IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

REPORTABLE

Case no: 86/2006

In the matter between

eTHEKWINI MUNICIPALITY **APPELLANT**

and

TSOGO SUN KWAZULU-NATAL (PTY) LTD **RESPONDENT**

Coram: **HOWIE P, BRAND, HEHER JJA, MUSI and THERON AJJA**

Heard: **13 MARCH 2007**

Delivered: **28 MARCH 2007**

Summary: **National Building Regulations and Building Standards Act 103 of 1997 s 7(1) – 'refuse to grant its approval' – interpretation.**

Neutral citation: **This judgment may be referred to as *eThekwini Municipality v Tsogo Sun Kwazulu-Natal* [2007] SCA 38**

(RSA).

JUDGMENT

HEHER JA

HEHER JA:

[1] This appeal turns on the interpretation of s 7[1] of the National Building Regulations and Building Standards Act 103 of 1977 and the purported compliance by the appellant with its terms.

[2] The respondent has for several years been engaged in a phased development of a casino complex on a site known as The Village Green near Durban's Snell Parade. The implementation of the project has required an extended period of interaction with the Kwa Zulu-Natal Gambling Board and the appellant. The

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1Section 7(1) provides:

'(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;

(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:

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.'

relationship with the latter has been dogged by disagreement.

[3] The site falls within the area of the appellant’s Durban Town Planning Scheme (in the course of preparation). The zoning of the land – Special Zone No 84: Village Green – is regulated by scheme clauses. Those relevant to the present dispute are the following:

‘1. (a) Purposes for which land may be used or for which buildings may be erected and used:-

Casino, licensed hotel, place of amusement, residential building, restaurant, shop and other uses considered by the Council to be ancillary to the aforementioned uses or reasonably necessary for the development of this Special Zone.

(b) Purposes for which land may be used or for which buildings may be erected and used only with the special consent of the Council:-

Any other uses not mentioned in paragraph (a).’

. . .

4. On-site parking shall be provided to the satisfaction of the Executive Director (Physical Environment).

. . .

8. In the case of a casino development, no buildings or structures shall be erected within this Special Zone unless they are in accordance with an Integrated Development Plan approved by Executive Director (Physical Environment) for the entire Special Zone.’

[4] It is common cause that an Integrated Development Plan (hereinafter ‘the IDP’) was prepared and approved and amended from time to time. For the purposes of this appeal the version of July 2002 is the one applicable. A copy was made available to the court *a quo* and included in the record before us. It is not a plan in the conventional sense but rather a planning instrument which consists of text, plans and drawings running to some fifty pages. It is perhaps not without significance in the light of the submissions of counsel for the respondents (which are referred to below) concerning the lack of weight to be attached to this

document, that the following is said in the Introduction:

'The Special Zone was formulated to allow a complete and comprehensive development of the site'.

[5] The respondent purchased the site from the appellant under an agreement of sale signed in November 2001 (Annexure JAM 3 to the founding affidavit). Although its terms are in my view peripheral to this appeal, attention may be drawn to the following clauses for a proper understanding of certain of the relief granted by the court *a quo*:

'**15. DEVELOPMENT AND EIA[2] CONSTRAINTS**

15.1 The property shall only be used or developed in accordance with the relevant municipal bylaws and town planning scheme regulations in force from time to time, as well as the National Building Regulations and Standards Act, Act 103 of 1977, or such other legislation as may be applicable. In this connection it is recorded, and the Seller warrants, that the property is zoned Special Zone 84 and the Purchaser shall comply with the regulations pertaining to that zone.

15.2 Subject to the rights afforded to the lessees under the Waterworld and Animal Farm leases, the property shall be used solely for the purpose of a casino and ancillary purposes as contemplated in terms of the IDP and any consent to a change in the usage shall be subject to the prior written consent of the Seller upon such terms and conditions as the Seller may impose, including any rights that the Seller may have in terms of clause 16.'

and

'**18. DEVELOPMENT**

18.1 The Purchaser shall develop the property substantially in accordance with the IDP, the

2Environmental Impact Assessment

> conditions in the Decision Notice, and the EIA conditions, or any amendments thereto. The Purchaser shall also develop the property substantially in accordance with such temporary licence conditions as may be issued by the Board from time to time in terms of the Act.'

[6] In November 2004, acting pursuant to s 4(1)[3] of the Act, BKS Engineers submitted three plans to the appellant on behalf of the respondent to give effect to amendments to the casino licence issued by the Board. The first plan, about which nothing further requires to be said, related to the demolition of a recreational facility known as 'Waterworld'. The second was for the construction of a temporary parking lot and became the subject of a stop notice in terms of s 4(1) of the Act on 30 November 2004. In fact the work was completed by 8 December of that year. It too can be disregarded for present purposes.

[7] The third plan (numbered 611/11/04) gave rise to the present dispute. It was a building plan for the construction of a multi-level parking facility which, according to the conditions of amendment of the licence, the respondent was required to develop at a cost of R27 million and complete and open by 31 July 2005.

[8] On 15 December 2004 attorneys representing the respondent wrote to the City Manager of the appellant as follows:

'**OUR CLIENT: TSOGO SUN KWAZULU-NATAL (PTY) LTD: OUTSTANDING PLANS IN RESPECT OF TEMPORARY PARKING, ENTRANCE AND PARKADE AT 20 BATTERY BEACH ROAD**

We refer to our faxes of 2 December and 9 December 2004 in the above connection.

3Section 4(1) provides:
'(1) No person shall without the prior approval in writing of the local authority in question, erect any building in respect of which plans and specifications are to be drawn and submitted in terms of this Act.'

Two sets of plans are presently lodged with your Municipality. The first relate to the temporary parking area (which was the subject of the stop work order that was dealt with in our telefax of 2 December) and a new entrance way and toll plaza. The second relate to a new parkade on the property.

The plans in respect of the first works were lodged with your Municipality on 7 October 2004, and referrals were attended to by BKS Engineers between that date and 19 November 2004. Our client and its professional team are therefore satisfied that the plans are now capable of approval.

The plans relating to the parkade were submitted to your Municipality on 10 November 2004. We are instructed that the architects have received no communications at all from the relevant officials in response thereto, and given the time elapsed, that is unusual. They have concluded either that the consideration of the plans has been "put on hold" due to the dispute regarding IDP compliance, or that the plans are in order, and are similarly capable of approval.

Our client has reviewed the process normally adopted in the consideration of plans of this nature, and is satisfied that both sets of plans should have been approved by now through the exercise of reasonable diligence and skill by your officials. Our client is entitled under the constitution and the provisions of other relevant legislation, to expect efficient administrative action from your Municipality in the consideration of plans lodged with it under the National Building Regulations.

However, mindful that this is the Christmas season, and that the Municipality may have been inundated with plans during the recent past, our client is prepared to grant a short extension to your officials to complete any outstanding tasks there may be in relation to the plans, and to issue its formal approval thereof. In the circumstances we are instructed to demand from you, as we hereby do, that unless both plans are approved, and such approval is communicated to our clients by no later than 7 January 2004, our client will approach the High Court for an appropriate Order.

Our client makes itself and its professional team available between now and 7 January 2004 to attend to any referrals or queries that may be raised by the relevant officials.'

[9] The appellant responded first to the issue of the temporary parking facility (on 21 December). On 24 January 2005 the respondent's attorney sent a strongly worded demand drawing attention to the fact that the period of 60 days afforded to the council by s 7(1) of the Act within which to grant or refuse its approval of the plans for the parkade had expired and requiring approval by no later than the 28th of that month failing which the respondent would bring an application to court for an order in terms of s 8(1)[4] of the Act directing it to do so.

[10] Only on 31 January 2005 did the appellant respond. The terms of its letter are central to the present dispute:

'**<u>PROPOSAL: NEW PARKADE AND TOLL PLAZA, SUNCOAST CASINO:</u>**

<u>PLAN NO. 6111104 – 20 BATTERY BEACH ROAD</u>

Kindly note that the following items are required to be attended to in order that further consideration may be given to the above application in terms of Section 7 of the National Building Regulations and Building Standards Act 103 of 1977:-

1. The application does not comply with the Integrated Development Plan of July 2002 and therefor cannot be considered until either:

1.1 The application complies with the Integrated Development Plan of July 2002; or

1.2 An application is made to amend the Integrated Development plan of July 2002 to allow for the proposal, and the approval of Council is obtained for such

4Section 8(1) provides:

'If a local authority fails to grant or refuse timeously its approval in accordance with section 7 in respect of an application, a court may on the application of the applicant concerned make an order directing such local authority to perform its duties and exercise its powers in accordance with that section within the period stated in such order, or make such other order as it may deem just.'

change to the Integrated Development Plan of July 2002.

Once the above has been attended to, the plans will be given further consideration.

Note: For your information you are furthermore advised that in terms of the Act, this application may be submitted anew at no additional cost, within a period not exceeding one year from the date

of this notice on the following conditions:-

(a) if the plans, specifications and other documents have been amended in respect of any aspect thereof which gave cause for the notice; (Note: all alterations to the drawings to be signed and dated) and

(b) if the plans, specification or other documents in their amended form do not substantially differ from the plan, specifications or other documents which were originally submitted.

Please arrange to collect the plans from the Collections Counter at Room G8 on the ground floor of the Development and Planning Unit, situated at 166 Old Fort Road, Durban.'

[11] On 25 February 2005 the respondent duly launched its threatened application. It sought an order in terms of s 8(1) directing the appellant to approve plan 611/11/04 for the construction of the multilevel parking facility. In the alternative it claimed an order directing the appellant to grant or refuse its approval within five days of the granting of the order.

[12] With that statutory provision, which is limited to a local authority that fails to perform the duty imposed on it by s 7, should be contrasted s 9(1), upon which the appellant relied in both courts, and which provides, inter alia, an appeal against the decision of a local authority taken in terms of s 7 to refuse to grant approval or against the interpretation or application by a local authority of a building regulation or by-law.[5]

[13] The primary dispute between the parties in the application to court was

5 Section 9(1) provides:

'Any person who-

(a) feels aggrieved by the refusal of a local authority to grant approval referred to in section 7 in respect of the erection of a building;

(b) feels aggrieved by any notice of prohibition referred to in section 10; or

(c) disputes the interpretation or application by a local authority of any national building regulation or any other building regulation or by-law,

may, within the period in the manner and upon payment of the fees prescribed by regulation, appeal to a review board.'

whether the appellant had, in its letter of 28 January 2005 communicated a decision to refuse to grant approval of the planning application or whether, properly interpreted, the notification merely amounted to a postponement or avoidance of a decision. The debate was coloured by allegations against the appellant of ulterior motives designed to pressure the respondent into meeting planning or development objectives of the appellant which were not acceptable to the respondent. (I consider the significance of this controversy below). From the appellant's side it was contended that the letter in question contained an unequivocal refusal to approve the plans and the only remedy open to the respondent, once that happened, lay in the appeal provided by s 9(1). Until it had exhausted this 'domestic remedy', so it was submitted, the court could not and would not entertain an application to review the appellant's decision. Suffice it to say at this stage that if the respondent's reliance on s 8(1) is correct no question of review arises because the section contains express authorization to approach a court to compel compliance with the duty imposed by s 7(1); if, on the other hand, its reliance was misplaced, the respondent has set up no alternative basis for interference with the decision, such as a review.

[14] Jappie J, in giving judgment, said that the respondent had sought an order in the following terms:

'1. That the respondent is directed in terms of section 7 of the National Building Regulations and Buildings Standards Act 103 of 1997 to grant or refuse approval of the applicant's plan No. 611/11/04 within 5 days of the granting of this order;

2. The construction by the applicant of a parkade in accordance with the plan, Annexure "JAM9" is not prohibited by the IDP or Regulation 8 of the regulations applicable in Special Zone No. 84 of the respondent's town planning scheme in the course of preparation and does not constitute a breach of the provisions of clause 15.2 of Annexure "JAM3".'

[15] The relief in paragraph 2 was, however, neither asked for in the notice of motion nor was a substratum for its grant laid in the founding affidavit. There was no indication in the record of proceedings filed in this Court as to whether, how or when the notice of motion was amended or what the appellant's attitude was in that regard. We were informed by counsel at the hearing that the claim for declaratory relief was first raised in the applicant's heads of argument submitted to the court *a quo.* No formal application for amendment was made. Nor is it clear whether the council resisted the proposal. In any event the order was made and no leave was sought to appeal against the propriety of making it. Respondent's counsel informed us that its purpose was to vent the true dispute between the parties, *viz* whether the council could justify its negative attitude to the submission of the planning application by reliance on the supposed non-compliance of the application with the IDP. Counsel submitted that the court *a quo* had been correct in finding that the IDP provided no such excuse and that 'any reference to the IDP in the determination whether building plan No 611/11/04 is to be approved or rejected in terms of the Act is irrelevant. . . The respondent . . . can . . . not be permitted to rely on the broad principles as they are set out in the IDP to justify the exercise of public power given to it by the Act' (thus Jappie J).

[16] The learned judge made an order in terms of the relief which he had quoted. On application he granted the local authority leave to appeal to this Court.

[17] In his judgment the judge found that the notification of 31 January 2005 'appears equivocal and falls short of what is required by s 7 of the Act as it communicates neither approval nor rejection of the building plan'. He appears to have equated 'rejection' with a refusal to give approval. That seems to evince a misunderstanding of s 7. A local authority is not required to reject an application but only to refuse to approve it. There is a significant difference between the two which is made clear in the Act and appears equally plainly in the letter of notification. While 'rejection' may bear a sense of outright and final refusal, a 'refusal to approve' is more flexible and does not necessarily shut the door on future approval. This broader meaning is implicit in s 7(5).[6]

[18] No doubt those applications which cannot be brought within the express reservations in s 7(5) must be regarded as having effectively been rejected. In the last-mentioned event the local authority becomes *functus officio* and the applicant who wishes his plans to receive further consideration will have to bring a new application in terms of s 4(3) of the Act. But a local authority is not *functus officio* if the plans which it has previously refused to approve qualify for reconsideration

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6'(5) Any application in respect of which a local authority refused in accordance with subsection (1) *(b)* to grant its approval, may notwithstanding the provisions of section 22, at no additional cost and subject to the provisions of subsection (1) be submitted anew to the local authority within a period not exceeding one year from the date of such refusal-

(a) (i) if the plans, specifications and other documents have been amended in respect of any aspect thereof which gave cause for the refusal; and

(ii) if the plans, specifications and other documents in their amended form do not substantially differ from the plans, specifications or other documents which were originally submitted; or

(b) where an application is submitted under section 18.'

by reason of s 7(5)(a) or (b). In such event the earlier refusal to approve was merely conditional and may be reversed.[7]

[19] Even in this sense of a refusal to approve, the notification must no doubt be unequivocal: it must manifest approval of the plans or a refusal to approve them.

[20] How then is one to understand the notification of 28 January? In my view, if the letter is read as a whole in the context of the enabling legislation, it conveys an unambiguous message. First, the local authority has considered the application. Second, as a necessary inference from the requirement that certain items must be attended to before *further consideration* can be given (my emphasis), it informs the reader that the local authority does not approve the application as it was submitted for approval. Third, it furnishes a reason for not approving the application, *viz* that it does not comply with the Integrated Development Plan of July 2002. Finally, it opens the door for reconsideration of the application under s 7(5) by telling the applicant what the local authority considers necessary to justify reconsideration.

[21] The appellant was careful to bring its notice within the terms of the statute by setting out the substance of s 7(5). Respondent's counsel submitted that those were merely the trappings of a letter in its standard form. Even if that were so, the addressee would have no ground for such a surmise. The reasonable reader would approach the note on the assumption that it is relevant to what preceded it. The last sentence of the letter is also not without significance: return

7This is a frequently encountered statutory power, see eg Baxter, *Administrative Law* 376.

of the plans is tendered which, in itself, is inconsistent with mere delay or the avoidance of a decision.

[22] In the circumstances the respondent's understanding of the notification as merely communicating an avoidance of the issue or (unwarranted) postponement of the decision is without justification.

[23] Once it is accepted that the decision communicated to the respondent constituted a refusal to approve, the question arises why the respondent should have been allowed to approach the court directly as opposed to first exhausting its remedy of an appeal to the review board ('the board') pursuant to s 9. The only reason advanced on behalf of the respondent in argument was that the declaratory order sought involved a question of interpretation of a contract which was antecedent to any decision on the approval of building plans. Even so, counsel was bound to concede that there was no reason why the board could not decide the preliminary issue as well. In the circumstances the court *a quo* should not, in my view, have entertained the application for the declaratory order. In the circumstances it is not really necessary to deal with the issues arising from the terms of the declaratory relief granted by the court *a quo*. However, lest this court be understood to endorse the declaratory order, I propose to consider those issues as well.

[24] In amplification of his justification for claiming such relief, respondent's counsel drew our attention to correspondence between the parties which preceded the correspondence in January 2004. He emphasized, rightly, that the council had

attempted to negotiate contributions to its developmental objectives in exchange for concessions by it in relation to the approval of the parkade and other requirements imposed by the Gambling Board when amending the licence. The thrust of his submission was that the council behaved improperly by attempting to extort co-operation in that way. More important, he submitted, this attitude influenced its recalcitrant and obstructive response to the respondent's planning application. This was, so counsel submitted, the reason it was necessary for the court to examine the council's reliance on the conflict between the IDP and the application. Such an examination would, he contended, reveal the hollowness of its excuse for not approving the application and expose its true motives. Accepting the premise, this seems to me a justifiable manner of attempting to show that a so-called 'refusal to approve' is in truth a sham which veils a simple refusal even to consider the application. I propose therefore to adopt counsel's invitation. Fundamental to counsel's reasoning was his submission that the IDP was nothing more than a conceptual development of the site, lacking detail, which, if it bound the respondent at all, did so only in the initial stages of the casino development. 'Times change', said counsel, 'and it could never have been intended that future development of the site would be hindered by pre-determined planning which would inevitably, with the development of the casino and changing demands on it, become outdated.'

[25] The appellant's scheme-in-preparation has the force of law; a local authority

is under a duty to observe and enforce its scheme[8]; failure to comply with its terms is a criminal offence[9]; the scheme clauses which regulate a particular zoning are incorporated in the scheme and become likewise enforcible. In the present instance clause 8 specifically prohibits the erection of buildings in the special zone unless they are in accordance with the approved IDP. To that extent, not the IDP as a whole but those of its provisions which relate to buildings (including those provisions embodied in the text, plans and drawings) must be taken to be incorporated in the scheme and to have acquired the status of law for the purposes of interpreting and enforcing clause 8. Indeed counsel conceded that the provisions of the IDP, so incorporated, would, for this reason, be 'any other applicable law' within the meaning of that expression in s 7(1)(a), if his submission were not to be accepted. He also conceded that in such event Jappie J 'understated' the position by describing the IDP as 'no more than a spatial development framework prepared by the applicant as a guide for the development of the property'.

[26] There is no vagueness in clause 8. It requires one who intends to erect a building on the land to have regard to the IDP to ensure that the proposed building conforms with that planning instrument. That is the law. It does not retreat or become unenforcible if its substance needs updating or its prescriptions are unduly rigid. In such event a remedy is at hand in the form of an application to amend the town planning scheme. Nor is there, in my view, anything vague or hypothetical

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8See definition of 'town planning scheme' in s 1 of the Town Planning Ordinance 27 of 1949 (N) read with s 56(1).
9S 77 of the Ordinance.

about the 'Indicative Site Development Plan' that forms part of the IDP and which reflects, according to scale, the scope and location of buildings which are to be erected on the site. The building which the respondent proposes to erect to house the parkade is not shown and, if erected, it will, as counsel conceded, take up a part of the site which is depicted as an open parking area on the Indicative Plan. The open area is laid out in accordance with what is described as the 'Landscape Master Plan' and one may deduce from the terms of the IDP that the relationship between buildings and landscaped areas as shown thereon was regarded as a matter of some value and importance to the development of the site and that the impact of the buildings in the development was likewise material to achieving harmony between the development and its wider geographical setting.

[27] The court *a quo* was influenced by the absence of provisions in the IDP which refer expressly to the construction of a parkade. Hence it found that 'there appears to be nothing in the IDP which either prohibits or permits for town planning purposes the construction of the proposed parkade'. That is why the learned judge granted the declaratory relief in the negative form that the applicant's counsel proposed. But he erred in that approach. Clause 8 required him to find positively that the proposed building 'is in accordance with the IDP' before it could be said that the planning application complied with the provisions of the scheme. Because it was not possible to make that finding, he should have refused the declaratory relief in so far as it related to the IDP.

[28] In the answering affidavit, the council's building control officer, Mr Graham

de Kock, drew attention to the non-compliance with clause 8 and to the Indicative Site Development Plan. He was obviously correct in saying that 'until such time as the IDP has been amended, the Respondent is precluded by law from approving the plans'.

[29] In so far as the declaration of rights raised the subject of clause 15.2 of the deed of sale (a matter totally irrelevant to the application for approval of the planning application under s 7 of the Act) the respondent is no doubt correct that the submission or approval of the planning application would not constitute a breach of those terms. The provision of parking on the site was a purpose which the council had, in its previous negotiations considered to be ancillary to the primary uses of the site. It was also so treated in the IDP. Before us counsel for the appellant did not seek to contend otherwise. (No-one drew attention to clause 15.1 which seems in terms to equate to scheme clause 8: a contravention of the last-mentioned would almost certainly constitute a breach of the former; but the terms of the declarator were, as I have said, settled by the respondent's counsel.)

[30] Counsel for the respondent sought to persuade us that the appellant was influenced wrongly, in its negative response to the planning application, by its insistence on its perceived contractual rights under the deed of sale. I have earlier in this judgment assumed that premise to be correct. However, properly construed, the reference by the appellant to those rights in the answering affidavit is no more than an explanation for the stance which it adopted during negotiations between the parties. It pointed out that the respondent had, without reference to the council,

obtained from the Gambling Board various amendments to its licence which if implemented would change the use of the property. In terms of the agreement such a change required the council's approval. It was therefore permissible for the council to negotiate a *quid pro quo* for its consent. That seems neither an untenable nor unreasonable attitude for it to have taken. But the council did not, in its answering affidavit, provide any basis for the submission that that view influenced its decision to refuse the planning application. The inference which counsel sought to draw remains speculative.

[31] In the result the appeal succeeds. The success achieved by the respondent in the court *a quo* was insufficient to influence the costs order in that court, particularly having regard to the stage at which the declaratory relief was first sought. In this court the respondent had no success of any consequence and it should therefore pay the costs of the appeal.

[32] The following order is made:

1. The appeal succeeds with costs including the costs of two counsel.
2. The order of the court *a quo* is set aside and replaced by the following:

   'The application is dismissed with costs, including, to the extent that two counsel were employed, the costs consequent upon such employment.'

J A HEHER
JUDGE OF APPEAL

HOWIE P)Concur
BRAND JA)
MUSI AJA)
THERON AJA)