THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

REPORTABLE
Case No: 154/13

In the matter between:

BRASHVILLE PROPERTIES 51 (PTY) LTD **APPELLANT**

and

JEAN-PHILIPPE COLMANT **FIRST RESPONDENT**

ANNE GILLIAN STONE **SECOND RESPONDENT**

LA BOURGOGNE FARM (PTY) LTD **THIRD RESPONDENT**

Neutral citation: *Brashville Properties v Colmant* (154/13) [2014] ZASCA 61 (6 May 2014)

Coram: Mpati P, Maya, Willis, Saldulker JJA and Mathopo AJA

Heard: 24 February 2014

Delivered: 6 May 2014

Summary: Administrative law – Review application ─ whether respondents had locus standi to challenge a local authority's decision to approve building plans ─ whether that approval complied with s 7(1)(a) of the Building Standards Act 103 of 1977 and ss 17, 39 and 40 of the Land Use Planning Ordinance 15 of 1985 (LUPO).

ORDER

On appeal from: Western Cape High Court, Cape Town (Yekiso J sitting as court of first instance):

The appeal is dismissed with costs which shall include the costs of two counsel where employed.

JUDGMENT

Mathopo AJA (Mpati P, Maya, Willis and Saldulker JJA concurring):

[1] This appeal concerns three administrative decisions of the Municipality of Stellenbosch (the municipality) which the Western Cape High Court (Yekiso J) set aside upon application by the respondent. These decisions relate to (a) the approval of the appellant's building plans on 12 January 2010 (the first decision); (b) the decision of the municipality to instruct the appellant to apply for the determination of a contravention levy during June 2011(the second decision); and (c) the decision taken by the municipality on 20 July 2011 to re-approve the appellant's building plans following payment of the contravention levy by the appellant (the third decision). The appeal is also directed against the decision of the court below to extend the period within which the review proceedings in connection with the first decision were instituted, as well as against the court's refusal to refer the matter to trial for the hearing of oral evidence in terms of s 6(5)(*g*) of the Uniform Rules of Court. The appeal is with the leave of that court.

Background

[2] The Appellant is the owner of Farm 1353, situated in Franschhoek, within the municipality of Stellenbosch. The farm was sold to the appellant by its previous

owner, Trade Quick 109 (Pty) Ltd, on 12 March 2007. Transfer was registered on 29 October 2007. The appellant conducts its principal business of a guest house from the farm which is situated in an area characterised by agricultural smallholdings with the prevailing character of the surrounding area being rural agricultural, interspersed with tourist accommodation and other facilities such as wine making and tasting. Condition 2 of the deed of transfer prohibits the erection of buildings on the land other than one dwelling house with such outbuildings as are ordinarily required 'except with the approval of the controlling authority as defined in Act 21 of 1940' (Advertising on Roads and Ribbons Development Act).

[3] On 13 June 2007 Trade Quick applied to the municipality of Stellenbosch for a rezoning of the farm so as to 'permit the extension of the existing guesthouse of 350 square meters by 784 square meters to a new area of 1134 square meters'. The municipality advertised the application in April 2008 in terms of s 17 of the Land Use Planning Ordinance 15 of 1985 (LUPO). By then the appellant had become owner of the farm. There were objections to the application. A report generated by a committee of the municipality indicated that the latter had no authority to approve rezoning applications. As a result, the application was referred to the Provincial Department of Environment and Planning (now the Department of Environmental Affairs and Development Planning, the third respondent in the court below). The municipality nevertheless recommended the application for approval. The applicant had given the assurance that the extension sought was only in respect of the existing guesthouse 'with no agricultural land being taken out of production'. The application was approved by the relevant Member of the Executive Council of the Western Cape Provincial Government (MEC) on 28 April 2009, subject to certain conditions, of which two read:

'2.1 the approval applies only to the rezoning in question, as indicated on the proposed site development plan attached, and shall not be construed as authority to depart from any other legal prescriptions or requirements.

2.11 . . . all final building plans be submitted to the Franschhoek Aesthetic Committee [FAC], or any similar body nominated by Council, for recommendation before submission to council for approval.'

[4] On 7 December 2009 the appellant applied to the municipality for an amendment to the MEC's conditions of approval in terms of s 42(3)*(a)* of LUPO so as 'to amend the Site Development Plan (SDP) previously approved to allow for the expansion of the guesthouse on the property'. The appellant now sought to erect six self-standing structures which would give it ten additional suites. The revised SDP thus differed entirely from the original one. On the following day the appellant commenced clearing the relevant site on the farm in preparation for construction works in accordance with the revised SDP. On 18 December 2009 the municipality purported to amend the MEC's conditions, the effect of which was the substitution of the revised SDP for the original. Section 42(3) of LUPO makes it clear that the conditions could only be amended by the MEC, who had imposed them. It was also a condition of the title deed that no development should take place within the 1:50 year flood line. This condition was not adhered to because almost half of the appellant's proposed development, namely the six new structures it intends to erect, falls below the flood line. The building control officer and the Land Building Development officer were not aware that a substantial portion of the development fell below the 1:50 year flood line. The appellant did not indicate in the application the location of the flood line. It may be mentioned that Mr Mons, the appellant's consultant, had earlier, in November 2009, made a presentation to officials of the Provincial Department in respect of drawings and plans for the proposed new development. In a letter dated 23 November 2009 the Head of the Department of Environmental Affairs indicated that the proposed amendment to the SDP was acceptable subject to the conditions stipulated in the approval letter of 28 April 2009.

[5] The appellant had by then already commenced building operations. The municipality was alerted to this by a neighbouring wine farmer (1st respondent as well as 2nd respondent's live-in partner), who requested that a building inspector be sent to inspect the building operations. The inspector attended the site and on 18 December 2009 an 'illegal building/cease works order' was served on the appellant. The notice instructed the appellant to submit building plans for approval within 30 days and to cease the building operations. On 4 January 2010 and after some skirmishes between it and the respondents the appellant, by email addressed to the Director: Planning and Development Services of the municipality, undertook to stop operations until the plans had been approved.

[6] The plans, which were submitted on 6 January 2010, were approved on 12 January 2010, this without their prior submission to the FAC, or any other body nominated by the municipality. It appears, however, that at that time the FAC no longer existed, but another committee, the Franschhoek Planning Advisory Committee (PAC), had been set up and was in existence. Its function, inter alia, is to advise Council on the aesthetic, functional (including water and energy utilization), architectural, cultural and historical aspects of any new development or contemplated development and with respect to any proposed alterations or additions to existing buildings, structures and elements of the built environment within any and all declared heritage areas or any other development that the Director: Planning and Environment may refer to such a Committee. The plans and the application for amendment of the conditions and SDP were never advertised for objections. Mr Eigelaar, the project manager of the appellant who deposed to the opposing affidavit, stated that Mr Mupariwa, Director: Planning Services, the relevant official of the municipality, did not regard the proposed amendment to the SDP as sufficiently material to warrant notice thereof being advertised or served on other land owners in the area. However, on 24 January 2010, after further skirmishes relating to the authority of the municipality to amend the conditions set by the

MEC, the appellant requested Mupariwa to revoke his decision of 18 December 2009 in terms of which he had amended the conditions imposed by the MEC on 28 April 2009. Mupariwa revoked his decision on 1 March 2010. A fresh application was then prepared for submission to the MEC. This application, which was for the rezoning of the property in order to bring it in line with the revised SDP, was submitted to the municipality on 17 February 2010 for its consideration and recommendation to the MEC. The application was advertised and objections were received from interested parties. The municipality considered the application on 3 August 2010 and thereafter transmitted it to the provincial Department concerned with its recommendation for approval. On 25 March 2011, Mr Benjamin the Chief Land Use Management Regulator – Region 1 advised the municipality by letter that the competent authority for the administration of LUPO had resolved to refuse both the applications for rezoning and the amendment to the relevant condition of approval. The last paragraph of the letter reads:

'Your municipality should instruct the applicant to apply for a contravention levy (as per provincial circular 4/2008) in terms of section 40 of the (LUPO).'

[7] In answer to an enquiry from the municipality as to whether the reference in his letter to a contravention levy was a formal instruction, Benjamin responded on 25 May 2011 that it was a request. On 24 June 2011 the municipality wrote to Mons instructing him to apply for a contravention levy. That was duly done, with Mons making a suggestion as to the amount of the levy. The municipality accepted the suggested amount and the levy was paid accordingly, after the municipality's condition that it be indemnified against any flood damage to the appellant's property was satisfied. On 20 July 2011 the municipality approved or reinstated the appellant's building plans and advised that the appellant may continue with construction. The motion proceedings, by the respondents, that led to the orders now appealed against being granted were instituted on 25 August 2011, the day on which building construction resumed after it had been suspended at the instance of the respondents.

Locus standi

[8] Although the locus standi of the respondents to launch the proceedings was admitted in the answering affidavit, it was nevertheless alleged that they were not adversely affected by any of the activities of the appellant, despite being in close proximity or adjacent to the appellant's farm. Properly construed, the underlying dispute is between neighbours. The respondents contend that the erection of the buildings will devalue their own properties. They have been joined in their opposition to the development on the appellant's farm by the Franschhoek Valley Conservation Trust (the Trust), which contends that the construction is unlawful because it epitomises the incremental erosion of the rural and agrarian atmosphere of the valley.

[9] The appellant's objection to the respondents' standing or locus standi was premised first, on the fact that the respondents had to demonstrate that each of the decisions taken by the municipality constituted administrative action as defined in PAJA. Secondly, the appellant disputed that the decisions materially and adversely affected the respondents' rights or legitimate expectations.

[10] The respondents contended that this case is not merely about safeguarding the view each of them enjoys from his or her property, as argued by the appellant, but rather concerns the loss of the sense of place that the buildings will cause; the legality of the decision taken by the municipality and the protection of the rural agrarian atmosphere of Franschhoek Valley. The respondents contended further that their farms are in close proximity to the unlawful buildings and associated building activities. They have therefore been adversely affected because first, the *audi alteram partem* principle was not observed in relation to the second decision despite their objection to it, given their geographic situation and their intimate involvement in the events which preceded and gave rise to the decisions. Secondly, they have an

intrinsic interest in lawful administrative action and in particular a direct and substantial interest in the lawful application of the planning and building laws which govern the area in which they live, conduct business and own properties. Their interest in the legality of the decisions is that the decisions have the effect of subverting the zoning scheme applicable in the area in which they reside and carry on business. These decisions in effect achieved a rezoning of the appellant's property when no rezoning had been granted in terms of s 16 of LUPO.[1] There is no suggestion that the municipality was in any way authorised to grant or refuse the appellant's application for rezoning of its land. The rezoning also occurred contrary to their views and comments as well as those of the Franschhoek Rate Payers Association and without the input of the PAC.

[11] The respondents further contended that when it approved the building plans the municipality was exercising a public power and its decision therefore constituted administrative action. For this contention they relied on the judgment of this Court in *Grey's Marine Hout Bay (Pty) Ltd & others v Minister of Public Works & others* 2005 (6) SA 313 (SCA) para 21, where the court, dealing with the definition of administrative action, held that -

'Administrative action means any decision of an administrative nature made . . . under an empowering provision [and] taken . . . by an organ of State, when exercising a power in terms of the Constitution or a provincial constitution, or exercising a public power or performing a public function in terms of any legislation, or [taken by] a natural or juristic person, other than an organ of State, when exercising a public power or performing a public function in terms of an empowering provision, which adversely affects the rights of any person and which has a direct, external legal effect. . . .'

[12] There is no doubt that the conduct of the municipality amounts to administrative action and that its decisions affect the legal rights of the respondents.

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[1] The relevant part of s 16 provides:
'**16. Rezoning on application of owner of land.—**(1) Either the Administrator or, if authorized thereto by the provisions of a structure plan, a council may grant or refuse an application by an owner of land for the rezoning thereof.'

When approving building plans, a local authority or its delegate exercises a public power constituting administrative action. See *Walele v City of Cape Town & others* 2008 (6) SA 129 (CC) para 27.

[13] The respondents' interest in ensuring compliance with the zoning scheme is evident in the fact that they own properties in an area governed by the zoning scheme, which are in immediate or close proximity to the appellant's property. In *JDJ Properties CC v Umgeni Local Municipality* 2013 (2) SA 395 (SCA), this court reviewed authorities in this connection by reference to the judgments in *BEF (Pty) Ltd v Cape Town Municipality* 1983 (2) SA 387 (C) and *PS Booksellers (Pty) Ltd v Harrison* 2008 (3) SA 633 (C). It held (at para 34) that the interest of the property owners in the enforcement of a scheme clothed them with *locus standi*. This was because, having regard their close proximity to the appellant's development, they had an intrinsic interest in lawful administrative action and in particular a substantial interest in the lawful application of the planning and building plans which govern the area in which they live and conduct business. Given their immediate or close proximity to the appellant's property, the respondents in the present case clearly have standing to challenge the decisions of the municipality.[2]

The first decision

[14] The validity of the approval of the appellant's building plans on 12 January 2010 was challenged on the basis that there was no compliance with condition 2.11 of the MEC's record of decision dated 28 April 2009, as referred to above. The submission made is that in terms of the peremptory conditions to which the MEC's decision was subject, the appellant had to submit the final building plans to the FAC or a similar body, in this case, the PAC.

[2] See *Paola v Jeeva NO & others* 2004 (1) SA 396 (SCA) para 23.

[15] It was submitted, on behalf of the respondents, that the decision of the municipality to approve the building plans without the input of the PAC was contrary to the MEC's decision. It was argued that Mons, who had been intimately involved in the drafting and submission of the appellant's application for rezoning, had conceded that for compliance with condition 2.11 of the MEC's conditions of approval the plans had to be submitted to the PAC. Mr Daniels, an official of the municipality who deposed to a supporting affidavit, also stated that the building plans were 'inadvertently not referred to the PAC' despite this being an express condition of the rezoning application.

[16] The approval of the building plans in the absence of any recommendation, views, or comments of the respondents and the PAC meant that the necessary jurisdictional fact therefor was lacking. The municipality failed to ensure that the original conditions, *viz*, the submission of the plans to the PAC, were fulfilled. This was necessary to comply with condition 2.11 and the *audi alteram partem* principle.

[17] What the municipality failed to consider when approving the building plans was that its decision was susceptible to attack due to a lack of public participation and compliance with s 7(1)(*a*) of the Building Standards Act, which requires that building plans comply with the requirements of the Act and any other applicable law. There is no evidence that the provisions of ss 17[3] and 39[4] of LUPO were

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[3] **17. Application for rezoning.**—(1) An owner of land may apply in writing to the town clerk or secretary concerned, as the case may be, for a rezoning of the land under section 16.
(2) The said town clerk or secretary shall—
(a) cause such application to be advertised;
(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;
(d) where his council may act under section 16 (1)—

[4] **39. Compliance with provisions of zoning scheme and of conditions of subdivision.**—(1) Every local authority shall comply and enforce compliance with—
(a) the provisions of this Ordinance or, in so far as they may apply in terms of this Ordinance, the provisions of the Township Ordinance, 1934 (Ordinance 33 of 1934);
(b) . . .
(c) . . .
(2) No person shall—

considered before the decision to approve was taken. Once the decision to amend the SDP was rescinded, the approval of the plans could not stand because it depended for its validity on the rezoning achieved through a purported amendment which was clearly unlawful.

[18] The decision to approve the building plans was not authorised by the relevant empowering provisions of LUPO and was thus reviewable under s 6(2)(*a*)(i) of PAJA, which authorises any person to institute proceedings in a court or a tribunal for the judicial review of an administrative action if the Administrator who took it was not authorised to do so by the empowering provisions.

[19] I fully agree with the reasoning of the court below that condition 2.11 was peremptory and, consequently, the municipality was in the circumstances obliged to comply with it. The municipality did not do so. It follows that its decision to approve the appellant's building plans on 12 January 2010 falls to be set aside.

The second decision

[20] The complaint relating to the second decision was triggered by a letter from the Department of Environmental Affairs and Development Planning in the Western Cape (Department) dated 25 March 2011. In terms of this letter the municipality was advised to instruct the appellant to apply for a contravention levy. This was after it had commenced building without approved plans.

[21] The objection by the respondents is that the Department had no authority to instruct the municipality to determine the imposition of a contravention levy.

(a) contravene or fail to comply with—
The provisions incorporated in a zoning scheme in terms of this Ordinance, or
Conditions imposed in terms of this Ordinance or in terms of the Townships Ordinance, 1934,except in accordance with the intention of a plan for a building as approved and to the extent that such plan has been implemented, or
(b) utilise any land for a purpose or in a manner other than that intended by a plan for a building as approved and to the extent that such plan has been implemented.

What it was required to do was either to refuse or grant the application and advise the local authority accordingly. The case advanced for the respondents was that the decision of the municipality was largely influenced by the Department and that, consequently, it did not exercise the discretion accorded to it in terms of s 40(1) of LUPO, the relevant part of which reads:

'(1)*(a)* If a building or any part thereof was erected in contravention of section 39(2)*(a)*, the local authority shall serve an instruction (hereinafter referred to as the instruction) on the owner concerned─

(i) to rectify such contravention before a date specified in the instruction, being not more than six months after the date of the instruction or, at the option of the said council,

(ii) to apply for the determination of a contravention levy, or in terms of section 15 for a departure, before a date specified in the instruction, being not more than thirty days after the date of the instruction.'

[22] In his affidavit Daniels conceded that because of the stance adopted by Davidson, the decision to instruct the appellant to apply for a contravention levy was vulnerable to attack. In my view, the concession was properly made. In his brief confirmatory affidavit Davidson confirmed the allegations made in the opposing affidavit which relate to him. In a supplementary affidavit Mr Truter (attorney for the respondents) dealt with the import of the emails as additional evidence that the municipality allowed itself to be dictated to by the Department. A reading of these emails, notably one from April to Davidson dated 14 June 2011, confirms this view. This email reads as follows:

'Implications of aforementioned response from province;

1. From the provincial response it is clear that we must now instruct the applicant to apply for a contravention levy in line with Circular 4/2008 relating to the determination of a contravention levy (20% of the actual building cost).

2. No mention is made in section 40 of LUPO of any further advertising.' (My emphasis.)

[23] The gist of this email, together with other letters, demonstrates that the will of the Department was brought to bear on the municipality. In terms of LUPO the

power to impose and deal with rectification lies squarely within the discretion of the municipality. Such power should neither be exercised with any influence from a superior body such as the Department, nor should the superior body dictate how the discretion is to be exercised. By simply following the instruction of the Department, the officials of the municipality did not apply their minds in deciding whether or not payment of the contravention levy was appropriate in the circumstances. There is no evidence that the instruction of the Department was motivated. Even if there was motivation, it simply was not empowered to tell the municipality what to do. Significantly Daniels, Davidson and Mr Pedro April, the municipality's Town Planner (April) elected not to deal with these allegations.

[24] We were urged to accept the statement by Daniels, that Davidson 'is not able to say that without such instruction he would have come to the same conclusion', as sufficient evidence that the municipality had not applied its mind properly to the issue when it instructed the appellant to apply for a contravention levy. Reference was also made to what was stated by Ms Duze, the Manager: Land Use Management of Stellenbosch Municipality, April and Daniels in their affidavits as additional evidence that the letter from the Department impacted on the discretion of the municipality.

[25] I am not persuaded by the contention of the appellant that the municipality's officials executed their free will and took a decision based on practical considerations because an instruction to demolish the structures that had already been under construction would have been too draconian. This argument loses sight of the fact that the provisions of LUPO were not complied with. In my view, once it had been shown, which it has been, that the officials were acting under instructions, it is difficult to fathom how it can be contended that they applied their minds to the legal alternatives prescribed in s 40 of LUPO. On the contrary, the evidence demonstrates that they were unlawfully dictated to by the

Department. The second decision falls to be set aside in terms of s 6(2)(*e)*(iv) of PAJA.

The third decision

[26] The issue relating to the third decision can be disposed of shortly. Both the appellant and the municipality conceded that if the decision regarding the contravention levy is set aside, then the approval of the building plans in July 2011 must also be set aside. The concession was properly made because the re-approved building plans were the same as the original plans which were approved without proper procedures being followed.

The delay in applying for review

[27] The review application in the court below was commenced more than 180 days after the first decision was taken by the municipality. In the founding papers the respondents explained in detail why they did not seek to review the administrative decisions taken on 12 January 2010 (approval of the building plans) earlier. It has been conceded that the review in respect of the second and third decisions was timeously instituted. I agree with counsel for the respondent that between 23 January 2010 and 20 July 2011 the appellant did not seek to proceed with the construction in accordance with the original building plans, and so there was no necessity to seek an order setting aside the approval of those plans. The appellant must fail on this issue as well.

The application to refer the matter to trial or evidence

[28] In the court below the appellant sought an order for the referral of the matter to trial for the hearing of oral evidence. It was submitted that the court below erred in deciding that the issues were capable of resolution without the hearing of oral evidence, particularly the evidence of Davidson, who played a role in relation to the second decision; Mupariwa, who approved the SDP on 18

December 2000 and rescinded his decision on 7 March 2011, and Mons and Mr Henk Stutterheim. This argument was rightly rejected by the court below. The evidence of the municipality relating to the contravention levy was not seriously challenged and it was not demonstrated in what respects the refusal of the order sought prejudiced the appellant.

[29] In the result the following order is made:

The appeal is dismissed with costs which shall include the costs of two counsel where employed.

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R S Mathopo

Acting Judge of Appeal

Appearances

For the Appellant:	J A van der Westhuizen SC
	Instructed by:
	Du Plessis Hofmeyr Malan Inc
	c/o Van der Spuy & Partners, Cape Town
	Honey Attorneys, Bloemfontein
For the Respondents:	M D Edmunds (with him C S Bosch)
	Instructed by:
	Werksmans Attorneys, Cape Town
	Phatshoane Henney Attorneys, Bloemfontein