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G.P.-S.43575—1969-70—2,000

J 219

In the Supreme Court of South Africa
In die Hooggeregshof van Suid-Afrika

(APPELLATE Provincial Division)
(Provinsiale Afdeling)

Appeal in Civil Case
Appèl in Siviele Saak

HANIFA TAR MAHOMED ESSACK *Appellant,*

versus

PIETERMARITZBURG CITY COUNCIL & ADMINISTRATOR (Natal) *Respondent*

Appellant's Attorney / *Prokureur vir Appellant* Lovius, B.M & C.

Respondent's Attorney / *Prokureur vir Respondent* McIntyre & v.d.Post

Appellant's Advocate / *Advokaat vir Appellant* L.R. Dunn and P. Rawlins

Respondent's Advocate / *Advokaat vir Respondent* H.C.C Fatham S.C. P.M.A. Hunt

Set down for hearing on / *Op die rol geplaas vir verhoor op* 7 - 5 - 1971

4 5 7 8 9

Coram: Holmes, Jansen, Rabie, Muller JJ.A. et Corbett A.J.A

(N.P.D.)

9.45 am — 11.30 am
11.15 am — 12.45 pm
2.15 pm — 2.30 pm

Judgment 13-5-1971. per Holmes J.A.
Dismissed with Costs, including costs of two Counsel

Bills Taxed---Kosterekenings Getakseer

Date Datum	Amount Bedrag	Initials Paraaf

Writ issued
Lasbrief uitgereik

Date and initials
Datum en paraaf

IN THE SUPREME COURT OF SOUTH AFRICA

APPELLATE DIVISION

In the matter between:

HANIFA TAR MAHOMED ESSACK ..... Appellant

AND

THE MAYOR & CITY COUNCILLORS OF PIETER-MARITZBURG ..... First Respondent

AND

THE ADMINISTRATOR OF THE PROVINCE OF NATAL ..... Second Respondent

Before: Holmes, Jansen, Rabie, Muller, JJ.A., et Corbett, A.J.A.

Heard: 7 May 1971. Delivered: 17 May 1971.

J U D G M E N T

HOLMES, J.A.:

The basic question in this appeal is whether Pietermaritzburg's town planning scheme in course of preparation is invalid, as contended on various grounds.

The question arises in a dispute between the

2/... City

City Council and the owner of certain land in that city. The dispute concerns the use to which the owner is putting a building which she has erected on her land.

The appellant is the registered owner of immovable property described as "Sub 7 of Lot 56 Pietermaritz Street, of the Townlands of Pietermaritzburg, situated in the City and County of Pietermaritzburg, Province of Natal, in extent 7900 square feet". The property has a street frontage of 48½ feet.

On 14 June 1963 the appellant submitted plans to the City Engineer of Pietermaritzburg for approval of a building to be erected on the said site. The plans provided for shops and flats on the ground floor, and flats on the first and second floors. The plans were rejected as they did not conform to the Council's town planning scheme in course of preparation, in terms of which the site falls within a general business zone. Proviso (vi) to table F of clause 20 of the scheme provides that no flats shall be erected on a site, in such zone, having an area of less than

9000 square feet in extent, and a street frontage of less than 60 feet, save in certain circumstances which need not be set out here. It will be recalled that the area of the appellant's site is only 7900 square feet, and its street frontage is only 48½ feet.

The appellant responded by re-submitting the plan with the deletion of all reference to flats, and the substitution therefor of the word "offices". This plan was approved in August 1963.

Thereafter the appellant made various attempts to revert to her original plan to enable her to build flats on the first and second floors. All these attempts failed. She started to erect the building and, in 1964, let the ground floor offices as residential flats. When the Council objected to this, she appealed, unsuccessfully, to the Town Planning Appeals Board. Undeterred, in 1965 she also allowed the first and second floors to be occupied as residential flats, with bathrooms and kitchens fitted with sinks and wiring for electric stoves. When the Council threatened action over this residential user, the appellant applied to the Licensing Officer for a certificate of authority entitling her to take out a boarding and lodging housekeeper's licence in respect of the building. This prompted the Council to request a

4/... prosecution

prosecution; and in June 1966 a summons was issued charging the appellant in the Magistrates' Court with a contravention of section 67 (1) (c) of Ord. 27 of 1949, alternatively of the relevant Building By-laws of the City. The former prohibits the use of a building, erected after the date of the taking effect of a resolution to prepare a town planning scheme, for a purpose different from that for which it was erected.

Undaunted, the appellant made several unavailing attempts to persuade the Council to consent to the use of the building, or part thereof, for residential purposes. As a final resort the appellant challenged the validity of the Council's town planning scheme. Accordingly the criminal summons was withdrawn, with the consent of the Attorney General, on the footing that the Council would bring an application in the Supreme Court for (a) a declarator that the appellant's use of the property for residential purposes was a contravention of section 67 (1) (c) of the Ordinance and of its town planning scheme; and (b) an order interdicting the appellant from using the property residentially. The application was brought on 27 March, 1968.

5/... In

In the course of the proceedings in the Court of first instance, the Administrator of Natal was joined as a party; but he has taken no part in the litigation. Shearer, J., granted the aforesaid order in favour of the Council. An appeal to a Full Bench failed, save for a slight variation as to costs. (James, J.P., Harcourt and Muller, JJ.) The matter is now before this Court with the leave of the Court a quo.

In order to appreciate the argument attacking the validity of the Council's town planning scheme, it is necessary first to refer to (a) the Private Township and Town Planning Ordinance, 1934 (Natal); (b) the steps taken by the Council thereunder; (c) the repealing Town Planning Ordinance No. 27 of 1949; and (d) the steps taken by the Council thereafter.

Section 33 of the 1934 Ordinance provided as follows:

> "33. (1) Every local authority to which the provisions of this chapter shall apply may prepare and submit to the Administrator in such form as may be

> prescribed a town-planning scheme hereinafter referred to as a scheme in respect of all or any of the land situate within its area.
>
> (2) Notice of intention to prepare a scheme for submission to the Administrator shall be given by the local authority by means of an advertisement once a week for three successive weeks in the Provincial Gazette and in a newspaper circulating in the area of the local authority."

That provision empowered but did not oblige local authorities to prepare a town planning scheme. However, a proviso was added to sub-section (1) by section 10 of Ord. 17 of 1941. It read:

> "provided that in the cases of the local authority areas under the control and jurisdiction of the City Councils of Pietermaritzburg and Durban, schemes shall be prepared and completed in respect of all the land within such areas, not later than the 31st. day of December, 1948, or such later date as may be approved by the Administrator, ..."

Pursuant to the latter provision, in 1944 the Council of Pietermaritzburg and its officers began to turn their

7/... attention

attention to the preparation of a town planning scheme. To this end, during the next few years resolutions were passed and plans and schemes were drafted. But no notice was given in the Gazette or in the press of the Council's intention to prepare a scheme. Counsel for the appellant submitted that this was a fundamental breach of the provisions of section 33 (2) supra and that it was fatal to the validity of the whole town planning scheme. I shall return to this point later. From time to time the Council sought, and the Administrator granted, extensions of time, for the submission to him of a scheme, the last being for eighteen months from 30 June 1951.

In the meantime, the Town Planning Ordinance No. 27 of 1949 (Natal) had been passed. It came into effect on 1 August 1951. It repealed its predecessor, Ord. 10 of 1934. It was designed inter alia to consolidate and amend the laws relating to the preparation and carrying out of town planning schemes by local authorities. To this end it includes provisions to the following general effect -

(i) "Scheme" means either a prepared and operative scheme approved by the Administrator, or a scheme in course of preparation; section 1.

(ii) A local authority may by resolution decide to prepare a town planning scheme; section 44 (1).

(iii) Such resolution shall not take effect unless and until it is approved by the Administrator; section 44 (2). This was an innovation. Under the 1934 Ordinance the local authority required approval only of the scheme. Now it requires approval twice, namely (a) of the resolution to prepare a scheme, and thereafter (b) of the scheme. See (vi) infra.

(iv) When the resolution has taken effect i.e. to say, has been approved by the Administrator, the local authority is required to give notice thereof in the Provincial Gazette and two issues of a local newspaper. The notice shall inter alia contain a concise statement of the effect of the resolution; section 45 (1) and (2).

9/... (v) After

(v) After a resolution to prepare a scheme has taken effect, no person may inter alia use any building, erected thereafter, for a purpose different from that for which it was erected; section 67 (1) (c), as substituted by section 30 of Ord. 19 of 1959.

(vi) The resolution to prepare a scheme having been approved by the Administrator, and having "taken effect", the draft scheme must be adopted by resolution; sec. 49. Thereafter the scheme requires the approval of the Administrator. "The scheme shall be presented (to him) in such form as shall be prescribed by the regulations and shall be accompanied by such maps, plans, documents and other relevant matters as may be required in terms of the regulations". See section 50. (I pause here to observe that section 78 (1) (g) (ii) empowers the Administrator to make regulations with respect to the procedure to be followed in connection with, inter alia, the preparation of schemes and

applications for their approval. No such regulations have been made.)

(vii) When the local authority applies for the Administrator's approval of a scheme under section 50, the Administrator must, under section 51, refer the matter for the consideration and report of the Town and Regional Planning Commission, a body established by section 2 of the Ordinance.

(viii) The Commission must advertise the fact that the scheme has been submitted to THE ADMINISTRATOR for approval and that objections may be lodged with its secretary; section 51.

(ix) Every owner or occupier of property and others having a sufficient interest therein, may file objections; section 52.

(x) The Commission shall notify the objectors and the local authority of the time, date and place for the hearing of the objections; section 53 (1). The hearing shall be open to the public; section 53 (2).

(xi) Upon the conclusion of the hearing, the

11/... Commission

Commission submits its report and recommendation to the Administrator; section 53 (3).

(xii) Thereafter the Administrator may approve the scheme, with or without modification, or may refuse it. On approval and notification thereof by proclamation in the Gazette, the scheme comes into operation, and is thereafter referred to as an approved scheme; section 54.

(xiii) Section 80 (3) contains a saving clause -

> "80. (3) Any scheme which was in course of preparation in terms of the Private Townships and Town-Planning Ordinance, 1934, shall on and after the commencement of this Ordinance be deemed to be a scheme in respect of which the resolution to prepare the same was approved by the Administrator under section 44 and notice thereof published in terms of section 45 of this Ordinance."

To sum up, the Ordinance envisages the following procedure -

(a) a resolution by a local authority of its decision to prepare a town planning scheme;

12/... (b) approval

(b) approval of the resolution by the Administrator;

(c) the resultant "taking effect" of the resolution, with certain consequences, e.g. as to the use of buildings erected thereafter;

(d) publication of notice of the resolution and of the fact of its approval;

(e) thereafter, the local authority's adoption, by resolution, of the draft scheme, its submission for the approval of the Administrator, his reference of the matter to the Town and Regional Planning Commission, the latter's publication of a notice calling for objections, the public hearing thereof, and the Commission's report to the Administrator;

(f) thereafter the ultimate approval by the Administrator acting upon the advice and with the consent of the Executive Committee, whereby the scheme ceases to be in the course of preparation and at last becomes operative.

It is plain that the path from Alpha to Omega may be long and arduous, unfoldment waiting patiently upon the hand of time.

13/... After

After the foregoing Ordinance had been passed, and before it came into effect on 1 August 1951, the Council of Pietermaritzburg was in some doubt as to the status of the steps which it had already taken under the 1934 Ordinance. Correspondence ensued between the Town Clerk and the Provincial Secretary. Eventually the Council proceeded as follows -

1. On 16 August 1951 it passed the following resolution -

   "1. That the City Council of Pietermaritzburg, in terms of Section 44 of Ordinance 27 of 1949 (The Town Planning Ordinance 1949) hereby decides to prepare a Town Planning Scheme in respect of the area of land situate within the Council's jurisdiction (excluding the Water Conservation Area known as Henley of Swartkop Native Location).

   2. That the above Resolution be forwarded to the Administrator for his approval and upon such approval being granted the resolution be published in terms of Section 45 of the said Ordinance."

2. On 20 August 1951 this resolution was forwarded to the Administrator for his approval

14/... under

under section 44(2) of Ord. 27 of 1949.

3. Although the Council thought that it was not legally obliged to do so, it published a notice of its decision to prepare a scheme, in a local newspaper dated 11 October 1952, under the heading -

> "CITY OF PIETERMARITZBURG.
>
> Notice of Town Planning Scheme in Course of Preparation under Ordinance 27 of 1949.
>
> It is hereby notified for general information that the City Council of Pietermaritzburg in terms of the above Ordinance, has a Town Planning Scheme in course of preparation for the whole of the area under its jurisdiction".

4. On 4 January 1954 the Provincial Secretary wrote to the Town Clerk informing him that the Administrator had approved of the aforesaid resolution in terms of section 44 of the 1949 Ordinance, adding, "It now remains for the Council to proceed in terms of Section 45 of Ordinance 27 of 1949". The actual date of approval, as distinct from date of notification of approval, was not stated; but it would appear to have been 22 Dec. 1953, judging by Ord. 35 of 1967, to which

15/... reference

reference will be made later.

5. On 16 January 1954 the Council accordingly gave notice in a local newspaper of the Administrator's approval, and of the availability for inspection of a plan in the office of the City Engineer. But it did not publish a notice in the Provincial Gazette in terms of section 45 (1).

6. On 23 December 1954 the Council adopted the provisions of the draft town planning scheme.

7. On 29 December 1954 the Council applied for the Administrator's approval of the scheme, under section 50 of the 1949 Ordinance.

8. The Administrator referred the matter to the Town and Regional Planning Commission for consideration and report under section 51. That body duly published notices in various newspapers in January and February 1955, inviting objections from owners or occupiers of immovable property in the area to which the scheme applied or other persons having sufficient interest therein.

9. More than 50 persons lodged objections. The appellant was not one of them, but no point was made of this.

10. On 14 September 1956 the Town and Regional Planning Commission requested certain further information before holding the public hearing provided for in section 53.

11. There the matter has rested. The record is silent as to the reason. No hearing of the objections has been held.

In all the foregoing circumstances, counsel for the appellant submitted in this Court that the Council's town planning scheme in course of preparation was wholly invalid, on the following grounds -

(a) The Council failed to advertise its intention to prepare a scheme for submission to the Administrator, as required by section 33 (2) of Ord. 10 of 1934.

(b) In breach of its duty under section 45 (1) of Act 27 of 1949, the Council failed properly to advertise the facts that the Administrator had approved of its resolution to prepare a scheme.

(c) No public hearing has been held by the Town and Regional Planning Commission in terms of section 53 of Ord. 27 of 1949.

17/... (d) The

(d) The Administrator failed to make regulations in terms of section 78 (1) of Ord. 27 of 1949.

(e) No provision is made for compensation for injurious affection.

As to the first of these contentions, counsel for the respondent Council submitted that notice of intention to prepare a scheme was unnecessary in this case, because section 10 of Ord. 17 of 1941 introduced a proviso to section 33 (1) of the 1934 Ordinance, in terms of which it was obligatory for Pietermaritzburg to prepare a scheme. An alternative submission was that the position was saved by section 80 (3) of Ord. 27 of 1949. (It is referred to in item (xiii) of the analysis of the Ordinance, supra). I do not find it necessary to deal with these arguments, because in my view the appellant's contention is met by a further submission which was made by counsel for the Council. He relied on the facts that on the 16 August 1951 the Council passed a resolution, in terms of section 44 of Ordinance 27 of 1949, deciding to

18/... prepare

prepare a town planning scheme; that on 20 August 1951 the resolution was forwarded to the Administrator for his approval under section 44 (2); and that on 4 January 1954 the Provincial Secretary notified the Town Clerk that the Administrator had approved of the resolution in terms of section 44. On those facts it is in my view clear that, in terms of section 44 (2), the said resolution "took effect" on approval by the Administrator. Such taking effect, quite apart from anything done under the 1934 Ordinance, is sufficient legal basis for the validity of the Council's scheme in course of preparation (unless there is substance in the four other points advanced by counsel for the appellant, with which I shall deal later).

The exact date of the Administrator's approval was not stated in the Provincial Secretary's letter; but that is of no significance in this case. What is significant is that the date was not later than 4 January 1954, i.e. to say, long before the appellant's plans were submitted and

approved and her building erected in the 1960's. (It will be recalled that section 67 (1) (c) applies to buildings erected after the taking effect of a resolution to prepare a scheme).

If it were necessary to fix the said date, one would have to say it was 22 Dec. 1953, because that is deemed to be the date by Ord. 35 of 1967; see section 2 thereof, read with item 31 of the first column of the schedule, and Proclamation 39 of 1950 referred to in the second column. The area referred to in that proclamation includes the land on which the appellant's building is situated. But, as already indicated, it is not necessary in this case to rely on the exact date when the Administrator approved the Council's resolution and it thereby took effect. Hence it is not necessary to invoke Ord. 35 of 1967. It is therefore unnecessary in this case to consider the

20/... argument

argument by counsel for the appellant that that Ordinance cannot affect pending matters, such as he claimed the dispute between the parties to be. In the result, the first of the appellant's contentions cannot be upheld.

The second contention was that the taking effect of the Council's resolution to prepare a scheme was vitiated by the failure to give notice of it as required by section 45 (1) and (2). In my view this contention is answered by the Ordinance. The effect of section 44 (2) is that a resolution to prepare a town planning scheme takes effect when it is approved by the Administrator. Such approval is the sole condition precedent to its taking effect. It is only after it has taken effect that section 45 (1) requires publication of a notice. Hence it could not have been the intention of the

Legislature that a subsequent absence of publication would retrospectively vitiate the existing effectiveness of the resolution. This view is strengthened by the inconsequential nature of the notice referred to in section 45 (2). No right is thereby given to anybody to object to the preparation of a scheme. That comes later, when the local authority submits its scheme to the Administrator for approval. Sections 51, et seq, then provide for notice, objection and hearing. On this view it is not necessary to discuss whether the Legislature, in passing Ord. 35 of 1967, intended its contents and proclamation to be notice of the taking effect of the resolution referred to therein.

The third contention on behalf of the appellant was that the absence of a hearing of objections by the Town and Regional Planning Commission

22/... in

in 1956 or at any time thereafter, vitiated retrospectively the taking effect of the Council's resolution on 22 December 1953. As to that, the Legislature in 1967 validated the Council's resolution to prepare a scheme, and declared that it took effect on 22 December 1953. Nowhere in any of the Ordinances is there provision, expressly or by implication, invalidating such a taking effect because of delay in the Commission's hearing of objections. No time is fixed by the Legislature for such hearing. The delay in the present case seems a long one; but town planning schemes inevitably do take a long time. We were informed from the Bar that only one scheme has reached the stage of approval in Natal, but that it has been converted back to a scheme in course of preparation, presumably

23/... under

under section 55 bis. As to the position in the Cape, it was common cause, in Belinco (Pty) Ltd. v. Bellville Municipality and Another, 1970 (4) S.A. 589 at 596 C, that no scheme has there reached the stage of approval. The papers in the present case do not disclose the cause of the delay or whether the Administrator has pressed the Commission to complete its task. There is no basis, on the papers before the Court, for vitiating the taking effect of the Council's resolution.

As to the fourth contention, i.e. the absence of regulations, section 78 (1) of Ord. 27 of 1949 provides that "The Administrator may make regulations ...". There follows a list of a number of matters. Some regulations have been made in regard to several items, relating to the Town and Regional

24/... Planning

Planning Commission established by section 2. No regulations have been made under items (g), (h) and (k), which read as follows:

"(g) the procedure to be followed in connection with -

(i) resolutions to prepare schemes and applications for the approval of such resolutions;

(ii) the preparation of schemes and applications for their approval;

including the submission in either case of maps, plans, documents and other information relevant thereto;

(h) the occasions when and the manner in which the public shall be consulted in respect of resolutions to prepare schemes and during the preparation of schemes;

25/... (k) any

(k) any matter which is by this Ordinance required or authorized to be prescribed;"

Counsel for the appellant contended that the provision for the making of regulations, in regard to the foregoing three items, was imperative; and that their absence vitiated the town planning scheme in course of preparation. Counsel for the Council contended that the provision, at any rate in regard to the three items just mentioned, was directory.

The basic test in deciding whether a statutory provision is imperative is whether the Legislature intended non-compliance to be visited with nullity; see Northern Assurance Co. Ltd. v. Somdaka, 1960 (1) S.A. 588 (A.D.) at 594 C, and S. v. Khan, 1963 (4) S.A. 897 (A.D.) at 900 B.

In answering this question, several so-called rules are sometimes called in aid. They are collected in Steyn, Uitleg van Wette, derde uitgawe, page 181 et seq. But the learned author sounds this introductory warning:

26/... "Die

"Die vraag moet elke keer opnuut beslis word, met inagneming van alle relevante oorwegings wat op die betrokke wetsvoorskrif en die nietigheid van 'n handeling in stryd daarmee verrig, betrekking het". Consistent therewith, this Court cited with approval, in Leibrandt v. South African Railways, 1941 A.D. 9 at 13, the following observation by Lord Penzance in Howard v. Bodington, 2 P.D., 203 -

> "I believe as far as any rule is concerned, you cannot safely go further than that in each case you must look to the subject-matter; consider the importance of the provision that has been disregarded and the relation of that provision to the general object intended to be secured by the Act; and upon a review of the case in that aspect, decide whether the matter is what is called imperative or only directory".

Approaching the matter in that light, one bears in mind that Ordinance 27 of 1949 deals in the main with town planning, a matter keenly affecting the common weal as urban

27/.... areas

areas continue to develop. See, for example, section 46 (1) and the Schedule of matters to be dealt with by schemes. By contrast, section $78^{(1)}_{A}(g)$ supra, deals with procedure, in connection with (i) resolutions to prepare schemes, and applications for approval thereof; and (ii) the preparation of schemes and applications for their approval. These procedural guides would be convenient, and in general it is desirable that they should be laid down. But having regard to the important and beneficial results which the Legislature was seeking to bring about, it does not seem to me reasonable to suppose that it intended that a resolution passed, or an application made for approval, or a draft scheme prepared or an application for its approval, should be visited with nullity because regulations thereanent were not made. Would you sacrifice substance to form? In the result I consider that the provision in section $78^{(1)}_{A}$ for the making of regulations under item (g) is directory only.

As regards the absence of regulations under item (h), it is important to bear in mind -

28/... (i) that

(i) that the Ordinance confers, on persons with a sufficient interest, a right to object and be heard, but only at the stage when the Town and Regional Planning Commission is considering an application by a local authority for approval of its scheme; see sections 52 and 53;

(ii) that no right is conferred on members of the public generally to be consulted during the earlier stages of resolution and preparation.

In the light of the foregoing, and bearing in mind the importance of what the Legislature was seeking to achieve, it does not seem to me that it intended an absence of regulations under (h) to vitiate a resolution or a town planning scheme in course of preparation. In these circumstances I hold the provision to be directory only.

As to the absence of regulations under item (k), counsel for the appellant relied on section 50, which deals with an application to the Administrator for approval of a scheme. It concludes, "The scheme shall be presented in such form as shall be prescribed by regulation and shall be

29/... accompanied

accompanied by such maps, plans, documents and other relevant matter as may be prescribed in terms of the regulations". In the light of the considerations indicated above in regard to items (g) and (h), it does not seem to me that the Legislature intended the Administrator's approval of a scheme to be visited with nullity because he had not made regulations under (k) as to the form of the application to him and as to the accompanying documents. In these circumstances this provision is also directory.

The fifth contention on behalf of the appellant relates to the absence of compensation for injurious affection in a case of this sort; see section 61 (1) (g) of Ord. 27/1949. As to that, Provincial Councils are empowered to legislate in regard to town planning by item 14 of the second schedule to Act 38 of 1945, as amended, which superseded the earlier Financial Relations Act, No. 10 of 1913. Item 14 reads -

"14. Town planning, including -

(a) the sub-division and lay-out of areas or groups of areas for building purposes or urban

30/... settlement,

settlement, or deemed by the executive committee of the province concerned to be destined for such purposes or settlement;

(b) the regulation and limitation of building upon sites;

(c) the variation, subject to compensation in cases of prejudice of any existing sub-division or lay-out of land used for building purposes or urban settlement, or deemed by the executive committee of the province concerned to be destined for such purposes or settlement, and the authorization of the consequential amendment of any general plan or any diagram of any subdivision or lay-out so varied and of the consequential alteration or endorsement of any document of title or any entry in a deeds registry;

(d) the reservation of land for local government or other public purposes in any approved or varied scheme of town planning;

(e) the prohibition of the transfer of land included in any approved or varied scheme of town planning where any lawful requirement has not been fulfilled; and

(f) the planning or re-planning subject to the provisions of sub-paragraph (c)

31/... of

> of any area, whether developed as an urban area or not, including the prohibition of the use of any land within such area in conflict with the terms of any town-planning scheme in operation or in the course of preparation in respect of the area within which such land is situated".

Dealing first with sub-paragraphs (a) - (d), supra, it is clear that compensation is only mentioned once, i.e. to say, in cases of prejudice in respect of variations of existing sub-divisions or layouts of land used for building purposes or urban settlement, etc.

Sub-paragraph (f), which was added in 1949, refers to the planning or re-planning of any area whether developed as an urban area or not; and it includes the prohibition of the use of any land within such area in conflict with the terms of any town planning scheme in the course of preparation in respect of the relevant area. Section 67 (1) (c) of Ordinance 27 of 1949 (Natal) as amended, clearly falls under the latter provision.

Now sub-paragraph (f) is expressed to be "subject

32/... to

to the provisions of sub-para (c)". In Pretoria City Council v. Levinson, 1949 (3) S.A. 305 at 320, this Court decided that the obligation to provide for compensation under (f) is limited to prejudice arising out of variations of subdivisions or layouts covered by (c). That would seem to be a logical interpretation, since the wide language of (f) is capable of covering subdivisions or layouts of land, and to that extent it was necessary to repeat the compensatory provision of (c). On that view, there was no obligation to provide for compensation in cases of any prejudice in section 67 (1) (c) of Ord. 27 of 1949 (Natal).

Counsel for the appellant invited us to hold that the foregoing reasoning in Levinson's case, supra, was wrong. As to that, it is sufficient to say that I am unpersuaded that it is clearly wrong. Reversal is therefore not competent. Counsel for the appellant referred, perhaps with some nostalgia, to Belinco (Pty) Ltd. v. Bellville Municipality and Another, 1970 (4) S.A. 589 (A.D.). But that was a horse of another colour. There the relevant Ordinance

33/... provided

provided for compensation for any land expropriated for a scheme. The Administrator, being empowered to prescribe provisions for a local authority's scheme, prescribed a clause which envisaged the surrender by an owner of part of his land, without compensation, as a condition of the passing of his building plans. This Court held that that was beyond the powers conferred upon the Administrator by the Ordinance.

In Levinson's case, supra at page 319, this Court also held that the compensatory provision in sub-paragraph (c) of item 14 "does not include prohibitions designed to preserve the status quo pending the coming into operation of a scheme". Counsel for the appellant argued that that could not apply in the case of Pietermaritzburg because the delays already referred to were such that no effective resolution and scheme in course of preparation still existed. This argument cannot prevail, for the reasons given earlier.

Turning now to the order sought by and granted

to the Council, it declared the appellant's residential use of the building to be a contravention of section 67 (1) (c) of Ord. 27 of 1949 as amended. The latter prohibits the use of a building, erected after the date when the resolution to prepare a scheme took effect (in this case not later than 4 January 1954) for a purpose different from that for which it was erected. It seems to me that the approved building plans must provide the criterion of such purpose. When approved in 1963 they provided for shops and offices. The building was erected in 1963/5 and is being used residentially. There is thus a clear conflict between purpose and use, within the meaning of section 67 (1) (c).

The order further declared the appellant's use of the building to be in contravention of the Council's Town planning scheme submitted to the Administrator for his approval in 1954. This clearly refers to the

35/... scheme

scheme "in course of preparation". Although Ordinance 27 of 1949 uses the latter expression, (e.g. in section 1 under "Town planning scheme", and section 48) it does not state when a scheme commences to be in the course of preparation. Having regard to the pattern of the Ordinance, it seems to me practical and sensible to hold that a scheme commences to be in course of preparation when the relevant resolution has been approved by the Administrator. Thereupon it "takes effect", to use the language of section 44 (2). Now the Council's scheme in course of preparation excludes the erection or establishment of flats from the zone in which the appellant's building is situated, if the site has a street frontage of less than 60' and an area of less than 9000 sq. feet. The appellant's site falls short of both of these requirements. Hence her use of the building for flats is contrary to the Council's town planning scheme in course of preparation.

36/... Finally,

Finally, it was contended on behalf of the appellant that the Court of first instance wrongly exercised its discretion in granting a declaratory order. The argument was that the matter was not an appropriate one for such an order; that the appellant's use of the property was not the subject-matter of the real dispute between the parties; and that the true dispute related to the validity of the Council's scheme and of its preparation. As to this, it is clear from the papers that what the Council was objecting to throughout was indeed the appellant's use of the building for residential purposes; and the appellant was throughout persisting in such user. It was the appellant who ultimately, by way of defence to the Council's attitude, challenged the validity of its entire town planning scheme. In these circumstances the Court exercised its discretion, correctly in my view, to enquire into and determine the appellant's defence, since its success or failure would be decisive of the validity or otherwise of the Council's attitude, and of the relief which it sought.

37/... To

To sum up: in my view the Natal Courts were right in holding the appellant's use of the building for residential purposes to be a contravention of section 67 (1) (c) of the Town Planning Ordinance No. 27 of 1949, as amended, and of Pietermaritzburg's town planning scheme in course of preparation. The interdict was also rightly granted.

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

G.N. HOLMES

JUDGE OF APPEAL.

Jansen, J.A.)
Rabie, J.A.) CONCUR
Muller, J.A.)
Corbett, A.J.A.)