REPUBLIC OF NAMIBIA REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: A 332/2011

In the matter between:

DFE PROPERTIES NUMBER ONE (PTY) LTD	**APPLICANT**
and	
DFE PROPERTIES NUMBER TWO CC	**FIRST RESPONDENT**
MING TONG CONSTRUCTION CC	**SECOND RESPONDENT**
COUNCIL FOR THE MUNICIPALITY OF WINDHOEK	**THIRD RESPONDENT**

Neutral citation: *DFE Properties Number One (Pty) Ltd v DFE Properties Number Two CC* (A 332/2011) [2012] NAHCMD 36 (25 October 2012)

Coram: PARKER AJ
Heard: **9 October 2012**
Delivered: **25 October 2012**

Flynote: Interdict – Final interdict – Applicant failing to establish it has clear right – Court refusing to grant the relief of final interdict.

Flynote: Administrative Law – Action by administrative body within the meaning of Article 18 of the Namibian Constitution – Third Respondent alone as administrative body has the power to administer the third respondent's Town Planning Scheme and Building Regulations – Any such action taken to implement the Scheme or the Regulations remains valid until set aside by the court.

Summary: Interdict – Final interdict – Restraining continuation of construction of building – Applicant seeks court's protection of its right to a view – Applicant failing to establish legal basis of such obscure right – Similarly, applicant failing, to establish he has a right to challenge action by the first respondent – Court finding that the first respondent has no power to take any action under the Scheme or the Regulations and so there is no action of it to challenge – Court concluding applicant has failed to establish he has a clear right – Consequently, court refusing to grant relief of interdict.

Summary: Administrative law – Windhoek Municipal Council (third respondent) – Administrative body in terms of Article 18 of Namibian Constitution – Council's Town Planning Scheme and Building Regulations – Scheme and Regulations administered by the Council only – Council approved first respondent's building plans – Building constructed in lawful accordance with such approved plans – Decision of the Council to approve the building plans in implementation of the Scheme and Regulations valid until set aside by the court – Court not entitled to grant relief for demolition of the building that is constructed according to the Council's approved building plans when the Council's decision has not been set aside by the court – It would not only be wrong in law but would also go against the tenets of fairness and equity if the court granted the relief to demolish the building or a part thereof.

ORDER

The application is dismissed with costs; and as respects the first respondent costs include costs of one instructing counsel and one instructed counsel, and as respects the third respondent, costs include costs of one instructing counsel and one instructed counsel, but in respect of the issue of costs only.

JUDGMENT

PARKER AJ:

[1] This application brought on notice of motion revolves around a residential dwelling ('the building') that has been constructed on property Erf 3738, Joey Street, Ludwigsdorf, Klein Windhoek in the municipality of Windhoek ('the property'). Separate relief, that is, (a) an order that the first and second respondents demolish 'the third floor, including the roof' of the building, (b) an interdict and (c) costs order, is sought against the first and second respondents. As against the third respondent; the applicant seeks only a costs order, that is, against the third respondent 'jointly and severally with the first and second respondents'.

[2] The first and third respondents have moved to reject the application; the first respondent, the entire application, and the third respondent, only the issue of costs. The second respondent has not opposed the application. It is my view, therefore, that since the second respondent has been given an opportunity to be heard but has declined to file papers, the second respondent shall be bound by any decision of this court.

[3] The applicant initially objected to the third respondent's late filing of its answering papers, but in the course of the hearing of the application it became apparent that the applicant does not oppose the application for condonation. The applicant raised a point *in limine*, too, but the applicant is not pursuing it. The first respondent raised a number of points *in limine* but they appear to be intertwined with the merits. I shall, therefore, proceed to consider the application on the merits. Mr Tötemeyer SC (assisted by Mr Van Vuuren) for the applicant, Mr Coleman for the first respondent, and Mr Narib for the third respondent have filed heads of argument.

[4] As I pore over the papers filed of record, I have no doubt in my mind that the pith and marrow of the applicant's case is primarily this. The first respondent constructed the building without the approval of the third respondent; and, therefore, the applicant, a neighbour of the owner of the building, has the 'right to approach the

court to have the building declared illegal and to ask the court to grant an order for the demolition' of the offending part of the building. The essence of the first respondent's case in the opposite direction is this. The first respondent constructed the building in lawful accordance with the building plans approved by the third respondent and the building and building permit issued by the third respondent; and so, therefore, 'the first respondent did nothing wrong'. As I have said previously only a costs order is sought against the third respondent, and so the third respondent moved to reject only that part of the application.

[5] On the materials before me, I reject the applicant's averment that its right to a view – a 'panoramic virtually 360 degree view' – has been violated by the owner for constructing the building. I do so on the basis that it was not established by the applicant if such a right is judicially protectable. In other words, the applicant does not tell the court the legal basis of such right; and more important, if it is judicially protectable. I have given considerable thought to the opposing contentions by the applicant and the first respondent (the main protagonists in the legal dispute in this proceeding).

[6] I now proceed to consider the issue whether or not the first respondent obtained the requisite approval and permit from the third respondent to entitle it to construct the building; that is to say, whether the third respondent approved the building plans and issued a permit for the construction of the building in order to determine whether the applicant has established its right to challenge the respondents on the basis that the building is illegal.

[7] Relying on AJ van der Walt, *The Law of Neighbours* 1st ed pp 341-344, Mr Tötemeyer SC, counsel for the applicant, submits that '[n]eighbours have the necessary right to approach the court to have a building or building works declared illegal and seek an order for' the building or a part of it to be demolished. I respectively accept the general principle. But this general principle must in Namibia be tested in the laboratory of Namibia's statute law and constitutional scheme on administration of local government before the principle can be adjudged to have application in Namibia – as far as this proceeding is concerned. In this regard, the

critical point must be signalized that the administration of the Windhoek Town Planning Scheme ('the Scheme') and the Municipality of Windhoek Building Regulations (Government Notice No. 59 of 1969, dated 28 April 1969) ('the Regulations') is the sole and exclusive responsibility of the Council: no other person or body of persons, including the applicant and all other neighbours of the owner of a building, and, indeed, the court have the power to administer or implement the Scheme and the Regulations.

[8] In this regard, the evidence that I accept is that through the internal arrangements of the third respondent the building plans for the construction of the building was approved by the third respondent; and what is more, that the building does not offend the building plans that were approved. And it has not been established by the applicant that they do. If it is the contention of the applicant that there was no basis upon which the third respondent could have approved the plans in terms of the Scheme or the Regulations, or that the approval was ultra vires the Scheme or the Regulations, that should not be the burden or concern of the first respondent (or the second respondent) who, as I have said previously are not responsible for administering the Scheme and the Regulations. In this regard, reg 3 of the Regulations cannot assist the applicant. The approval remains valid until set aside, as I have reasoned below.

[9] The purposive interpretation of the first part of reg 3 (on 'safe') is, therefore, that the owner of a building is responsible for ensuring that his building is 'safe'. In this regard it must be remembered that the word 'building' is a noun and it is qualified by the adjective 'such'. Thus, suppose, for example, there is a building on a street in Windhoek. X is walking by that building and the eastern wall falls on X, or Y is attending a party on the top floor of that building and the top floor caves in. X is injured by the falling wall, and Y by the caving in of the top floor. The owner of the building cannot be heard to say that he is not liable to X and Y on the basis that the building plans of his building were approved by the Council, or while the building was being constructed or the completed building were inspected by the third respondent. And the phrase 'these regulations and all other laws applicable' refer to any provisions of the Regulations and provisions of a law that govern buildings in the

Windhoek Municipality area or, indeed, the country. For instance, it is illegal for the owner of a building in Windhoek to use it in a manner contrary to any provision of the Scheme (See s. 48(2)*(d)* of the Scheme.) It is also illegal for the owner of the building to use it as a brothel; and if the owner is charged with an offence for contravening s 2(2)*(e)* of the Combating of Immoral Practices Act 21 of 1980, the fact that the building plans of his building were approved by the Council or the building while under construction and the completed building were inspected by the Council is not a defence. I find these parts of reg 3 to be pleonastic; but, probably, they are put there *ex cautela abuntandi*. After the Council has approved the building plans for the construction of a building and the building is completed it would be unreasonable and unfair – in my opinion – for the Council to be held responsible for anything respecting the building, which is not its property.

[10] Thus, any interpretation of regulation 3 (as that which Mr Tötemeyer appears to put forth) that suggests that after X's building plans have been approved by the third respondent and the building has been constructed in lawful accordance with such building plans X is liable to his neighbour, if the neighbour is not happy with the building because the neighbour (like the applicant) contends that he has 'a right to a view' and that 'right' has been violated by the owner of the building cannot be applied: it is not the proper construction of reg 3. Such interpretation will surely lead to unjust and unfair result; and such unjust and absurd result could not have been intended by the makers of the Scheme and the Regulations. (See *Jacob Alexander v The Minister of Justice and Others* Case No. A 210/2007 (unreported), and the authorities gathered there.) In any case, I have found previously that the right which the applicant approaches the court to protect is unclear as the court has not been told as to the legal basis of such obscure right. In this connexion, it must be remembered that the first respondent (and second respondent) are not administrative bodies, and so they are not subject to Article 18 of the Namibia Constitution. The third respondent is; but the applicant does not seek against the third respondent the relief of administrative justice in terms of Article 18, read with Article 25(2), of the Namibian Constitution.

[11] It is Mr Tötemeyer's further argument that the Scheme was enacted for the interest of a particular class of persons, and the applicant falls within that class and so the applicant has 'standing to challenge actions taken in violation of the Scheme'. In support of his argument, Mr Tötemeyer referred a bevy of authorities to the court. With utmost deference to Mr Tötemeyer, I have to say that counsel misses the point. The first respondent does not administer the Scheme and the Regulations, as I have stated previously. It is the third respondent which has the power to take any action under the Scheme and the Regulations in the implementation of those instruments, and it did take action under the Scheme and the Regulations by approving the first respondent's building plans and issuing the building permit, which decisions were in implementation – that is, administration – of the Scheme and the Regulations – as I say. By constructing the building the first respondent merely took advantage of, and derived a benefit from, the decision of the third respondent which it was entitled to do. If that decision of the third respondent has not been set aside, how can it be seriously argued that the first respondent has violated the Scheme and the Regulations, particularly where it has been established that the building does not offend the building plans as approved by the Council? Thus, I accept the evidence that as far as the third respondent is concerned, the building as it stands is in compliance with the building plans that were approved and the building permit that was issued. On a proper construction of the relevant provisions of the Scheme and the Regulations the legality of the erection of the building was not dependent on the legal validity of the third respondent's approval of the building plans and the issuance of the permit but merely on the fact that approval was given and the permit issued (See eg O*udekrall Estates (Pty) Ltd v City of Cape Town and Others* 2004 (6) SA 222 (SCA).) The makers of the Regulations and the Scheme could not have expected the first respondent to first satisfy itself that the third respondent's approval and permit were valid before it commenced, and continued, to erect the building. Furthermore, the makers of the Regulations and the Scheme could not have expected the first respondent to enquire into the validity of the third respondent's approval and permit before it relied on the approval and the permit. In my view, therefore, the first respondent is entitled to erect its building – as it did and continues to do – merely upon the fact of the third respondent's approval and permit. The first respondent's act in erecting the building is accordingly lawful. Thus, so long as the

approval and the permit exist in fact the first respondent is entitled to erect, and carry on with the erection of, the building; provided, of course, that the erection of the building was in accordance with the approval and the permit. I am satisfied that the first respondent has established that the building is in accordance with the building plans as approved and the building permit that was issued, as I have said previously.

[12] For these reasons, I conclude that the applicant has not established a clear right; and so I find that a crucial requirement for the grant of a final interdict has not been proved. I accept Mr Coleman's submission on this point. It follows that the applicant's prayer for interdictory relief fails.

[13] For what I have said previously, I find that in the granting of the aforementioned approval of the building plans of the building the third respondent, which is an administrative body, took a decision within the meaning of Article 18 of the Namibian Constitution. The applicant does not, as I have mentioned previously, seek redress in terms of Article 25(2), read with Article 18 of the Namibian Constitution. Consequently, it cannot be disputed that that decision continues to have effect until it is set aside, as Mr Coleman submitted. I should have said so even if I had not looked at the various decided cases; but when I look at *Oukekraal Estates (Pty) Ltd v City of Cape Town* and *Smith v East Elloe Rural District Council* [1956] AC 36 (HL), for example, I feel no doubt – none at all – that the decision of the third respondent is valid and, therefore, it cannot be ignored by this court: this court must respect the decision. Thus, where the owner of a building has constructed the building in the Windhoek Municipality area (to bring the enquiry nearer home) in legal accordance with building plans approved by the third respondent and a building permit issued by it, it would not only be wrong in law but it would also go against the tenets of fairness and equity to order such building or a part thereof to be demolished. Accordingly, I refuse to make an order to demolish the third floor (including the roof) of the building.

[14] In virtue of the view I have taken of this application as indicated in the aforegoing reasoning and conclusions, I think it serves no real purpose to consider

the first respondent's first point *in limine*. The second and third points *in limine* are tied up with the merits – in my opinion – and I have deal with them previously.

[15] As to the issue of costs; in my judgement costs should follow the event. This disposes of the issue of costs as it affects the third respondent, too.

[16] For all the aforegoing reasons, the application is dismissed with costs; and as respects the first respondent costs include costs of one instructing counsel and one instructed counsel, and as respects the third respondent, costs include costs of one instructing counsel and one instructed counsel, but in respect of the issue of costs only.

C Parker

Acting Judge

APPEARANCES

APPLICANT: R Tötemeyer SC (with him A Van Vuuren)
Instructed by Fisher, Quarmby & Pfeifer, Windhoek

FIRST RESPONDENT: G Coleman
Instructed by AngulaColeman, Windhoek

THIRD RESPONDENT: G Narib
Instructed by Hengari, Kangueehi & Kavendjii Inc, Windhoek