CG CASE NUMBER: 169/94

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

IVO LOUIS HUISMAN Appellant

and

THE MINISTER OF LOCAL GOVERNMENT

HOUSING AND WORKS [House of Assembly] 1st Respondent

THE MUNICIPALITY OF THE CITY

OF PORT ELIZABETH 2nd Respondent

CORAM: JOUBERT, NESTADT, VAN DEN HEEVER, HARMS JJA et SCOTT AJA

HEARD ON: 21 NOVEMBER 1995

DELIVERED ON: 29 NOVEMBER 1995

J U D G M E N T

VAN DEN HEEVER JA

The appellant, a consulting engineer who lives at 46 Upper Hill Street, Central, Port Elizabeth, runs his practice from offices he regards as unsuitable and inadequate. He bought Erf 2619, a property consisting of a block of three flats situate at 35 Havelock Street, Central, intending to relocate his practice there after converting the flat at street level into a suite of offices. The upper storey would be retained, after refurbishing, as two upmarket flats. Erf 2619 is zoned as "general residential". During March 1990 the appellant applied in terms of section 17 of the Land Use Planning Ordinance, No 15 of 1985 (Cape) ("the Ordinance") for the rezoning of the property to permit of its being used for "special purposes with proviso that the groundfloor is used for office activities and the rest remains residential".

A structure plan had been prepared and approved for the area in terms of section 4 of the Ordinance. Section 5 of the Ordinance provides:

"(1) The general purpose of a structure plan shall be to lay down guidelines for the future spatial development of the area to which it relates (including urban renewal, urban design or the preparation of development plans) in such a way as will most effectively promote the order of the area as well as the general welfare of the community concerned.

(2) A structure plan may authorize rezoning in accordance with such structure plan by a council.

(3) A structure plan shall not confer or take away any right in respect of land."

Chapter II of the Ordinance deals with Zoning Schemes, and provides for regulations to be made to control zoning. In terms of section 9 such regulations "may authorize the granting of departures and subdivisions" by a municipal council.

Erf 2619 falls within what is referred to in the structure plan as

Area 3. Paragraph 2.2.3 of the structure plan states:

"Area 3 (residential: Other Users)

The existing General Residential zoning ... in respect of Area 3 as shown on Plan 2 will not change. The residential character, atmosphere and use in these areas prevails and because of its strength and largely unspoilt appearance,

> needs to be conserved. Retail activities such as antique dealers, jewellers and house crafts may be permitted in terms of clause 21.2 of the P E Zoning Scheme. Where retail or office activities are permitted by the Council the building must retain its residential use and character, and therefore will not be allowed to be altered to look like a shop or business premises. Owners wishing to include a retail activity on their properties will be required to obtain the comments and agreement of abutting owners prior to their submitting an application for such use. Office activities, in conjunction with a residential use, could be permitted on the ground floor only of blocks of flats in this Land Use Category. The use of flats exclusively for office purposes should be strongly resisted in order to maintain a strong residential component. On-site parking will be required for all non-residential use in terms of the Council's parking policy ..."

I return later to the regulation, made under Chapter II of the Ordinance relating to "other uses" permissible on property zoned as residential in Area 3, referred to in the passage quoted as "clause 21.2".

The structure plan envisages the appointment of an advisory committee to report on all matters relating to conservation within inter

alia. Area 3. The comments of the Environmental Affairs Advisory Committee ("EAAC") on the proposed rezoning having been obtained, the Land Use Committee of the second respondent refused the appellant's application.

On 11 June 1991 the appellant noted an appeal in terms of section 44 of the Ordinance against this decision. This section reads:

> "44(l)(a) An applicant in respect of an application to a council in terms of this Ordinance, and a person who has objected to the granting of such application in terms of this Ordinance, may appeal to the Administrator, in such manner and within such period as may be prescribed by regulation, against the refusal or granting or conditional granting of such application."

(No regulations have been promulgated prescribing in what manner such an "appeal" is to be conducted. Only time limits have been determined.)

> (2) The Administrator may, after consultation with the council concerned, in his discretion dismiss an appeal contemplated in subsection (l)(a) ... or uphold it wholly or in part or make a decision in relation thereto which the

council concerned could have made.

(3) For the purposes of this Ordinance -

(c) a decision made by the Administrator under the provisions of subsection (2) shall be deemed to have been made by the council concerned."

The powers of the former Administrator set out in section 44(2) above, have devolved upon the first respondent.

The documents on which the appellant relied in appealing to the first respondent, were voluminous. They consisted of the following items:

(4) The application that had been submitted to the second respondent, containing a detailed motivation report; photographs of the property and its surroundings; letters of support from neighbours and residents; a locality map, a zoning map, a land use map, a layout plan and the layout proposed.

(5) A letter written by the appellant's attorneys on 3 September 1990 to the Director: Administration of the second respondent. The appellant

had somehow learned that the EAAC had submitted advice adverse to his application to the council via the department of the City Engineer. The letter urged that the appellant be provided with a copy of that advice in order to enable him to comment on it; alternatively that his own comments, set out at length, on the report of the City Engineer be placed before the Land Usage Committee for its consideration.

(6) The agenda and minutes of the meeting of the EAAC held on 4 July 1990. This was adjourned with a request for further information from the City Engineer. These documents, along with the City Engineer's ensuing report and the minutes of the adjourned meeting, held on 22 August 1990, had been made available to the appellant in compliance with the request contained in item 3 above.

(7) A further letter, dated 1 February 1991, from the appellant's attorney to the Director: Administration. This acknowledged receipt of the items in paragraph 3 above, and set out detailed argument critical of the approach of the EAAC, contradicting the allegations of the City

Engineer, and asking that the Land Usage Committee take cognisance of the comments in this letter when considering any recommendation to it from the City Engineer.

(8) The letter dated 10 June 1991 from the Director: Administration to the appellant informing him that the first respondent's Land Usage Committee had turned down the appellant's application for rezoning. The reasons which motivated that Committee were set out, and the appellant reminded of his right to appeal.

(9) A copy of paragraph 2.2.3 of the structure plan applicable to Area 3 (quoted earlier in this judgment).

(10) A newspaper cutting that municipal plans for the development of the square on which erf 2619 is situated, have had to be scaled down for financial reasons; and

(11) A lengthy memorandum dated 11 June 1991 dealing with all the above, and with the arguments advanced adverse to the application as they appeared from those. The memorandum goes further, dealing also

with issues allegedly "inadequately dealt with and/or misleading" and not dealt with at all; in conclusion urging the first respondent to reverse the decision of the Land Usage Committee and approve of the appellant's application.

During April 1992 the appellant was advised that the first respondent had dismissed his appeal. No reasons were given.

In June 1992 the appellant launched review proceedings in the South Eastern Cape Local Division, attacking the refusal of the first respondent to reverse the decision of the second respondent. The first respondent was called upon in the Notice of Motion, by virtue of Supreme Court Rule 53(l)(b), to despatch to the Registrar of that court the "record of the proceedings" in which the first respondent arrived at its decision.

The grounds on which the decision of the first respondent were and are attacked, have since then both changed, and narrowed, considerably.

In his founding affidavit appellant attacked the recommendation of the EAAC on the grounds that it had misdirected itself by reporting on a matter which was in terms of the Ordinance none of its business, namely the interpretation of the structure plan, and moreover been wrong on that score. No more need be said of this. The EAAC is a purely advisory body, and this complaint was not pursued further.

The appellant alleged that the Land Usage Committee had been guilty of the same misdirection. It had not only misinterpreted the structure plan, but held itself to be rigidly bound by its terms. It was also wrong in its assessment of the facts. The merits of the application, so the appellant alleged, are so patent, and refusing it so unreasonable, that the inference is inescapable that

(12) the first respondent did not apply his mind to the matter

(13) alternatively, he took account of improper or irrelevant matter. The appellant explained:

"I verily believe further reports, information and input was obtained for and on behalf of the First Respondent prior to

considering such appeal."

Mr Dercksen, as Ministerial Representative: Eastern and Northern Cape Region of the Minister's Council of the House of Assembly is the person entrusted with the powers formerly conferred on the Administrator by Section 44 of the Ordinance. The second respondent falls within his jurisdiction. In compliance with Rule 53 he produced the departmental file relating to the appellant's re-zoning application, under cover of an affidavit in which he made it clear that the first respondent was not opposing the review proceedings, which was not to be construed as a concession that he, Dercksen, had erred as alleged in the appellant's affidavit. Dercksen set out how he had gone about dealing with the matter. He had received the file in March of 1992. He not only read all the documents, but held two inspections in situ, where he saw i.a. that the house on the property was weathered but not dilapidated. He lists the facts of which he took cognisance, which included the Port Elizabeth Zoning Scheme regulations. He says that he accepted that the structure

plan was merely a policy guideline for the future development of the area; that he properly and honestly applied his mind to all the representations, suggestions and viewpoints advanced, and took his own, honest, bona fide decision that the appeal should be dismissed.

The file was voluminous. It contained all the documents submitted by the appellant for purposes of his appeal, as listed above, along with departmental memoranda, minutes of meetings, correspondence - largely of a formal nature - and so on. Of relevance are, in chronological order: 1. A lengthy letter from the Town Clerk dated 25 October 1991 in reply to the appellant's contentions. It contains submissions on "the true intent" of Section 2.2.3 of the structure plan and the import of regulation 3.11, which had formerly been numbered 21.2, made for purposes of the Zoning Scheme. It counters arguments advanced in the appellant's papers, and points out i.a. that despite assurances that the appellant's own practice would not be an undesirable activity nor cause serious parking problems in the area, there could be no guarantee that a future purchaser

of the property, were it rezoned, would conduct a similar business there. Moreover grant of the rezoning sought would set a precedent. 2. Internal memoranda which passed between officials in Dercksen's department in February 1992. They were Sue Geyser and Charl Marais, and favoured upholding the appellant's appeal. Geyser submitted an undated report to Mr Nel, the Assistant Director: Local Government, containing a summary of prior events and arguments, and her recommendation which was based almost entirely on the facts urged by the appellant, with two of her own. An inspection had revealed that "the building is dilapidated", and "the proposals by the appellant promote the interests of the city - there are very few consulting structural engineers in Port Elizabeth". The contents of her memorandum were adopted by Nel in a memorandum dated 6 March 1992. Geyser had however on 27 March consulted with the town planners and staff in the office of the Town Clerk, been persuaded that she had misinterpreted the structure plan relating to area 3, changed her mind, and reported accordingly to

her superior. He deleted in his own memorandum the paragraph containing his recommendation, replacing it with an annexure. This set out that on the strength of discussions with municipal officials on 27 March 1992, he was persuaded that in terms of clause 2.2.3 (Area 3) of the structure plan read with clause 3.11 of the Port Elizabeth Zoning Scheme regulations, approval of the appellant's application would override the intentions of the Zoning Scheme. This document was signed by Dercksen on 30 March 1992.

The predecessor of regulation 3.11, then numbered 21.2, was applicable when the appellant originally applied for rezoning of erf 2619. It read:

> "The Council may by special consent permit the practice, subject to the Council's By-laws, by <u>any resident</u> of a dwelling house or residential building, of a profession or occupation provided that: -
>
> (a) the house or building shall continue at all times to be used mainly for the purpose of a dwelling house or residential building." (Emphasis added.)

Its successor, in force by the time the appellant submitted his documents for purposes of his appeal in terms of section 44, had become more precise, providing that -

> "3.11.1 ... The Council may consent to the practise ... by any resident of a dwelling unit, of a profession or occupation ... provided that such profession or occupation does not, in the opinion of the Council, involve -
>
> (vii) the use of more than a minor portion of the floor area of the dwelling unit for the practise of the profession or occupation.
>
> 3.11.4 The consent of the Council granted in terms of this regulation shall attach to the applicant personally and not to the premises on which the business is conducted." (My emphasis.)

Having had sight of these additional documents, the appellant filed what may be called a supplementary founding affidavit. In this he argues that Dercksen's file makes it clear that additional submissions were made by the second respondent without those being forwarded to the appellant for comment. He says that input, consisting of new matter not

previously raised by the second respondent was obtained by Dercksen's officials from those of the municipality without any reference to the appellant whatsoever. Dercksen was obliged "to fully inform me of the additional submissions which had been made by the second respondent" and his failure to do so had resulted in the appeal proceedings being contrary to the principles of natural justice. The affidavit continues with argument at length on the merits, the main thrust of which is that Dercksen had been persuaded to change his favourable view by his officials, who had changed theirs as a consequence of a meeting with municipal officials on 27 March. There the latter had propounded an incorrect interpretation of the Structure Plan by incorporating the provisions of clause 3.11 of the Port Elizabeth Zoning Scheme regulations.

The second respondent opposed the appellant's application for review. Its affidavits consist almost entirely of argument. A relevant factual allegation made by the Chief Estates Officer of the second

respondent, one Zeiss, is that he was present at the meeting on 27 March.

It was one held in the normal course of municipal business, was of a

general nature, in which no new matter relating to the appellant's appeal

had been raised:

> "All that happened was that Second Respondent's officials reiterated their stance on the interpretation of the structure plan and the question of parking. All this the [appellant] had already replied to."

The appellant then filed a replying affidavit. This too consists almost entirely of argument, save that appellant annexed further charts and photographs in support of his contentions on the merits of his cause.

The court a quo, Mullins J, in a careful judgment, held that the new "input" of 27 March, complained of, consisted of argument and submissions to meet the specific grounds of appeal raised by the then applicant, all of which arguments were already known to the appellant. In the circumstances of the case, the fact that the appellant had not been afforded the equivalent of a right of reply to the material placed before

Dercksen, or information which Dercksen had himself obtained by his inspections, was not unfair. There had been no breach of the rules of natural justice, nor had any case been made out to justify asking that his decision be set aside. The application for review accordingly failed, with costs. The subsequent application for leave to appeal was likewise dismissed with costs. The appellant came before us by virtue of leave of this Court on an unopposed application therefor.

Before us Mr Buchanan, who appeared for the appellant, had two strings to his bow. He again urged that the merits of the application to re-zone were so manifest, that the only inference to be drawn from Dercksen's failure to uphold the appeal was that he could not have applied his mind properly to the matter. I do not propose to enter upon any in-depth discussion of the facts, which have now been canvassed for the fourth time. One of the arguments relied upon throughout by the appellant, is that failure to rezone will result in the building inevitably deteriorating, to the detriment of the entire area, since it is not a viable

economic proposition for him to upgrade the building unless he gets what he wants. Such an argument makes a mockery of municipal attempts to "promote the order of (an) area as well as the general welfare of the community concerned", since the "disadvantage" to the community allegedly inherent in refusing the appellant's application, is prima facie one of the appellant's making. There is no evidence of the price he paid for the property, nor any suggestion that suitable offices are not available elsewhere in Port Elizabeth. The decision to take an investment risk was his own. At the right price a buyer prepared to upgrade the building without altering its use could presumably be found. There can be no merit in the argument that confronting the Council with a fait accompli (his purchase) and a veiled threat (that the property will be permitted to decay) make accession to the appellant's application inevitable. And on the other side of the coin, there is merit in the arguments advanced throughout by the second respondent, i.a. that, being concerned about traffic flow and parking, it could not take cognisance of only the

appellant's intentions. A future owner with assured rights to rezoned property, might well alter the picture entirely. I find nothing in Derckson's reasons as set out in his affidavit which constitute a misdirection in his approach to the exercise of his discretion.

In short, the merits and dements of the application were and remain arguable. Dercksen said under oath that he did apply his mind properly and honestly to the issue. On this score there is not even a dispute of fact on the papers, since the appellant relies on no more than inferential reasoning for his denial of Derckson's positive allegation. The inference falls away where there is no reason to suggest that Dercksen committed perjury. The court a quo correctly held that the appellant had not discharged the formidable onus burdening him on this issue.

The second string to Mr Buchanan's bow, was the alleged procedural irregularity resulting in a failure of justice.

Were new facts to be placed before the "Administrator" which could be prejudicial to an appellant, it would be only fair that the latter

be given an opportunity to counter them if he were able to do so, more particularly were the matter one in which the extant rights of an appellant could be detrimentally affected. That is however not what happened here. No extant rights of the appellant were in danger. He was seeking to have those increased. Mr Buchanan could not point to any additional information contained in either the written memorandum submitted by the Town Clerk in reply to that of the appellant, or the documentation in Dercksen's file, of which the appellant had not been aware and with which he had not dealt earlier. Indeed, the complaint voiced persistently in the appellant's affidavits was that he had not been given an opportunity to deal with the submissions advanced by the officials of the municipality. Mr Buchanan repeated this initially: the appellant wanted to have the last word. He had been entitled to a right of reply.

Mr Buchanan offered no authority undermining the common-sense approach of the court a quo, that proceedings could be endlessly protracted were any such "right" be held to exist. Why should the

municipality not then have a right in turn to reply to the appellant's submissions, and so on? When Mr Buchanan was reminded that in terms of the Rules of this Court, an applicant for leave to appeal and the respondent were ordinarily each offered only one bite at the cherry, without any suggestion ever being advanced that that is ipso facto unfair, he altered his attack and submitted that in terms of the rules of natural justice a hearing should not only be fair, but be perceived to be fair. Written submissions had been made by both parties. Thereafter Dercksen consulted with some of the first respondent's officials without the appellant being present; which in itself was perceived to be unfair. That in itself, he argued, must lead to Dercksen's decision being set aside.

I pointed out in the beginning of this judgment that, although section 44(1) of the Ordinance authorizes the making of regulations to deal with the time-limits and manner in which appeals should be dealt with, only the former have been so prescribed. There can be no

suggestion that such an "appeal" is one comparable to a judicial proceeding conducted according to set rules and based on sworn testimony. Section 44(2) obliges the "Administrator" to consult with the very body whose decision is placed in issue. Accepting - without deciding- that the municipality is to be regarded thereafter as the opponent of the appellant in the matter on which Dercksen has to exercise his own discretion, the sub-section does not stipulate in what manner such "consultation" is to be effected, nor limit it to a choice between either written or oral submissions, or if the latter, to such submissions made on a single occasion only. Nor is there any suggestion that the appellant should be present or given a copy of written or resume of oral statements before Dercksen made up his mind.

According to the uncontradicted evidence the appellant's alleged perception was wrong, nothing improper occurred behind his back, and no injustice in fact occurred.

The appeal is dismissed with costs, including the costs of two counsel.

L VAN DEN HEEVER JA

CONCUR:

JOUBERT JA)
NESTADT JA)
HARMS JA)
SCOTT AJA)