

Notes on recent case law that impacts on the development industry

- Municipalities Adding “Spluma Conditions” Before Issuing a Transfer Clearance
- Building Objectionable, Unsightly or Disfiguring of Area? Municipality to Apply Legitimate Expectation Test When Considering Building Plan Approval Requests

MUNICIPALITIES ADDING “SPLUMA CONDITIONS” BEFORE ISSUING A TRANSFER CLEARANCE

In *Glencore (Pty) Ltd and Others v Steve Tshwete Local Municipality and Others (2607/2019) (18 January 2021)*, a very itchy issue in the property development industry was addressed. It relates to the question whether a municipality has the power to impose further conditions, in addition to the requirement to obtain a municipal rates clearance certificate, before giving its permission for transfer. The judgment deals with systems applied by certain municipalities in Mpumalanga and that deeds registry, but will influence further opposition to these so-called “SPLUMA certificates” which other municipalities country-wide seek to introduce as a prerequisite to allowing transfer.

A detailed case summary is available [here](#). In essence, the matter pertains to different municipalities in Mpumalanga applying certain provisions of a so-called “model By-law” which was originally prepared at provincial level and adapted to municipal specific purposes. The By-laws contain some provisions suggesting that property registration transactions in the Mbombela Deeds Office will only proceed if the municipality has issued written confirmation regarding a range of alleged obligations of the land owner (seller). Thus, in addition to the typical clearance or confirmation pertaining to monies owed to the municipality (in regard to rates and taxes and consumable services), the affected municipalities went further to also insist on certification regarding:

- The property being rendered fully compliant with the local land use scheme (the rezoning must accord with the de facto use of the property);
- Submission of an occupation certificate (as contemplated in the National Building Regulations and Building Standards Act, 1977 (Act 103 of 1977)) which, by extension, implies that approved building plans must exist in regard to all building structures on the subject property;
- the owner (seller) must prove that all monies due to the municipality (also in regard to punitive fines for a contravention of municipal regulations) have been paid;

and the like.

The aforesaid provisions were previously applied generically to all categories of land within the affected municipal areas, including larger farm portions which fall beyond any recognisable urban development boundary. It goes without saying that, in many instances, the building structures erected on larger farm portions will probably not be reflected on approved building plans. In consequence, no occupation certificates will be available. The Court found these requirements invalid for reasons described in the [summary](#).

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BUILDING OBJECTIONABLE, UNSIGHTLY OR DISFIGURING OF AREA? APPLY LEGITIMATE EXPECTATION TEST

In *Trustees of the Simcha Trust v Da Cruz and Others; City of Cape Town v Da Cruz and Others* (CCT125/18; CCT128/18) [2019] ZACC 8 (19 February 2019), the Constitutional Court provided clear guidelines as to the proper import and interpretation of section 7(1) of the Building Standards Act which finds application when a local authority is asked to approve building plans. The Court confirmed that the 'legitimate expectation' test must be applied by the decision-makers, who must, amongst other things, objectively determine whether the proposed building will probably, or in fact, be so disfiguring of the area, objectionable or unsightly that it would exceed the legitimate expectations of a hypothetical owner of a neighbouring property.

The judgment summary is available [here](#). As background, the facts of the matter relate to the Four Seasons sectional title development in Cape Town, a 17 storey building with balconies abutting the boundary of the property. The zoning regulations for the area permit owners to build up to the boundaries of their respective properties. However, it was not disputed that the City of Cape Town Municipality (the Municipality) did not usually approve plans with habitable areas or balconies on the boundaries abutting neighbouring erven. (Uninhabited spaces, like fire escapes, ordinarily occupy these spaces.) Contrary to common practice, the Municipality nonetheless approved the plans of Four Seasons which placed balconies on the boundary abutting the neighbouring property. The Simcha Trust (the Trust), owner of a neighbouring property, submitted a development application in October 2007. It sought to build an additional four stories to the existing four-storey structure on its land. All storeys were to be built up to the boundary of the property. If implemented, the top three storeys of the new building would touch the existing balconies on the eighth, ninth and tenth floors of Four Seasons' building.

The Municipality approved the Trust's building plans. In doing so, the Building Control Officer stated in his report that was submitted to the Head of the Building Development Management Section for approval, that the Trust's application and plans complied with the legal and technical requirements of section 7(1) of the National Building Regulations and Building Standards Act 103 of 1977 (the Act) and that there was "no basis to be satisfied" that the building would be erected in such a manner or would be of such a nature or appearance that it would disfigure the area, or that it would be unsightly or objectionable or would derogate from the value of adjoining properties. The neighbours, being owners in and the body corporate of the Four Seasons sectional title scheme, objected to the approval of the plans. The dispute culminated in a whole series of court applications and judgments. Ultimately, the point of law before the Constitutional Court was whether the legitimate expectations test applied in the context of the two disqualifying factors found in section 7(1)(b)(ii)(aa) of the Act, being the investigation whether the building would probably or in fact disfigure the area or will probably or in fact be unsightly or objectionable.

The Constitutional Court held that the legitimate expectations test is an objective test, based on the relevant facts available to the local authority and when applied to each of the disqualifying factors in s7(1)(b)(ii)(aa) is an accurate translation of the duties of local authorities

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under the Act and the Constitution. Accordingly, the decision maker must consider the impact of the proposed development on neighbouring properties from the perspective of a hypothetical neighbour. In addition to this, the Court reaffirmed that a local authority, when considering a building application, must be positively satisfied that there are no disqualifying factors present, and that such factors should be considered separately from the compliance with the other requirements of the Act.

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