

REPUBLIC OF SOUTH AFRICA

DELETE WHICHEVER IS NOT APPLICABLE



(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED.

5/02/2010
~~2009~~

DATE

SIGNATURE

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: 09/32813

In the matter between:

PARKHURST VILLAGE ASSOCIATION
(also known as PARKHURST VILLAGE RESIDENTS ASSOCIATION) Applicant

and

MICHAEL ANTHONY CAPELA First Respondent

HOLLYBERRY PROPS 3 (PTY) LIMITED Second Respondent

CITY OF JOHANNESBURG Third Respondent

JUDGMENT

VAN EEDEN AJ:

1. The Parkhurst Village Association launched this application. It claims to have a special interest in the Parkhurst suburb of Johannesburg. The first respondent is a director and shareholder of the second respondent. The second respondent is a private company and the owner of certain immovable

property in Fourth Avenue, Parkhurst, which is zoned Business 1 in terms of the Johannesburg Townplanning Scheme, 1979. The City of Johannesburg is the third respondent, and I shall simply refer to it as the "**City**". The second respondent, represented by *inter alia* the first respondent, applied to the City for the necessary consent to conduct the business of a restaurant from the property. In essence the relief sought is an interdict against the first two respondents to prevent them from operating the business of a restaurant or coffee shop from the property, and an interdict against the City preventing it from granting the consent required to conduct such a business.

2. The application pivots on the interpretation to be placed on that portion of the Regional Spatial Development Framework ("**RSDF**") adopted by the City and relied upon by the applicant, which reads as follows:

"No more coffee shops and restaurants to be supported along Fourth Avenue."

3. The RSDF owes its existence, in a general sense, to the Municipal Systems Act,¹ since this Act imposes the obligation upon a municipality to adopt a so-called "*integrated development plan*". The City has complied with this obligation, and has incorporated the RSDF therein. It follows that the RSDF forms part of the City's integrated development plan.

¹ Local Government: Municipal Systems Act, 32 of 2000.

4. The Municipal Systems Act covers a very wide field of municipal activity.² It is divided into 12 chapters and two schedules, with 124 sections. The various chapters have the following headings:

- Interpretation;
- Legal nature and rights and duties of municipalities;
- Municipal functions and powers;
- Community participation;
- Integrated development planning;³
- Performance management;
- Local public administration and human resources;
- Municipal services;
- Municipal entities;
- Credit control and debt collection;

² The long title states the Act's objectives as follows: *"To provide for the core principles, mechanisms and processes that are necessary to enable municipalities to move progressively towards the social and economic upliftment of local communities, and ensure universal access to essential services that are affordable to all; to define the legal nature of the municipality as including the local community within the municipal area, working in partnership with the municipality's political and administrative structures; to provide for the manner in which municipal powers and functions are exercised and performed; to provide for community participation; to establish a simple and enabling framework for the core processes of planning, performance management, resource mobilisation and organisational change which underpin the notion of developmental local government; to provide a framework for local public administration and human resource development; to empower the poor and ensure that municipalities put in place service tariffs and credit control policies that take their needs into account by providing a framework for the provision of services, service delivery agreement and municipal service districts; to provide for credit control and debt collection; to establish a framework for support, monitoring and standard setting by other spheres of government in order to progressively build local government into an efficient, frontline development agency capable of integrating the activities of all spheres of government for the overall social and economic upliftment of communities in harmony with their local nature environment; to provide for legal matters pertaining to local government; and to provide for matters incidental thereto."*

³ Chapter 5 which deals with Integrated Development Planning, the most important chapter for deciding this matter, is in turn divided into four parts: General; Contents of integrated development plans; Process for planning, drafting, adopting and review of integrated development plans; Miscellaneous.

- Provincial and national monitoring and standard setting;
- Legal matters and miscellaneous; and
- Miscellaneous.

5. Section 1 defines an "*integrated development plan*" as a plan envisaged in s 25. Section 25(1) imposes obligations upon a municipality in respect of such a plan in the following terms:

"25. *Adoption of integrated development plans*

(1) Each municipal council must, within a prescribed period after the start of its elected term, adopt a single, inclusive and strategic plan for the development of the municipality which –

(a) links, integrates and co-ordinates plans and takes into account proposals for the development of the municipality;

(b) aligns the resources and capacity of the municipality with the implementation of the plan;

(c) forms the policy framework and general basis on which annual budgets must be based;

(d) complies with the provisions of this Chapter; and

(e) is compatible with national and provincial development plans and planning requirements binding on the municipality in terms of legislation."

6. The core components to be reflected in an integrated development plan are set out in s 26. These include the municipal council's vision for the long-term development of the municipality with special emphasis on the municipality's most critical development and internal transformation needs; an assessment of the existing level of development in the municipality, which must include an identification of communities which do not have access to basic municipal services; the council's development priorities and objectives for its elected term, including its local economic development aims and its internal transformation needs; the council's development strategies which must be aligned with any national or provincial sectoral plans and planning requirements binding on the municipality in terms of legislation; a spatial development framework which must include the provision of basic guidelines for land use management system for the municipality; the council's operational strategies; applicable disaster management plans; a financial plan which must include a budget projection for at least the next three years and the key performance indicators and performance targets determined in terms of section 41.
7. The issue that must be resolved is whether the provision of the RSDF that no more coffee shops and restaurants are to be supported can properly be said to prohibit the operation of a restaurant or coffee shop from the property, given the Business 1 zoning thereof. The essence of Mr Dendy's argument on behalf of the applicant may be stated as follows. The RSDF forms part of the integrated development plan of the City. A municipality is compelled to give effect to its integrated development plan and must conduct its affairs in a

manner consistent therewith. The integrated development plan guides and informs all planning and development, and all decisions with regard to planning, management and development in the municipality. It binds the municipality in the exercise of its executive authority, except to the extent of inconsistency between the integrated development plan and national or provincial legislation. The prohibition of no *"more coffee shops and restaurants to be supported along Fourth Avenue"* was couched in imperative terms and, it is submitted, admits of no discretion at all on the part of the City. The RSDF thus has the force of law. In support of these submissions Mr Dendy relied on the provisions of sections 35 and 36 which read as follows:

"35. *Status of Integrated Development Plan*

- (1) *An integrated development plan adopted by the council of the municipality-*
 - (a) *is the principal strategic planning instrument which guides and informs all planning and development, and all decisions with regard to planning, management and development, in the municipality;*
 - (b) *binds the municipality in the exercise of its executive authority, except to the extent of any inconsistency between the municipality's integrated development plan and national or provincial legislation, in which case such legislation prevails; and*

(c) *binds all other persons to the extent that those parts of the integrated development plan that impose duties or affect the rights of those persons have been passed as a by-law.*

(2) *A spatial development framework contained in an integrated development plan prevails over a plan as defined in section 1 of the Physical Planning Act, 1991 (Act 125 of 1991).*

36. ***Municipality to give effect to integrated development plan***

A municipality must give effect to its integrated development plan and conduct its affairs in a manner which is consistent with its integrated development plan."

8. Although the respondents filed answering affidavits, all three gave notice in terms of rule 6(5)(d)(iii) to raise a point of law. They contend that the RSDF constitutes no more than a policy document guiding and informing town planning decisions in respect of applications made to the City after adoption of the RSDF. In essence the answering affidavits highlighted this contention, and I need say no more about the affidavits. Mr Porteous, appearing on behalf of the first two respondents, and Mr Mitchell, appearing on behalf of the third, submitted that the starting point was the Johannesburg Townplanning Scheme, 1979 (*"the Scheme"*). It was published in the Provincial Gazette of 3 October 1979 pursuant to the provisions of the Town-Planning & Townships Ordinance, 1965 (*"the Ordinance"*). The Ordinance allows a local authority to prepare a town-planning scheme in respect of all or

any land situated within its area of jurisdiction,⁴ and determines that the general purpose of a town planning scheme must be directed towards the co-ordinated and harmonious development of the area to which it relates in such a way as will most effectively tend to promote the health, safety, good order, amenity, convenience and general welfare of such area as well as efficiency and economy in the process of such development.⁵ The Ordinance determines that where the Administrator has approved an interim scheme, he shall give notice thereof in the Provincial Gazette and shall state in the notice that a copy of the approved scheme will lie for inspection. An approved scheme shall come into operation on the date of the publication of the necessary notice, and from that date the local authority shall observe and enforce the provisions thereof.⁶ Any person who contravenes or fails to comply with the provision of an approved scheme shall be guilty of an offence.⁷ A Business 1 zoning entitles the property or building erected thereon to be used for business purposes as a primary right.⁸ The Scheme defines⁹ business purposes as follows.

"It means the use of a building for offices, a showroom, warehouse, restaurant and for other business purposes which are not elsewhere defined in this clause as well as all uses which are ancillary, directly related to and subservient to the main use and includes the use of land for business purposes."

⁴ Section 18.

⁵ Section 19.

⁶ Section 39.

⁷ Section 40.

⁸ Section 14 of the Scheme read with Table C.

⁹ Section 1(xii).

9. Mr Mitchell submitted that s 40 of the Ordinance compels the City to observe and enforce the provisions of the scheme, on threat of a criminal sanction. This, he said, entailed that the City was compelled to treat the application received from the first two respondents like any other application of a property zoned in terms of the Scheme as Business 1, whether situate in Parkhurst or not. Mr Porteous submitted that the owner of the property is entitled to exercise the rights afforded to it by the Scheme and that such owner's rights are in no way adversely affected or diminished by the RSDF. The City, he stated, was obliged to consider the application for consent for the intended use. Mr Mitchell submitted that the integrated development plan constitutes the principal strategic planning instrument which guides and informs planning decisions taken by the City in respect of applications lodged after the adoption of the integrated development plan, of which the RSDF forms part. It is not aimed at addressing rights which have already been granted in terms of the Ordinance, but is rather aimed at prospective development, *i.e.* applications which it will have to consider after the adoption of the RSDF. He referred to paragraph 1.2 of the RSDF, which is headed "*Interpretation and Application of the RSDF*". The section states that it is intended to guide the interpretation and application of the contents of the RSDF document. An analysis of this aid to interpretation reflects that it is to be used when assessing any potential development application and that the assessment framework provides a tool for evaluating any potential application. Should any particular development demonstrate a meaningful contribution to the City's strategies and desired urban structure, the merits

should be considered. The interventions and guidelines in the sub-area management tables and the proposals in approved precinct plans should guide and inform the assessment of any potential development application, but should not be considered to grant any specific rights or negate the merits of any particular proposal. The maps and plans contained within the RSDF are strategic and conceptual and do not suggest a site-specific representation (unless stated as such under a precinct plan). Mr Mitchell also submitted that given the broad nature of the RSDF, it is practically impossible for it to be used as an instrument to determine the town-planning merit of an application at the microcosmic level of an erf within an approved township. The RSDF was always intended to be a guide for the assessment of applications in terms of its broad brush sphere of influence. It was never intended to be an instrument to give or remove town-planning rights. The RSDF and the Spatial Development Framework are to be used in conjunction with one another when assessing any potential development application. The Spatial Development Framework, in association with the RSDF, represents the prevailing spatial planning policy of the City. It informs the determination of development proposals and applications that fall outside the scope of prevailing Town Planning Schemes and provides a city wide perspective of spatial challenges and interventions within the city.¹⁰

10. Mr Dendy, however, argued that section 35(1) of the Municipal Systems Act must be interpreted in a manner consistent with the express provision contained in section 36, which states that the municipality must give effect to

¹⁰ Section 1.1 Legal Framework of the Spatial Development Framework.

its integrated development plan and conduct its affairs in a manner which is consistent therewith. He submitted that a local authority has no discretion to ignore the integrated development plan, for if so, the plan could not function as the principal strategic planning instrument and could not guide and inform planning and development, and all decisions with regard to planning, management and development. The Scheme, Mr Dendy said, is neither national nor provincial legislation. He said that under the Ordinance a town-planning scheme is initiated by a local authority, whereafter it is eventually submitted to the Provincial Premier (formerly the Administrator) who either approves or rejects the scheme. If the scheme is approved, the approval is advertised, whereafter it comes into operation. It follows that a provincial legislator is at no stage involved in the formulation of a town-planning scheme, and therefore the scheme is not provincial legislation.¹¹ Mr Dendy relied on two reported matters where it was accepted that a town-planning scheme has "*characteristics of legislation*".¹² This, he said, meant that it was in fact not legislation. Accordingly, he submitted that no inconsistency between the Scheme and the RSDF can interfere with the binding nature of the RSDF. It is only conflicting national or provincial legislation which can override the RSDF, and not a town-planning scheme, which is neither of the two.

¹¹ As contemplated in section 35(1)(b).

¹² Broadway Mansions (Pty) Ltd v Pretoria City Council 1955 (1) SA 517 (A) 523C and The Administrator, Transvaal and the Firs Investments (Pty) Ltd v Johannesburg City Council 1971 (1) SA 56 (A) 68E – F.

11. It seems to me that the argument advanced by Mr Dendy is fundamentally flawed for a number of reasons. The Municipal Systems Act compels the municipality to adopt an integrated development plan. The adoption is compulsory. If the municipality were not bound by its integrated development plan, the intention of the legislator could easily be flouted by a municipality ignoring its own plan at whim. Thus the Act stipulates that it is binding on the municipality in the exercise of its executive authority, but where the integrated development plan is inconsistent with national or provincial legislation, such legislation prevails.¹³ Once adopted, it guides and informs planning and development. The Act recognises that over time the plan will be revisited and refined by amendments.¹⁴ Thus the binding nature thereof is limited in its operation. It is also not binding on other persons except to the extent as having been passed as a by-law.¹⁵ The legislator was clear that no conflict should arise between integrated development plans and national and provincial legislation, and expressly stipulated that a municipality exercises its legislative or executive authority by implementing applicable national and provincial legislation and its by-laws.¹⁶ The integrated development plan must be compatible with national and provincial development plans and planning requirements binding on the municipality in terms of legislation.¹⁷

12. The general and sweeping nature of the Act and of integrated development plans do not lend themselves to any detail regulation of property as

¹³ Section 35(1)(b).

¹⁴ Section 34.

¹⁵ Section 35(1)(c).

¹⁶ Section 11(3)(e).

¹⁷ Section 25(1)(e).

contended for by Mr Dendy. A spatial development framework, a core component of the integrated development plan, is only required to include the provision of basic guidelines for a land use management system.¹⁸ The national minister responsible for local government has made regulations in terms of the Municipal Systems Act¹⁹ which deals with the integrated development plan and spatial development framework. These were recently summarised by Yacoob J in these terms, which again illustrates the general nature of the plan and framework:²⁰

“The framework must ‘set out the objectives that reflect the desired spatial form of the municipality’. The framework must also contain strategies to achieve the desired spatial form. These strategies must ‘indicate desired patterns of land use within the municipality’ and ‘address the special reconstruction of the municipality’. The strategy must also relate to the location and nature of development within the municipality. The final requirement of the regulations worth mentioning is that the spatial framework must ‘set out basic guidelines for land use management system in the municipality’.”

13. I see nothing in the integrated development plan that can either confer or remove rights of property owners, and none impacting on the manner in which town-planning applications are to be lodged and adjudicated by the City.²¹ It seems to be a broad instrument not intended to apply to property

¹⁸ Section 26(e).

¹⁹ In terms of section 72.

²⁰ Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd and Another 2009 (1) SA 337 (CC) 387 [136].

²¹ This conclusion seems to be supported by City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and Others (335/09) [2009] ZASCA 106 (22 September 2009).

as defined in section 1.²² The fact that the RSDF is revisited annually, and that it may consequently then be amended, militates strongly against the submission that it is to be regarded as having the force of law. I cannot accept that the legislator intended with s 35 and s36 to accord integrated development plans, which at the time when the Act was promulgated, still had to be developed by any number of municipalities, the force of law. If it was ever intended to override existing town planning schemes and the rights already accorded to properties, I would certainly have expected an express indication. I conclude that the integrated development plan and the RSDF will only have the force of law when passed as a by-law, following the required procedures for the passing of by-laws, and only to such extent. The integrated development plan and that portion of the RSDF relied upon by the applicant have not been passed as a by-law, and consequently do not have the force of law. It follows that the RSDF cannot detract from rights acquired in terms of the Scheme, and that I accept the submissions of Mr Porteous and Mr Mitchell as a correct reflection of the legal position.

14. As already explained, the Scheme was adopted and is enforced in terms of the Ordinance. This is the principle tool for regulating land use by a municipality.²³ Any person who contravenes or fails to comply with a

²² Section 1 also defines "*property*" as meaning immovable property registered in the name of a person, including a unit as defined in section 1 of the Sectional Titles Act or a right registered against immovable property in the name of a person. Cf Camps Bay Rate Payers & Residents Association and Others v Minister of Planning, Culture & Administration, Western Cape, and Others 2001 (4) SA 294 (C) 326J-327B.

²³ City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal *supra* par 5.

provision of an approved scheme shall be guilty of an offence.²⁴ Property owners and their neighbours are entitled to insist upon the enforcement of the provisions of the Scheme.²⁵ Section 26(d) of the Municipal Systems Act compels the City to let the integrated development plan reflect its development strategies, which must also be aligned with any national or provincial sectoral plans and planning requirements binding on the municipality in terms of legislation. Section 27(2)(a) requires the municipality to identify the plans and planning requirements binding on it in terms of national and provincial legislation. Section 29(1)(c) determines that the process followed by a municipality to draft its integrated development plan, including its consideration and adoption of the draft, must provide for the identification of all plans and planning requirements binding on the municipality in terms of national and provincial legislation. In my view the Scheme forms part of the "*national and provincial development plans and planning requirements*", the "*national or provincial sectoral plans and planning requirements*" and the "*plans and planning requirements*" binding on the City in terms of national and provincial legislation. In the premises the reference in s 35(1)(b) to provincial legislation is to be understood to include a town planning scheme adopted in terms of the Ordinance. Thus, even if I am wrong in concluding that the RSDF does not have the force of law, I am of the view that in the event of inconsistency, the RSDF must yield to the provisions of the Scheme.

²⁴ Section 40(2) of the Ordinance.

²⁵ Pick 'n Pay Stores Ltd and Others v Teazers Comedy and Revue CC and Others 2000 (3) SA645 (W) 654D – E; BEF (Pty) Ltd v Cape Town Municipality and Others 1983 (2) SA 387 (C) 401B; Muller & Others v City of Cape Town 2006 (5) SA 415 (C) 428F; United Technical Equipment Co (Pty) Ltd v Johannesburg City Council 1987 (4) SA 343 (T) 348H.

15. It follows that the first two respondents have every right to apply for consent to conduct the business of a restaurant or coffee shop on the property. The City is compelled to consider the application, notwithstanding the RSDF recording that no more coffee shops and restaurants are to be supported along Fourth Avenue, Parkhurst. The RSDF does not prohibit the City from granting the application. Mr Dendy was quite correct when he submitted that a restaurant cannot be opened or operated on the shop premises merely by virtue of the Business 1 zoning of the property, and that there is consequently no vested right to conduct such business. Approval first has to be obtained in terms of the Businesses Act.²⁶ But this requirement does not preclude the first or second respondent from applying for such consent, nor can the City be interdicted from considering and granting same.
16. In the heads of argument all parties asked for costs to be awarded on the scale as between attorney and client. It appears that the applicant refused to attend a round-table meeting at the request of the first two respondents. The request was sensible and aimed at discussing the applicant's contentions pertaining to the RSDF, and the respondents' own investigation into the possibility of opening a restaurant on the property. The applicant elected to immediately proceed to court, rather than to meet and discuss these issues. In appropriate matters this approach may well lead to a special costs order.²⁷ On the other hand the very late application by the first two respondents for security for costs, which they eventually indicated would be proceeded with

²⁶ Act No 71 of 1991.

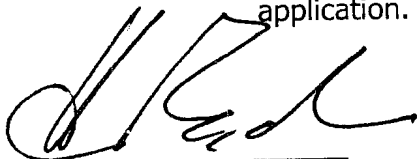
²⁷ Cf Szedlacsek v Szedlacsek; Van der Walt v Van der Walt; Warner v Warner 2000 (4) SA 147 (ECD).

only in the event of the argument not being disposed of on the first day, also contributed much to the parties' initial emotive approach to the matter. Before me, however, the representatives of all parties focussed on and limited argument to the legal contentions each party relied upon. Given this approach, it seems that it would be inappropriate to accede to any request to make a special order for costs.

17. I make the following orders:

17.1. The application is dismissed.

17.2. The applicant is directed to pay the respondents' costs of the application.



H VAN EEDEN
ACTING JUDGE OF THE HIGH COURT

Counsel for applicant: Attorney Mr M Dendy
Instructed by: Mervyn Dendy Attorney

Counsel for first and second respondent: Adv G F Porteous
Instructed by: Schindlers Attorneys

Counsel for third respondent: Adv S Mitchell
Instructed by: Lennon Moleele Attorneys

Date of hearing: 11 November 2009
Date of judgment: 5 February 2010