Editorial note: Certain information has been redacted from this judgment in compliance with the law.

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO.: 54425/2020

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

....

In the matter between:

ANDISWA PETROS APPLICANT

And

THE CITY OF TSHWANE METROPOLITAN MUNICIPALITY FIRST RESPONDENT

THANDI ZODWA MAHLANGU SECOND RESPONDENT

JUDGMENT

MANAMELA AJ

[1.] This is an opposed review application in terms of Rule 53 of the Uniform Rules, in terms of which the applicant seeks an order to review and set-aside the decision of the first respondent, with punitive costs.

[2.] The applicant is Andiswa Petros, the registered owner of […] M[…] Street, M[…] West Extension […]. The first respondent is the City of Tshwane Metropolitan, responsible for the adjudication of relaxation application of building lines. The second respondent is the registered owner of […] M[…] Street, M[…], situated adjacent to the applicant's property.

[3.] In 2019, the second respondent applied to the first respondent for relaxation of the building line, as she had plans to build a garage. The applicant when approached by the second respondent, refused to consent to the approval of the building plan and formally filed her objections to the first respondent, on more than one occasion. The second respondent commenced with the construction of the building structure, despite the said objections and the applicant never received any response from the first respondent.

[4.] The applicant argues that the first respondent did not follow section 7 of the Building Regulations Act 103 of 1977, as amended, that the *audi alterum partem* rule was not adhered to, and that the provisions of Promotion of Administrate Justice Act 3 of 2000 ("PAJA"), was not complied with, and as such the approval process by the first respondent was unlawful.

[5.] The applicant further made reference to section 6(1)[1] and 7(1)[2] of the National Building Regulations and Standard Act 103 of 1977, as well as chapter 5 and 6 of the City of Tshwane Land Use Management by-law, 2016.

[6.] The review application was issued on 15 October 2020, the prescribed period of 15 days lapsed, followed by a Rule 30A notice served on 18 January 2021, in terms of which the first respondent was called upon to comply with Rule 53 within 10 days of dispatch of a rule 30A notice.

[1] Section 6(1) A building control officer shall- (a) make recommendations to the local authority in question, regarding any plans, specifications, documents and information submitted to such local authority in accordance with section 4(3); (b) ensure that any instruction given in terms of this Act by the local authority in question be carried out; (c) inspect the erection of a building, and any activities or matters connected therewith, in respect of which approval referred to in section 4(1) was granted; (d) report to the local authority in question, regarding non-compliance with any condition on which approval referred to in section 4(1) was granted.

[2] Section 7(1) If a local authority, having considered a recommendation referred to in section 6(1)(a)- (a) is satisfied that the application in question complies with the requirements of this Act and any other applicable law, it shall grant its approval in respect thereof; [Para. (a) substituted by s. 4 (a) of Act 62 of 1989.] (b) (i) is not so satisfied; or (ii) is satisfied that the building to which the application in question relates- (aa) is to be erected in such manner or will be of such nature or appearance that- (aaa) the area in which it is to be erected will probably or in fact be disfigured thereby; (bbb) it will probably or in fact be unsightly or objectionable; (ccc) it will probably or in fact derogate from the value of adjoining or neighbouring properties; (bb) will probably or in fact be dangerous to life or property, such local authority shall refuse to grant its approval in respect thereof and give written reasons for such refusal: [Para. (b) amended by s. 4 (b) of Act 62 of 1989.] Provided that the local authority shall grant or refuse, as the case may be, its approval in respect of any application where the architectural area of the building to which the application relates is less than 500 square metres, within a period of 30 days after receipt of the application and, where the architectural area of such building is 500 square metres or larger, within a period of 60 days after receipt of the application.

[7.] The first respondent filed no opposing affidavit, despite filing its notice to oppose. The first respondent filed the records relating to the application under review on 30 March 2021 after a compel application was launched. The records consisted of the building plan checklist, notice sent to the second respondent, notices to other interested parties [including the applicant], list of receipt of notice signatures,, proof of receipt, notes from SPLUMA, file cover, letter requesting addresses, affidavit in terms of Clause 15 of Tshwane Town-Planning Scheme, 2008 (revised 2014) on ERF 41291, Notice of intention and pictures. The second respondent is opposing the application.

[8.] The applicant argues that there is no explanation why the objection filed in opposition of the application of the second respondent's application for the relaxation of the building lines was not included in the records issued by the first respondent.

[9.] In so far as the first respondent's response to the request for those records, it is apparent that the records provided constitutes the only records the first respondent considered in approving the application by the second respondent.

[10.] The court is therefore invited to make a finding as to whether the first respondent committed a reviewable error by failing to consider the objections filed by the applicant against the respondent's application for relaxation of building lines. This forms the basis of the applicant's an application for the review and setting aside of the first respondent's decision of approving the second respondent's application for relaxation of building lines, and an order seeking that the building be demolished, as stated in preceding the notice of motion. The administrative error by the first respondent would unfortunately result in dare consequences for both the applicant and the first respondent, the applicant has already demonstrated the economic loss that she would sustain on the one hand, and having considered that the structure is already build the second respondent would also suffer substantial loss. This could have been avoided, and it would be for the first respondent to remedy its own mistake. It would be in the best interest of justice if this matter is remitted back to the first respondent for remediation. It would not be justifiable to condone the error.

[11.] It is common cause that the second respondent filed application for the relaxation of building line separating the two properties. It is further commons cause that the applicant as well as other neighbours were invited to consent or object to the application, on more than one occasion. The first objection by the applicant was filed on 23 September

2019, in response to an invitation dated 29 August 2019, the second objection dated 30 October 2019, was issued in response to the invitation dated 4 October 2019 and an invitation notice issued on 1 November 2019, addressed to other interested parties, without proof of delivery to the applicant.

[12.] The records does not specify the recommendations made in terms of section 6(1) of Act 103 of 1977, and there is no evidence of consideration of any grounds listed under section 7(1). The applicant stated that the basis for the objection is that allowing relaxation of building lines would have devastating economic impact on the property of the application, that the applicant's view would be affected by the second respondent's building erected on the boundary walls, which both the applicant and the second respondent have equal right, resulting in encroachment. The applicant argues that notwithstanding the objections, no response was issued by the first respondent. The construction of the building commenced around August 2020, and despite the demand by the applicant to cease the construction continued. The applicant argues that she will suffer irreparable economic harm if the building continues.

[13.] The applicant sought a land surveyor's report from CED Land Surveyors South Africa, dated 30 August 2019, attached to her objection letter, in terms of which the land surveyor confirmed that '*The boundary wall of erf*

[…] [being […]] is encroaching on to erf […] [being […]] as per included plans and a 0.00 relaxation is recommended between the two erven".

[14.] The second respondent's opposition of the review application is based on the structure of the applicant's application for review, that the applicant wrongfully relies on the by-laws were she actually wants an interdict.

[15.] It is trite law that, the *audi alterum partem* rule is the cornerstone of our democracy, and that a party must be given an opportunity to state his or her case before a decision is made. Furthermore, any administrative process by any sphere of government has to be transparent, impartial and based on administratively and legally sound reasons.

[16.] Section 33 of the Constitution of and the Promotion of Administrative Justice Act 3 of 2000, were introduced to safeguard against unfair administrative action. Section 33(1) of the constitution provides that "Everyone has the right to administrative action that id lawful reasonable and procedurals fair".

[17.] In S v MOROKA en Andere 1969 2 SA 394 (A) 39 & D, the Appellate Division held the Rule is excluded where a decision affects the public in General. It is with doubt that, in cash the decision the approve, only

affects the Applicant hence the Rule does apply, and the municipality has failed to apply it here.

[18.] *Where a decision it to be in terms of Tshwane Town-planning scheme 2008 (revised 2014). It allows the affected neighbour to object, formally and lodged such, objection with the municipality has to deal with such objection*[3]*.*

[19.] In Ngwenya the court held that the invitation of objective was purposes. The intention on the drafted of the scheme, when made a room to invite the affected neighbours when relaxation expectation is made, created legitimate expectation on the said neighbour that, that once objection is filed, the municipality will consider same. The scheme further, does not exempt the municipality form entertaining the objective once lodged.

[20.] It is without doubt, the municipality when approving the building line relation application was performing the administrative act. It was therefore, duly bond to ensure that, such decision is arrived at just and fair manner. Botha JA held in Sachs V Minister of Justice 1934 AD, held that *"If individual liberty or property was affected, then the principle of Audi aterm must be applied".* The assurance of this important rights was advanced in the PAJA.

[21.] *"**In Joseph v City of Johannesburg 2010 (4) SA SS (cc)*** it was held *"The rights to administrative justice is fundamental to the realisation of these constitutional values, and is at the heart of our transition to a*

[3] *R.V Ngwevela 1954 of SA 123 (A)*

constitutional democracy. The scope of the Section 33 right to just administration and associated constitutional values, as given effect under PAJA must cover the field of public administration and bureaucratic in order property to instrumentalize principles of good governance. It is plain that the reach of administrative law would be unjustifiably curtailed if it did not regulate administrative decision s which would affect the enjoyment of rights, properties understood, at least for the purpose of procedural fairness".

[22.] Procedural fairness in that context would mean once the applicant is invited by scheme to object to application, and she does so, she must be advised if her objection was rejected or not, and reason be provided as such. Failure to consider the objection, compromised the applicant's right to be heard.

[23.] The first respondent does not dispute the allegations made against it, relating to the manner in which it has dealt with the application and the failure to follow administrative process when dealing with the second respondent's application.

[24.] I find that the opposition by the second respondent has no merit, in that it does not deal with the merits of this application. In her opposition the second respondent, reiterated the process leading to the submission of the application for the relaxation of building lines, but failed to indicate the authority under which she justifies the decision made by the first respondent. The second respondent is not a member of the municipality

and did not form part of the adjudication process leading to the approval of her application.

[25.] It is apparent from the process set-out under section 7 of the Building Regulations Act, requires that the first respondent should invite both the applicant and the second respondent for a hearing before making any decision, and that was not done.

[26.] The first respondent has already been ordered on 23 June 2021 to pay the wasted cost for failing to timeously file the records requested in terms of Rule 53. In so far as the punitive costs are concerned, I am of the view that, it was not necessary for the applicant's application to have been met with any opposition, as I find that such opposition was simply an abuse of process and misguided. In that regard a cost order on attorney and client scale is justifiable, against the second respondent on opposed basis and against the first respondent on unopposed basis.

ORDER

In the result, the following order is made –

1. The first respondent's decision is reviewed and set aside;
2. The second respondent is liable for the costs of this application on attorney and client scale; and the first respondent is to contribute to the costs of this application on an unopposed basis, on attorney and client scale.

P N MANAMELA
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Date of hearing: 25 August 2022

Judgment delivered: 3 April 2023

APPEARANCES:

Counsel for the Applicant: Adv. Vhutshilo Mukwevho

Attorneys for the Applicant: Shapiro Ledwaba Attorneys

First Respondent: no appearance

Attorneys for the First Respondent: Mpoyana Ledwaba Inc

Counsel for the Second Respondent:

Attorneys for the Second Respondent: Erasmus-Scheepers Inc