SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 20590/2014

In the appeal between:

Plover's Nest Investments (Pty) Ltd **Appellant**

and

Jacques Willem De Haan **First Respondent**

The Bitou Local Municipality **Second Respondent**

Neutral citation: *Plover's Nest Investments v De Haan* (20590/2014) [2015] ZASCA (193) (30 November 2015).

Coram: Lewis, Mhlantla, Leach, Tshiqi and Majiedt JJA

Heard: 9 November 2015

Delivered: 30 November 2015

Summary: Administrative Law – administrative action – what constitutes – effect of failure of official of municipal council to communicate resolution of council correctly – official not empowered to make decisions on behalf of council – act of official merely administrative error not amounting to administrative action – resolution of council valid and binding.

ORDER

On appeal from: Western Cape Division of the High Court, Eastern Circuit Local Division, George (Griesel J sitting as court of first instance):

The appeal is dismissed with costs.

JUDGMENT

Mhlantla JA (Lewis, Leach, Tshiqi and Majiedt JJA concurring):

[1] This appeal concerns the approval by the second respondent, Bitou Local Municipality, formerly known as the Plettenberg Bay Municipality (the municipality), of building plans submitted by the appellant, Plover's Nest Investments (Pty) Ltd (Plover's Nest). The plans were in respect of extensions and additions onto in an area over which a neighbouring property had a servitude. The first respondent, Mr J W De Haan (De Haan), is currently the owner of the dominant tenement. He claims that the building extension plan approved by the municipality interfere with his rights of ownership in two main respects. He thus applied, amongst other things, for an order setting aside the municipality's approval of the extensions on the basis that the decision to approve the building plans was unlawful. His application succeeded and the approval was set aside by the Western Cape Division of the High Court (Griesel J).

[2] The primary issue both before the court a quo and this court on appeal is whether conditions imposed on owners of unimproved erven, which were not communicated to them, and not registered against the title

deeds of the respective properties, were binding on the owners. The other issue is whether De Haan's rights under the servitude are impeded by the building that was approved. These rights include access to a pedestrian path to the public beach, which Plover's Nest's property faces, obtained by means of a right of way over it registered in favour of De Haan's property in terms of a Notarial Deed of Servitude K 715/98 and a right to a view of the sea.

[3] The litigation in this matter arose after De Haan discovered that the municipality had approved Plover's Nest's building plans for extensions and additions to its property and that Plover's Nest had built within the servitude area. The background to the application in the court a quo is briefly the following. Certain unimproved erven 3983, 3984, 3985 and 3986, situated on Solar Beach in Plettenberg Bay, were sold to Plover's Nest and De Haan's predecessors in title. Erf 3984 extended to the beach by means of a 'pan–handle pathway'. Plover's Nest owned erven 3983, 3985 and 3986 whilst its neighbours, Mr and Mrs Douglas–Jones (the Douglas-Joneses) owned erf 3984. During May 1994 an application was submitted to the municipality on behalf of the owners of these erven for the subdivision and consolidation of the vacant erven.

[4] On 6 June 1994, the senior town planner in the employ of the municipality, Mr J Geyer (Geyer), compiled and submitted a report to the municipal council in which he recommended that the application be approved in principle, subject to compliance with the provisions of the Land Use Planning Ordinance 15 of 1985 (the LUPO) and the provision of new service connection points for the account of the applicants. On 27 June 1994, Geyer's report was considered by the council and his recommendations were accepted. An additional condition imposed by the

council was that it would not, as a result of the re-subdivision, be prepared to support any future requests for relaxation of the building lines of the re-demarcated properties. The application for the proposed consolidation and re-subdivision was duly advertised for comments and no objections were received. In January 1995, Geyer submitted a report to the Building, Planning and Development Committee of the municipal council. In it, he recommended that additional conditions be imposed for the approval of the consolidation and re-subdivision.

[5] On 30 January 1995, the report was tabled at the meeting of the council where it resolved to approve the consolidation and re-subdivision subject to the six conditions proposed by Geyer. The resultant resolution of the council which included these further conditions was as follows:

' (i) That approval be granted in terms of section 25(1) of Ordinance 15 of 1985 for the consolidation and re-subdivision of erven 3983 to 3986 (Solar Beach) into 3 erven as depicted on Plan No 1 dated October 1994;

(ii) That the provision of service connection points be for the account of the owners of the land;

(iii) Council will not, as a result of the resubdivision, be prepared to support any future requests for relaxation of the building lines of the new properties created;

(iv) That erf 5637 (19 m^2 in extent) be consolidated with erf 3982 because of a previous encroachment;

(v) At no time in future will the servitude area be used for building purposes; and

(vi) Reference 259.42.20 of erf 5638 will be the lateral building line for that particular erf. (Plan No 2 dated October 1994).'

[6] On 10 February 1995, Geyer, acting in terms of s 24(2)*(d)*(ii) of the LUPO,[1] sent to Mr H van Waart, who was Plover's Nest's land-surveyor,

[1]Section 24(2)*(d)*(ii) of the LUPO provides as follows in relation to applications for subdivision:
'the said town clerk or secretary shall where his council may act under section 25(1) notify the owner and the Surveyor-General concerned of his council's decision and where applicable furnish them with a copy of any conditions imposed by that council'.

and to the Surveyor-General, a letter in the following terms:-

'My council, at its meeting held on 30 January 1995 resolved as follows:-

1. That approval be granted in terms of section 25(1) of Ordinance No 15 of 1985 for the consolidation and re-subdivision of erven 3983 to 3986 (Solar Beach into 3 erven as depicted on Plan No 1 and 2 dated October 1994.
2. That the provision of new service connection points be for the account of the owners of the land.

Enclosed please find three copies of the subdivision plan duly signed and dated by the Town Clerk.'

It will be noted that the other conditions in the council resolution were omitted from this letter.

[7] On 28 February 1995, the municipality approved Plover's Nest's building plans. Between March 1995 and May 1996, Plover's Nest and the Douglas-Joneses built their respective dwellings. A certificate of consolidated title was issued in respect of erf 5636 owned by the Douglas-Joneses.

[8] On 3 January 1997, a Notarial Deed of Servitude between Plover's Nest and the Douglas–Joneses was executed and registered by the Registrar of Deeds. The body of the deed of servitude specified:-

'…. The owner, his successors in the title or assigns of the Servient Tenement [Plover's Nest's] shall allow the Dominant Tenement [Douglas–Joneses'] the non–exclusive right of pedestrian access over the Servient Tenement for the purposes of going to or departing from the beach. The figure BCDEFN on Diagram SG No 4229/95 annexed to Certificate of Consolidated Title NO T64903/98 represents the servitude area.

Such access right shall be exercised by the Dominant Tenement at all times in a reasonable manner so as to provide as little as possible disturbance to the privacy of the Servient Tenement. In the exercise of this servitude, the owner of the Dominant Tenement shall only use the demarcated path to the beach.

The Dominant Tenement from the upstairs section of the house shall be entitled to unobscured visibility of the sea over the pathway and a view which will be partially obscured by vegetation elsewhere.'

[9] On 16 February 1999, the Douglas-Joneses sold their property to De Haan. During February 2004, Plover's Nest submitted an application to the municipality for the approval of building plans to erect a swimming pool, boardwalk and a deck on erf 5638. The application was subsequently approved and all these structures were built within the servitude area.

[10] On 13 August 2012, Plover's Nest submitted an application to the municipality for the approval of building plans for the extension of the house. The application was accompanied by submission forms for building plans which contained the relevant information and requirements in terms of the National Building Regulations and Building Standards Act 103 of 1997. One of the questions asked in these forms was whether there were any impediments that could affect the granting of the approval. It was couched in the following terms:

'Title Deeds

Are there any restrictions in the title deed, in respect of this Erf which may have an effect on this application and which should be lifted in terms of the Removal of Restrictions Act, Act 84 of 1967?

Answer: No.'

[11] On 4 February 2013, erven 5635 and 5638 owned by Plover's Nest were consolidated to create erf 12702. Nine days later, on 13 February, the municipality approved the building plans for the extensions and additions to the buildings on erf 12702. Plover's Nest thereafter proceeded with the building extensions over the property despite the

condition precluding building in the servitude area. During April 2013, De Haan, who then lived in Australia, received a report that Plover's Nest had done some extensions on its property and in the servitude area. The report came from the manager of the guest house that De Haan was running on the property. Upon inspection, he discovered that extensive building works had already been constructed in the servitude area without his prior consent.

[12] Consequently De Haan launched an application in the Western Cape Division of the High Court, Eastern Circuit Local Division, George for the review and setting aside of the municipality's approval of Plover's Nest's building plans for the extension. He also sought an interdict restraining Plover's Nest from proceeding with the building operations pending the finalisation of the review application. The application was founded on the basis that the municipality's approval of the building plans was inconsistent with s 39(1)*(a)* and *(c)* of the LUPO and also with s 7(1)*(a)* of the National Building Regulations and Building Standards Act 103 of 1997,[2] because the approved building work was incompatible with the provisions of the notarial deed of servitude executed and registered between Plover's Nest and the predecessors-in-title of the property (the Douglas-Joneses) now owned by De Haan.

[13] De Haan argued also that a municipality is obliged to enforce compliance with its own decisions. In this regard, s 39(1)*(a)* and *(c)* of the LUPO reads:

'Compliance with provisions of zoning scheme and of conditions of subdivision.-

(1) Every local authority shall comply and enforce compliance with –

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[2]Section 7(1)*(a)* of the National Building Regulations and Building Standard Act provides:
'If a local authority, having considered a recommendation referred to in section 6(1)*(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'.

(*a*) The provision of this Ordinance or, in so far as they may apply in terms of this Ordinance, the provisions of the Township Ordinance, 1934 (Ordinance 33 of 1934);

(*b*). . .

(*c*) Conditions imposed in terms of this Ordinance or in terms of the Township Ordinance, 1934, and shall not do anything, the effect of which is in conflict with the intention of this subsection.'

[14] The deponent to the answering affidavit on behalf of the municipality admitted that the council's resolution dated 30 January 1995 had contained six conditions. He averred that an error had occurred when Geyer communicated its resolution to Plover's Nest, in that the letter written by Geyer referred only to two conditions instead of to all six. This resulted in four conditions being omitted. Furthermore, he averred that the municipality's officials had not been aware of this mistake until De Haan's attorneys threatened legal action. The mistake was also not noticed when the application for the approval of the building plans for the extension was considered. The municipality averred that it would not have approved the application had it been aware of the existence of the restrictive conditions.

[15] On the other hand, Mr Thomas, the deponent to the answering affidavit of Plover's Nest, denied the allegations that Plover's Nest had breached the conditions of approval. According to him, the municipality's approval and decision was what had been officially communicated by Geyer to Plover's Nest and the Surveyor-General containing two conditions only, without any restrictions on the proposed building project. He contended that, for the past 19 years, Plover's Nest had not been aware of the restrictive conditions and that had it known about them, it would have lodged an appeal to the Administrator in terms of s 44 of the LUPO against the imposition of the condition prohibiting building. He

further averred that Plover's Nest had expended an amount in excess of R1 million in effecting the building extensions approved by the municipality.

[16] In the court a quo, Plover's Nest contended that conditions 5 and 6 were not operative as the letter sent by Geyer did not contain them. According to Plover's Nest, the operative decision was the one communicated to them by the official of the municipality and that the municipality could not ignore that letter and seek to rely on its decision of 30 January 1995.

[17] The learned judge did not decide the question relating to the effect and consequence of Geyer's mistake when he communicated the council's resolution, but disposed of the matter on a different point. He concluded that Plover's Nest had omitted relevant and crucial information in the forms submitted with the building plans and that its answers were misleading. He concluded also that had the municipality been aware of the current facts – that there were restrictions in the title deed – it would not have approved the plans. The court a quo thus granted an order reviewing and setting aside the approval of the building plans dated August 2012. Plover's Nest appeals against that finding with the leave of this court.

[18] The appeal raises the question of the consequences of the failure of an official of the municipality to communicate a decision of the municipal council correctly and whether the action of that official constitutes administrative action. Simply put, whether, as Plover's Nest contended, the decision as communicated constituted the decision of the municipality.

[19] There is no doubt that the conduct of the municipality in approving the consolidation and subdivision of erven, subject to conditions, amounts to administrative action and that its decision affects the legal rights of an individual. It is necessary in view of the provisions of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) to identify the administrative action which under review would stand to be set aside. To that end, Professor Hoexter identifies seven main elements under the PAJA namely:
(a) A decision; (b) by an organ of State (or natural or juristic person); (c) exercising public power or performing a public function; (d) in terms of any legislation (or an empowering provision); (e) that adversely affects rights; (f) and has a direct, external legal effect; and (g) which does not fall within one of the listed exclusions (eg legislative, executive and judicial functions).

[20] The PAJA further broadly defines the term 'decision' under s 1 as meaning, for current purposes:

'any decision of an administrative nature made, proposed to be made, or required to be made, as the case may be, under an empowering provision, including a decision relating to—

. . .

(b) giving, . . . or refusing to give . . . approval, . . . or permission;

. . .

(d) imposing a condition or restriction;

. . . or

(g) doing or refusing to do any other act or thing of an administrative nature, and a reference to a failure to take a decision must be construed accordingly.'

[21] Before us, counsel for Plover's Nest submitted that Geyer's failure to notify the owners and the Surveyor-General of the municipal council's

Cora Hoexter *Administrative Law in South Africa* 2 ed (2012) at 197.

decision to impose conditions 5 and 6 meant that these conditions were inoperative and that Geyer's defective notification constituted administrative action. In support of his submission counsel relied on the decisions of *Kirland*[3] and *President of the Republic of South Africa & others v South African Rugby Football Union & others 2000 (1) SA 1 (CC) (SARFU III).*

[22] In my view, the reliance on these decisions is misplaced. The facts of these cases are distinguishable from the facts of this matter. In *Kirland* the relevant administrator made two conflicting decisions: the first had been correctly taken (but not communicated by the relevant official to the applicant entity), while the second – relied and acted upon – which was communicated to the applicant, had been defective and unlawful. The two decisions were taken by functionaries vested with the necessary legislative powers to approve or refuse the application. The question before the court was whether the approval by the acting superintendent-general and the withdrawal by the superintendent–general constituted unlawful administrative action. The administrative action is mentioned in para 69 of the majority judgment, where the following appears:

'The problem arises from two decisions on applications Kirland submitted to the Eastern Cape government in 2006 and 2007 to establish private hospitals in the province. The first said No. The second said Yes. The first, the refusal, was never signed off or communicated to Kirland. This was because Mr Boya, the superintendent-general who took that decision, became incapacitated. The second, the approval, was taken on 23 October 2007 by an acting superintendent-general, Dr Diliza, while Mr Boya was away. That decision was communicated to Kirland, but Dr Diliza took it in circumstances that make it vulnerable to challenge on review.'

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[3]*MEC for Health, Eastern Cape & another v Kirland Investments* (Pty) *Ltd t/a Eye & Laser Institute* 2014 (3) SA 481 (CC).

[23] The decision of this court in *Oudekraal*[4] (ie that defective decisions of administrators remain binding until they are set aside through judicial review) was affirmed by the Constitutional Court in *Kirland*. That court essentially required organs of state to apply for the review and setting aside of their own erroneous decisions upon learning of them, where applicants for the decisions wish to rely upon them. These principles are further in line with the principle underlying the term *functus officio*, which entails that once an administrator has made a decision it has no power to change it or set it aside.[5]

[24] *SARFU III* related to the exercise of presidential executive powers to appoint a commission of enquiry in terms of s 84(2)*(f)* of the Constitution. The question before the court was whether the exercise of the power conferred on the President constituted administrative action. The Constitutional Court held that the decision was executive rather than administrative action. But Plover's Nest argued that *SARFU III* was authority for the proposition that a decision takes effect only when communicated. The court said (para 44) that the appointment of a commission of enquiry 'only takes place when the President's decision is translated into an overt act, through public notification'. The argument loses sight of the fact that the President was the repository of power in terms of the Constitution: only he could take such a decision and he was required to make it public. In this matter Geyer was not the repository of power. The council was. Geyer simply miscommunicated its decision.

[25] In this case the municipality resolved to grant the application for consolidation and re-subdivision subject to six conditions. It is clear that some of the conditions were extracted from the motivation submitted on

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[4] *Oudekraal Estates (Pty) Ltd v City of Cape Town & others* 2004 (6) SA 222 (SCA).
[5] Lawrence Baxter *Administrative Law* (1984) at 372-380 and Hoexter op cit at 278-281.

behalf of Plover's Nest although the applicant owners were not aware of their land-surveyor's submission at the time. The municipal council did not err when it made its decision. The only issue is the effect of Geyer's failure to communicate the decision correctly.

[26] *Kuzwayo v Representative of the Executor in the Estate of the late Masilela*[6] is pertinent authority on the distinction between clerical and administrative actions. In that case, a delegate of the Director-General for the Department of Housing issued a declaration that Kuzwayo had been granted the right of ownership in respect of a site that had already been allocated to Masilela. It was not in dispute that Masilela had paid for the site and had built a house on it: he and his family had lived in the house for 13 years prior to his death. In determining the question, whether the act of the official amounted to a decision in terms of the PAJA, Lewis JA for this court held (para 28):

'The only administrative decision that could and should have been made was that of the Director-General or his delegate, after the inquiry mandated by s 2 of the Conversion Act [81 of 1988]. And that was the only decision that could be subject to review. The act of signing the declaration and the deed of transfer were but clerical acts that would have followed on a decision. Not every act of an official amounts to administrative action that is reviewable under PAJA or otherwise.'

[27] In this case, it is common cause that Geyer's action was an obvious mistake: whoever had typed the letter had not turned over to the page that contained the rest of the conditions including that prohibiting building in the servitude area. One need merely scrutinise the letter to see that Geyer had not made any decision. The introductory part reads:

'My council, at its meeting held on 30 January 1995 resolved as follows: . . .'

[6] *Kuzwayo v Representative of the Executor in the Estate of the late Masilela* [2011] 2 All SA 599 (SCA) para 28. See also *Nedbank Ltd v Mendelow & another NNO* 2013 (6) SA 130 (SCA) paras 24-26 and *Seale v Van Rooyen NO & others; Provincial Government, North West Province v Van Rooyen & others No* 2008 (4) SA 43 (SCA) para 12.

In my view, it cannot be said that Geyer made any decision when regard is had to the introductory part of the letter. He did not evaluate the council's decision but merely conveyed it. The act of writing the letter was a notification that followed on a decision. It has to be borne in mind that he had a duty to notify Plover's Nest of the municipal council decision and the conditions imposed and that he was not vested with any authority to take a decision. It is clear that Geyer did not intend to do anything other than communicate the decision of the council. He performed a clerical act and in the process committed an error. The communication of the decision had nothing to do with the decision – only the notification was defective. His error cannot be imputed to the council and elevated as the decision of council. It follows that the clerical error does not constitute administrative action that would substitute the resolution of the municipality. In the result, the resolution of council dated 30 January 1995 is valid and binding on the municipality. It follows that the decision of the municipality on 13 February 2013 to grant approval to Plover's Nest's building plans is fatally flawed and stands to be reviewed and set aside.

[28] What remains is the question relating to the finding of the court a quo that the answers provided by Plover's Nest in the forms submitted with the building plans stating that there were no restrictions in the title deed were misleading. In terms of the Notarial Deed of Servitude, Plover's Nest allowed the Douglas-Joneses, and later De Haan, the non-exclusive right of pedestrian access to and from the beach. It furthermore provided that De Haan would be entitled to an unobscured view of the sea over the pathway from the upstairs section of the house. The registered servitude did not expressly or by necessary implication prohibit building in the servitude area as contended by De Haan. In the result, it was not

necessary for Plover's Nest to bring the existence of the servitude to the attention of the municipality when it applied for the approval of its building extension plans. The court a quo therefore erred when it made the finding that the omission by Plover's Nest of relevant information resulted in the municipality granting the approval because relevant considerations were not taken into account.

[29] This conclusion does not, however, assist Plover's Nest as the 1995 resolution of the municipal council remains valid. The municipality was bound by its previous decision when it approved the application for extension in February 2013. The appeal must therefore fail.

[30] There may be some merit in Plover's Nest's argument that it would not make sense to sterilise an area as large as the 'servitude area' which is about 15 times the size of the pre-existing 'tongue' (formerly the pan-handle of the stand) and is 66l square metres in extent, the equivalent to a full front-row stand in the Solar Beach area. It may also be correct that it was not fair that Plover's Nest has been paying rates and taxes on a full front-stand value whereas the Douglas-Joneses and De Haan in turn had been paying on a back-stand value. However the LUPO does provide several alternative remedies for Plover's Nest (eg a s 30 amendment to the subdivision and a s 40 rectification of contraventions). Moreover, Plover's Nest may claim damages against the municipality for the negligent conduct of its official, and, given that it learned of the decision only 19 years after it was made, it may well still be able to apply to court to set it aside.

[31] In the result, the appeal is dismissed with costs.

N Z MHLANTLA
JUDGE OF APPEAL

APPEARANCES:

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