whether the Systems Act affords the applicants any right to appeal. It therefore does not matter whether in claiming relief the applicants stated their complaint to be the building works, pursuant to permission, or the permission itself.

[35] Thus in my view, the applicants – and neighbours in their position who are not party to an application or an objection to the grant of permission to act by a municipality – are not afforded an appeal under s 62. The very wording of the section precludes it. If they are entitled to relief of any kind outside the NBR Act or the Systems Act, it can only be a review under PAJA. And since s 62 does not afford them a viable

appeal there is no internal remedy that can first be exhausted before applying for a review of the decision.

[36] This approach differs from that in the judgment of Jafta JA in that it essentially accords with the approach of the full court which Jafta JA finds unnecessary to consider. In my view, the entire reasoning and approach of the full court should be affirmed.[8]

[37] For these reasons I agree with Jafta JA that the appeal should be dismissed with costs including those consequent on the employment of two counsel.

C H LEWIS
JUDGE OF APPEAL

[8] Counsel for the municipality referred this court to a decision of Olivier AJ in the Cape High Court, *Syntell (Pty) Ltd v The City of Cape Town & another* (unreported judgment, case 17780/2007, handed down on 13 March 2008), in which that court sought to distinguish the case before it from that now before us, having regard to the judgment of the full court in this matter. The issue before that court was the right of an unsuccessful tenderer to appeal in terms of s 62 of the Systems Act. Since no final tender had been awarded, the court held that an appeal under s 62 was not precluded by the decision of the full court. The question of a tenderer's right to appeal as it emerged in that case is not before us.

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