THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Case No 174/96

In the matter between:

ERF ONE SIX SEVEN ORCHARDS CC Appellant

and

THE GREATER JOHANNESBURG METROPOLITAN COUNCIL: JOHANNESBURG ADMINISTRATION First Respondent

STEIN. MARK ADAM Second Respondent

CORAM: SMALBERGER, VIVIER, NIENABER, SCHUTZ, JJA et NGOEPE,AJA

DATE OF HEARING: 14 September 1998 DATE

DELIVERED: 29 September 1998

JUDGMENT

NGOEPE, AJA

The appellant is the owner of a residential property in an area described in the papers as an "upmarket" suburb in Johannesburg. Adjacent to this property on its western side is that of the second respondent. Both houses are single storeyed dwellings.

The first respondent was the local authority that had to approve any plan in respect of the building which is the subject of this appeal. A plan was approved on 15 June 1995.

At all material times one Allan Heyman Levin was the sole member of the appellant and he, and the other members of his household, lived on the appellant's property.

During May 1995 Levin noticed that construction operations were about to take place on the property of the second respondent. He did not pay much attention. One evening in June 1995 he

observed that there was a structure ("the building") being erected by the second respondent above the latter's existing garage. He noticed that one wall of the building, adjacent to the western wall of the appellant's

property, had been built to a significant extent during the day. He did not like what he saw because that very same evening he telephoned the second respondent to complain that the building appeared to be, inter alia, unsightly, objectionable and such that it would derogate from the value of the appellant's property. He asked the second respondent to call a halt to the building operations until he, Levin, had made certain inquiries with the first respondent as to whether there had been prior compliance with existing laws and regulations. His request was not acceded to, despite the fact that he had offered to pay expenses occasioned by the stoppage, if subsequently proven wrong. Levin says after this telephonic

discussion the construction seemed to continue at double speed.

Nevertheless Levin proceeded to conduct his investigations with the first respondent. He discovered that the plan of the building had been approved by the first respondent. Earlier the plan had been rejected, but was later approved after certain modifications had been made. After extensive research by Levin into the applicable law, the appellant lodged objections against the building with the first respondent. The objections fell into two categories. The first comprised objections based on the provisions of the National Building Regulations and Building Standards Act 103 of 1977 ("the Act"). The other complaints were in terms of the Johannesburg Town Planning Scheme 1979 ('the Scheme").

Section 7(l)(b)(ii)(aa) of the Act provides that a local authority shall refuse to approve a plan if such authority is satisfied that the

proposed building will, if erected, disfigure the area, probably or in fact be unsightly or objectionable, or derogate from the value of adjoining or neighbouring properties. The appellant raised a number of points to substantiate its contention that the building offended against the section.

The objection under the Scheme was that whereas the Scheme allowed a maximum of two "subsidiary dwelling units"on one property (clause 34(1)(b)), the building would be a third such unit on the second respondent's property. The Scheme gives a broad description of a "subsidiary dwelling unit". It is common cause that the second respondent already had two such units and therefore that a third one could not be approved. The issue was therefore whether the building would be a subsidiary dwelling unit as contended for by the appellant.

The first respondent turned down all the appellant's objections, and refused to reconsider its decision to approve the plan in question. The result was that the appellant launched an application in the Witwatersrand Local Division, asking inter alia for the review and setting aside of the first respondent's decision and the demolition of the building.

The grounds on which the appellant brought the review application were that the first respondent had failed to apply its mind to the matter; alternatively, that it had applied a wrong principle; further, alternatively, that it had failed in its duty to make proper and justified administrative decisions. These allegations were denied by the respondents. Extensive affidavits were filed by both sides. It is not necessary to go into them because in the end, the first respondent's decision was set aside on an entirely different basis.

Suffice it to say that the court (Wunsh J) found against the appellant on all but one of the substantive grounds on which the decision was being challenged. The court a quo also found against the appellant on the latter's argument that the building would disfigure the area, and that it would be unsightly or objectionable; it also rejected the appellant's argument that the building was a habitable or subsidiary dwelling unit. In fact the court a quo rejected all the grounds on which the appellant had objected to the building, except for the contention that the building would derogate from the value of adjoining properties (more about this later).

These findings on the merits were not the end of the matter because the appellant had also alleged a procedural irregularity against the first respondent, namely, that under both the Act and the Scheme, as also in terms of section 24(b) and (c) of the Constitution

of the Republic of South Africa Act 200 of 1993 ("the Interim Constitution"), the appellant should have been heard before the plan of the building was approved, which opportunity the appellant had not been

afforded. The court a quo held that under the Scheme, the appellant did not have such a right. It did hold, though, that the appellant had such a right under the Act and that the audi alteram partem rule applied. The court a quo held that the appellant had not been afforded the opportunity to be heard and, on that ground, the first respondent's decision was set aside. The court did not find it necessary to consider the appellant's alleged right under the Interim Constitution. It declined to order the demolition of the building. An order was made awarding the appellant the costs, which order was suspended subject to further representations on the issue by the respondents. The order was subsequently changed, and a new one

made in terms of which the appellant was deprived of half its costs. After setting aside the first respondent's decision, the court a quo referred the matter back to the first respondent. The appellant was, however, restricted to making representations on the issue as to whether or not the proposed building would "probably or in fact derogate from the value of adjoining or neighbouring properties" (section 7(1) (b) (aa) (ccc) of the Act). This, as I have already mentioned, was the only aspect on which the court a quo made no finding, being a point on which the learned judge held that the appellant should have been heard. The court declined to make an order for the demolition of the building. The appeal is against the order dismissing all the other objections and referring the matter back to the first respondent on the limited ground only; the refusal to order the demolition of the building, and the order depriving the appellant

of half its costs.

Although the first respondent noted a cross-appeal against the order setting aside its decision, the cross-appeal was withdrawn about ten months before the appeal was heard. No tender of costs was made. Neither of the respondents actively opposed the appeal; both abided the decision of this court.

Regarding costs.

As to what an appropriate order would be with regard to costs, it is largely a matter of discretion. Wunsh J, correctly took into account the fact that the appellant failed on a number of issues, succeeding only on one. It has not been shown that his discretion was wrongly exercised and there is therefore no reason to interfere with his order. As far as the costs on appeal are concerned, the appellant is entitled to the costs of the cross-appeal up to the stage when it was

withdrawn, but for the rest will have to pay the costs of appeal.

Regarding the decision to refer the matter back.

In approving the plan in question, the first respondent was discharging its administrative functions. When setting aside such a decision, a court of law will be governed by certain principles in deciding whether to refer the matter back or substitute its own decision for that of the administrative organ. The principles governing such a decision have been set out as follows:

> "From a survey of the ... decisions it seems to me possible to state the basic principle as follows, namely that the Court has a discretion, to be exercised judicially upon a consideration of the facts of each case, and that, although the matter will be sent back if there is no reason for not doing so, in essence it is a question of fairness to both sides."(Livestock and Meat Industries Control Board v Garda 1961(1) SA 342 (A) 349 G.)

See also, inter alia, Local Road Transportation Board and Another v Durban City Council and Another 1965(1) SA 586 (A) 598 D-F; and

Airoadexpress (Pty) Ltd v Chairman. Local Road Transportation Board, Durban, and Others 1986(2) SA 663 (A) (680 E-F).

The general principle is therefore that the matter will be sent back unless there are special circumstances giving reason for not doing so. Thus, for example, a matter would not be referred back where the tribunal or functionary has exhibited bias or gross incompetence or when the outcome appears to be forgone. (Airoadexpress (Pty) Ltd v Chairman. Local Road Transportation Board, Durban, and Others, supra, 680 F-G).

While conceding that the decision to refer the matter back was a matter for the discretion of the court, counsel for the appellant contended that there was evidence of bias and incompetence, and therefore that the court a quo acted incorrectly In referring the matter back. It was also argued that in persisting that its decision had been

correctly taken, the first respondent's conduct is indicative of the fact that it had prejudged the matter. These allegations were rejected by the court a quo and, in my view, correctly so. There is no evidence of bias or incompetence; nor is there reason to believe that the first respondent will not apply its mind fairly and properly to any representations made to it. As far as the first respondent's attitude before the court a quo is concerned, it was merely consistent with the first respondent's genuine perception of the legal position. It is

also noteworthy that the first respondent has since withdrawn its cross-appeal and does not oppose the appeal. In my view, therefore, the decision to refer the matter back cannot be faulted.

Regarding the alleged refusal to order the demolition of the structure.

The fate of this argument has in fact already been determined

by the conclusion arrived at on the previous issue.

Counsel has argued that in declining to order the demolition of the building, the court a quo exercised its discretion incorrectly. What this argument overlooks is the fact that a decision to make such an order can only be properly made after taking into account all the facts at hand. As the learned judge had taken the decision to refer the matter back, where further representations would have to be made and considered, it follows that the stage for the exercise of a discretion had not yet been reached and no question of a wrong exercise of discretion arises. Once the argument against the decision to refer the matter back fails, so too must the argument regarding the alleged refusal to issue the demolition order.

It was also argued that we are in as good a position as the court a quo to make such an order. I disagree. The court a quo has, on the

merits, found against the appellant; it rejected all the points on which the appellant had objected against the building, except with regard to the question whether the building would probably or in fact derogate from the value of adjoining or neighbouring properties. No finding can be made on that latter issue until the matter has been fully canvassed in terms of the referral. It may, for example, turn out that such derogation from the value of other properties as there may be, is so minimal that an order to demolish would amount to the improper

exercise of a discretion. We therefore do not have all the relevant facts on which to exercise such a discretion; indeed, the very purpose of the referral is to gather more facts.

In the result the appeal is dismissed with costs. The first respondent is to pay the costs of the cross-appeal up to the stage when

it was withdrawn.

NGOEPE, AJA

SMALBERGER, JA
VIVIER, JA
NIENABER, JA
SCHUTZ, JA (Concur