The right to a view

VERSUS THE RIGHT TO BE HEARD

The Municipality of the City of Cape Town v Reader and Others (719/2007) ZASCA 130 (14 November 2008)

When first confronted by the facts of the case in *The Municipality of the City of Cape Town v Reader and Others*, one is tempted to think that it is yet another judgment dealing with the notorious question of whether property owners have a 'right to a view'. This is especially true as the facts bear a striking similarity to earlier judgments that have dealt with this issue. This judgment, however, stops short of deciding whether the applicants are in fact entitled to 'a view'. It deals rather with the question of whether the appeal procedures set out in section 62 of the Municipal Systems Act afford interested third parties (very often neighbours) affected by the planning decisions of a municipality an adequate platform from which to appeal those decisions.

Section 62 of the Systems Act provides:

> A person whose rights are affected by a decision taken by a political structure … 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 … or staff member, may appeal against the decision by giving written notice of the appeal to the municipal manager within 21 days of the date of the notification of the decision.

Section 62 of the Systems Act becomes particularly important in the context of section 7 of the Promotion of Access to Justice Act (PAJA), which prescribes that "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".

In this case, the Court had to consider whether the applicants were obliged to use section 62 before approaching the courts for assistance.

Facts

The respondents in this case, Mrs Marina Reader and Mr Peploe, are both residents of the affluent suburb of Sea Point in Cape Town. On becoming aware of the increased building activity on their neighbour's (Mrs Iken's) property, they approached the municipality to ascertain whether she had obtained the necessary approval to make the alterations which were taking place.

Their concern stemmed from the fact that the alterations were fairly extensive and involved converting the single-storey house into a double-storey.

The municipality informed them that Mrs Iken had taken all the necessary steps to get her building plans approved and that those plans complied with the municipality's zoning scheme regulations. The respondents then argued that the municipality had erred in granting the approval, as the alterations to Mrs Iken's property affected them severely. They argued, amongst other objections, that the alterations obliterated their view of the sea, thus diminishing the value of their property, and compromised the privacy of their homes.

They furthermore argued that in considering the recommendation of the building officer to approve the building plans, the municipality should have considered whether the building officer was 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.

The applicants felt that they should have been given proper notification of the intended construction as well as the opportunity to make representations in respect of the application for approval of the building plans. The building, in the meantime, was completed during the application to the Cape High Court. The applicants therefore wanted the Court to set aside the decision of the municipality to approve the building plans and order the municipality to demolish the building.

The High Court

The municipality argued that the applicants had failed to make use of the appeal procedure set out in section 62 of the Systems Act. As such, the requirements of section 7 of PAJA, that all internal remedies be exhausted before a court is approached, had not been satisfied. The Court, in full agreement with the municipality, dismissed the application.

On appeal

Mrs Reader and Mr Peploe appealed this decision to a full bench of the High Court. The Court was asked to examine whether section 62 indeed provided a 'viable internal remedy' for the applicants. In doing so, the Court evaluated section 62 in its entirety. The Court found that while section 62(1) provided a mechanism for appeal, section 62(3) seemed to contradict this. It held that in terms of section 62(3), "once a right has 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."

Section 62 therefore appears to give with one hand and take away with the other: even if the initial decision was wrongly granted, any rights resulting from that decision cannot be taken away. If, for example, the right to build is granted, and that decision is later appealed and revoked, section 62(3) protects the building from being demolished. The Court therefore held that section 62(1) and (3), read together, do not appear to give aggrieved parties, such as the appellants, a 'viable internal remedy'.

Rather, the Court held, the mechanism created by these sections

> 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.

Applied to this case, the appeal mechanism of section 62 would have been of use to Mrs Iken if her application for the approval of her building plans had been denied. It did not, however,

extend a right of appeal to Mrs Reader and Mr Peploe, who were not party to the application for the approval of Mrs Iken's building plans. They therefore had no viable internal remedy which they could pursue.

As a result, held the Court, section 7 of PAJA did not apply to this case and the applicants were fully entitled to turn to the courts for assistance in setting aside the approval.

The Supreme Court of Appeal

The City of Cape Town appealed this decision to the Supreme Court of Appeal (SCA). Because the judgment was likely to have an impact not only on the City, but on local government across the board, the eThekwini Metropolitan Municipality was admitted to the proceedings as an *amicus curiae* (friend of the court).

If it were found that section 62 did, in fact, create a mechanism of appeal for third parties, municipalities would have to find ways to accommodate that right before the decision (approval of the building plans) was implemented. In practice, municipalities would have to identify and notify all parties that they thought could possibly be impacted by the decision.

This near-impossible task would be extremely time-consuming and costly to municipalities. It would also create bottlenecks in planning decisions that could negatively affect development in municipal areas.

The question before the SCA was whether section 62 of the Systems Act afforded applicants an internal remedy as contemplated by section 7(2) of PAJA.

The Court held that in order to invoke section 62, two requirements had to be met, namely:

- The decision being appealed against must have affected the rights of the appellant.
- The decision should have been reached in the exercise of a delegated power.

The Court therefore had to determine if the decision to approve Mrs Iken's building plans had affected the rights of Mrs Marina and Mr Peploe. The Court found that both Mrs Marina and Mr. Peploe had not argued that the approval of the plans to build had affected their rights. Rather, they argued that the *execution* of that right – the actual erection of the building – had affected their rights. Only once the building commenced was the value of their properties diminished. Framed negatively, if the building had not gone ahead, they would still have had their sea view and the value of their properties would not have diminished.

Photo: Graeme Williams, MediaClubSouthAfrica.com

The Court also observed that in order for the municipality to argue that the applicants should have used section 62, they should have alleged that Mrs Reader and Mr Peploe's rights had been affected. Not only did the municipality fail to allege that their rights had been affected, but it expressly denied that the applicants had any rights in respect of the decision to approve the building. In fact, the municipality's principal plans examiner stated that "they had no right to be heard either in terms of the Act or the Constitution, before the building plans were approved".

The Court therefore held that if Mrs Reader and Mr Peploe did not allege that their rights had been affected by the municipality's approval of the plans, and if the municipality had not consulted them because the approval did not involve them, then, clearly, the necessary requirements to invoke section 62(1) had not been met.

The Court furthermore relied on the judgment of the Constitutional Court in *Walele v The City of Cape Town and Others* 2008 (6) SA 129 (CC) to affirm that the applicants had no right to be heard at a preapproval hearing. The Court in *Welele* held:

> 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 … The granting of the approval could not, by itself, affect the applicant's rights.

On the strength of *Walele*, the Court held that if applicants had no right to a preapproval hearing, it followed that they had no right to an appeal hearing:

> In my view, if the decision concerned does not affect the applicant's 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 affects their rights for purposes of an appeal.

Practically, this meant that the municipality had been under no obligation to involve Mrs Reader and Mr Peploe before granting its approval for Mrs Iken's building plans.

Notification

The Court also looked at the notification requirements of section 62(1), which requires that the person whose rights are affected by a decision be notified so that he or she can note an appeal within 21 days from the date of notification. Notification can only be given to someone whose rights have been affected by the decision. The Court held that this was further proof that "section 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" [my emphasis added].

The Court held that the applicants did not allege that the decision to approve the building plans affected their rights, but rather that the execution of that decision affected them. In view of this, the Court felt it unnecessary to interpret the rest of section 62 and the extent to which it qualified as a 'viable internal remedy'. The Court was therefore reluctant to rule out section 62 as a viable remedy in contexts other than planning decisions.

The Court confirmed, however, that the applicants in this case could not have invoked section 62 and that they therefore had a right to approach the High Court. While its reasons for concluding that Mrs Reader and Mr Peploe's appeal should not have been dismissed differed from those of the High Court, the SCA did confirm its finding.

Comment

This judgment has done away with the expectation that when making planning decisions, municipalities should be obliged to engage third parties who are not party to the applications for those decisions. A different finding would have forced municipalities to engage with countless parties, be they neighbours or civic organizations, that felt in some way affected by municipal planning decisions. This would undoubtedly have clogged up the already overburdened system.

At the same time, this decision has left little room for people who find themselves in similar situations to that of Mrs Reader and Mr Peploe. For now, they have to resort to applying for a review under PAJA.

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