BUILDING PLANS ARE MORE THAN JUST PAPERWORK

Camps Bay & Clifton Ratepayers Association and Others v Al Khalifa Family Trust and Another (11256/2019) [2020] ZAWCHC 181 (15 December 2020)

In this matter, a homeowner not only deviated from its approved building plans and subsequent rider plans, but also continued building before the outcome of departure applications (which were never granted). It turned out the plans were incorrectly approved by the municipality. This was because much of the envisaged end product contravened building regulations. In addition, many substantive alterations to the original plans were not 'marked up' properly when submitted for approval as rider plans, resulting in these slipping through the cracks. With the result that the plans were set aside despite building works being so far along, would a demolition order be granted?

The Judgment can be viewed here.

FACTS

The Al Khalifa Family Trust ('the Trust') commenced with substantial building works on a property it owns in Camps Bay. It had submitted three sets of plans to the City of Cape Town ('CCT') for approval, as follows: a set of original building plans which were approved in November 2015 ('the 2015 plans'); and a first and second set of rider plans that were approved in October 2017 ('the 2017 plans') and December 2018 ('the 2018 plans') respectively.

After approval was received, building works commenced.

The Camps Bay & Clifton Ratepayers Association ('CRA') as well as the neighbouring owners became involved once it became apparent that the bulk of the building works were substantial and not in terms of applicable building regulations.

The CRA and neighbours therefore brought the present application for the review and setting aside of the approval of the 2015 plans, as well as the 2017 and 2018 plans respectively. They also alleged that, the CCT's incorrect approval aside, the dwelling as built in any event also deviated from the approved plans as the physical buildings differed in many respects from what was initially approved, in each instance.

When the application was initially launched in July 2019, construction was far advanced. The Trust opposed the review.

HELD

Correct marking of changes in rider plans

- In this matter it is important to be clear about what the CCT decided in each round of approvals. The Constitutional Court judgment in *Camps Bay Ratepayers' and Residents' Association & another v Harrison & another* had the effect, amongst others, that where a feature in earlier plans appears without alteration in later plans, municipal officials will not have reason to revisit that feature. A review attack on that feature should thus be directed at the approval of the original plans, because that is when in substance the impugned decision was taken.

- The approach in *Harrison* accords with the practice followed by the CCT: When original plans are submitted for approval, the plans in their entirety are assessed. When rider plans are submitted, the submitting party is

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required to mark up the alterations and their type in specified colours, and it is only the marked-up features that the officials assess. It may be that the approval of rider plans is an approval of those plans in their entirety, but the approval of unchanged features does not entail any fresh application of the mind, so that in substance the relevant approval is the earlier one.

- One of the CCT's complaints in this matter was indeed that not all alterations were marked up when the 2017 and 2018 plans were submitted, and that alterations which the CCT would not have approved (or at least would have considered) if they had been marked up properly, slipped through by default. In such a case, one might say that the unmarked alterations were not the subject of any decision at all. Alternatively, if the approval of rider plans is in law an approval of the plans in their entirety, one would be dealing with an approval in part to which, due to the fault of the submitting party, the municipality was precluded from applying its mind.

- This therefore constituted one ground in terms of which the Court found that the plan approvals were to be reviewed and set aside.

(*Then followed the Court's detailed investigation into the claims made by CRA in respect of reviewable aspects of each set of plans. These are not repeated here as it is technical in nature and specific to the particular plans, and only the outcome is indicated*.)

- In respect of the 2015, 2017 and 2018 plans, many irregularities were pointed out. These included that in many instances:

    - The plans and subsequent approval thereof were contrary to the requirements of the Building Act as well as the CCT's own legislated development rules and development restrictions contained in the property's title deed. Specifically (and as conceded by the CCT itself), the Building Control Officer ('the BCO'), in his recommendation that the plans be approved, applied the wrong test. He stated in his recommendation that he was 'unable to find satisfying factors indicating that the proposed building would have any of the disqualifying features specified in s 7(1)(b)(ii) of the Building Act. The correct test, which has been approved by our courts, is that the BCO must be positively satisfied that the disqualifying factors in section 7 of the Building Act do not exist. (In other words, the BCO must approve plans, unless it is satisfied that the proposed building will probably, or in fact, trigger one of the disqualifying factors referred to in s 7(1)(b)(ii). If in doubt, the building authority must consequently approve the plans. The disqualifying factors are whether: the area in which the proposed building is to be erected will probably or in fact be disfigured thereby; it will probably or in fact be unsightly or objectionable; it will probably or in fact derogate from the value of adjoining or neighbouring properties; or it will probably or in fact be dangerous to life or property.) In the present case, the BCO's recommendation did not serve this intended function.

    - Further plan suggestions required the Trust to apply for and obtain a departure before the plans could be approved. Although two departure applications were made subsequent to the approval of the 2015 plans, neither had been granted. It followed that the 2015 plans were unlawfully approved.

- Similar problems remained in the 2017 and 2018 plans, with the conclusion therefore that the approvals had to be set aside.

- In addition, regarding the building as actually constructed, it appeared that it was very different from the plans approved, whether it be the 2015, 2017 or 2018 plans. Section 4 of the Building Act prohibits the construction of buildings without approved plans. In terms of regulation A25(5) it is a criminal offence to deviate to a material degree from approved plans unless the deviation has been approved.

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CONCLUSION

The conclusion was therefore that the plan approvals had to be set aside on multiple grounds. The CRA was also entitled to a declaration that the building as actually constructed violated the 2018 plans in the respects identified, since such deviations were a violation of the Building Act and its regulations.

In respect of the request for a demolition order to be issued, the Court noted, with regards to the question of prejudice, that it had to be kept in mind that, from the outset, the Trust began building a house which was materially different to the one shown in the 2015 plans. The 2015 plans will not allow the dwelling which had been built to be preserved to any material extent. The Trust pressed ahead with its building work, knowing about its neighbours' concerns. It cast its roof slab in June 2018 at a time when its first departure application was still pending and the time for lodging objections had not expired. Nonetheless, in the meantime, the Court ordered that the Trust be allowed some time to consider its options for regularising matters.

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