

IN THE 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 (PROPRIETARY)
LIMITED**

Second Respondent

CITY OF JOHANNESBURG

Third Respondent

APPLICATION FOR LEAVE TO APPEAL

TAKE NOTICE that the abovenamed Applicant intends to make application for leave to appeal to the Supreme Court of Appeal against the whole of the judgment and order of His Lordship Mr Acting Justice Van Eeden dated 5 February 2010.

TAKE NOTICE FURTHER that the grounds of appeal are as follows:

1. The learned Judge held that the regional spatial development framework ('RSDF') which forms part of the integrated development plan of the third respondent, like other such integrated development plans, does not lend itself to any such detailed regulation of property as contended for on behalf of the applicant (judgment, pages 12—13 para 12), and seems to be a broad instrument

not intended to apply to property as defined in section 1 of the Local Government: Municipal Systems Act 32 of 2000 (judgment, pages 13—14 para 13)

WHEREAS

the learned Judge should have held that the RSDF is a document which is sufficiently specific to apply to property as defined in section 1 of the Local Government: Municipal Systems Act and does lend itself to detailed regulation of property of the kind contended for on behalf of the applicant, because the RSDF not only is divided into parts each of which deals with a specific ‘sub area’ (for example Parkhurst) but also contains highly specific provisions which were clearly intended to regulate small groups of individual erven, for example the ‘intervention’ provisions reading ‘Contain commercial/Business development on Fourth Avenue to between south of Fourteenth and north [of] Fifth Streets’ and ‘[n]o more coffee shops and restaurants to be supported along Fourth Avenue’ (record, page 65), and the ‘guidelines’ provision reading ‘[n]o further retail, restaurants or coffee shops to be supported whatsoever [along Sixth Street]’ (record, page 66).

2. The learned Judge held that, according to section 35(1)(c) of the Local Government: Municipal Systems Act, the integrated development plan adopted by the council of a municipality (such as the third respondent) is not binding on

persons other than the municipality except to the extent to which the plan has been passed as a by-law (judgment, page 12 para 11)

WHEREAS

the learned Judge should have held that (i) according to section 35(1)(c) of the Local Government: Municipal Systems Act 32 of 2000, the integrated development plan adopted by the council of a municipality (such as the third respondent) is not binding on persons other than the municipality to the extent that parts of the integrated development plan impose duties on such other persons or affect the rights of such other persons, except to the extent to which those parts of the plan have been passed as a by-law, and (ii) the provision of the third respondent's RSDF which states that '[n]o more coffee shops and restaurants [are] to be supported along Fourth Avenue' does not have to be passed as a by-law in order to bind the first and second respondents, since that provision neither imposes duties upon the first and second respondents nor affects any rights of the first and second respondents, because the first and second respondents did not acquire, prior to the introduction of that provision into the RSDF, a vested right to open or operate a coffee shop or a restaurant along Fourth Avenue, Parkhurst.

3. The learned Judge held that nothing in the integrated development plan can either confer or remove rights of property owners (judgment, page 13 para 13)

WHEREAS

the learned Judge should have held that the provision in the third respondent's RSDF which states that no more coffee shops and restaurants are to be supported along Fourth Avenue does not remove any rights of the first or the second respondent, inasmuch as neither the first respondent nor the second respondent acquired any right to open or operate a coffee shop or a restaurant along Fourth Avenue prior to the introduction of that provision into the RSDF.

4. The learned Judge held that 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 (judgment, page 14 para 13)

WHEREAS

the learned Judge should have held that the question whether the RSDF has the force of law is unaffected by the fact that it is revisited annually and may consequently be amended annually, inasmuch as any legislative instrument may be revisited annually (or more regularly) without its status as legislation having the force of law being thereby removed (as, for example, in the case of the Income Tax Act 58 of 1962, which is in fact revisited and amended annually, yet which clearly retains the force of law despite such annual revisitation and amendment).

5. The learned Judge held that the legislator could not be intended, in sections 35 and 36 of the Local Government: Municipal Systems Act, to have accorded integrated development plans the force of law (judgment, page 14 para 13)

WHEREAS

the learned Judge should have held that an integrated development plan adopted by the council of a municipality does not have the force of law (except to the extent that it is inconsistent with national or provincial legislation, and to the extent that it imposes duties or affects the rights of persons other than the municipality without having been passed as a by-law) because section 35(1)(b) of the Local Government: Municipal Systems Act states that an integrated development plan binds the municipality in the exercise of its executive authority (which includes the consideration of an application for a licence for the opening or operation of a restaurant in terms of the Businesses Act 71 of 1991), and because section 36 of the Local Government: Municipal Systems Act provides that a municipality must give effect to its integrated development plan and must conduct its affairs (which include the consideration of an application for a licence for the opening or operation of a restaurant in terms of the Businesses Act 71 of 1991) in a manner which is consistent with its integrated development plan.

6. The learned Judge held that an express indication would have been expected (in section 35 and/or section 36 of the Local Government: Municipal Systems Act) if it was ever intended that the RSDF would override existing town-planning schemes (judgment, page 14 para 13)

WHEREAS

the learned Judge should have held that the applicable ('Business 1') provisions of Table C of the Johannesburg Town Planning Scheme 1979, read with clause 14(1) of the Johannesburg Town Planning Scheme and the definition of 'business purposes' in clause 1 of the Johannesburg Town Planning Scheme, taken in conjunction with the governing provisions of the Businesses Act 71 of 1991, are not overridden by the provision of the RSDF upon which the applicant relies, inasmuch as (i) the aforesaid provisions of the Town Planning Scheme read with the applicable provisions of the Businesses Act do not confer upon the first and second respondents the right to open a coffee shop or a restaurant along Fourth Avenue, (ii) those provisions entitle the first and second respondents to the grant of a restaurant licence only if the premises in question comply with the requirements relating to town planning or the safety or health of the public of any law which applies to those premises at the time when an application for a restaurant licence is made, and (iii) the premises in question did not comply with the requirements of the governing laws relating to town planning at the time when the restaurant-licence application by the first respondent was made, since they are

situated along Fourth Avenue, Parkhurst and violate the prohibition against support by the third respondent for any more coffee shops and restaurants along Fourth Avenue, read with section 35(1)(b) and section 36 of the Local Government: Municipal Systems Act.

7. The learned Judge held that an express indication would have been expected (in section 35 and/or section 36 of the Local Government: Municipal Systems Act) if it was ever intended that the RSDF would override the rights already accorded to properties (judgment, page 14 para 13)

WHEREAS

the learned Judge should have held that no right to open or operate a restaurant along Fourth Avenue, Parkhurst was ever acquired by the first respondent or the second respondent, inasmuch as no application for the grant of a restaurant licence to the first respondent or to the second respondent in respect of premises situated along Fourth Avenue has ever been granted, and that no right which does accrue to the first respondent or the second respondent is overridden by the provision of the RSDF which states that '[n]o more coffee shops and restaurants [are] to be supported along Fourth Avenue'.

8. The learned Judge held that the integrated development plan and the RSDF will have the force of law only when passed as a by-law, and that the portion of the

RSDF relied upon by the applicant does not have the force of law because it has not been passed as a by-law (judgment, page 14 para 13)

WHEREAS

the learned Judge should have held that the provision of the RSDF stating '[n]o more coffee shops and restaurants to be supported along Fourth Avenue' does not have to be passed as a by-law in order to be binding upon the first and second respondents because the first and second respondents have never acquired a right to open a coffee shop or a restaurant along Fourth Avenue, Parkhurst inasmuch as a licence in terms of the Businesses Act 71 of 1991 has never been granted to either the first respondent or the second respondent to open such a coffee shop or restaurant along Fourth Avenue.

9. The learned Judge held that the reference in section 35(1)(b) of the Local Government: Municipal Systems Act to provincial legislation must be held to include a town-planning scheme (such as the Johannesburg Town Planning Scheme 1979) (judgment, page 15 para 14).

WHEREAS

the learned Judge should have held that the Johannesburg Town Planning Scheme 1979 (and any other town-planning scheme like it) does not constitute provincial

legislation because it was not enacted by a provincial council under the old order (prior to 27 April 1994) or by a provincial legislature under section 125 of the Constitution of the Republic of South Africa, Act 200 of 1993 or section 104 of the Constitution of the Republic of South Africa, 1996.

10. The learned Judge held that the RSDF must yield to the provisions of the Johannesburg Town Planning Scheme 1979 (judgment, page 15 para 14)

WHEREAS

the learned Judge should have held that the provision of the RSDF which states '[n]o more coffee shops and restaurants to be supported along Fourth Avenue' is not inconsistent with the Johannesburg Town Planning Scheme 1979, and that nothing in the Johannesburg Town Planning Scheme negates that provision of the RSDF, or deprives it of force or effect.

11. The learned Judge held that the third respondent is compelled to consider the application by the first respondent for a restaurant licence, notwithstanding that the RSDF records that no more coffee shops and restaurants are to be supported along Fourth Avenue, Parkhurst, and that the RSDF does not prohibit the third respondent from granting the restaurant-licence application (judgment, page 16 para 15)

WHEREAS

the learned Judge should have held that the provision of the RSDF to the effect that no more coffee shops and restaurants are to be supported along Fourth Avenue renders it unlawful for the third respondent to grant a licence in terms of the Businesses Act 71 of 1991 for the opening or operation of a restaurant along Fourth Avenue by the first respondent on the premises of the second respondent, regardless of the provisions of the Johannesburg Town Planning Scheme 1979, and that the RSDF accordingly prohibits the third respondent from granting the restaurant-licence application.

12. The learned Judge held that the third respondent cannot be interdicted from considering and granting the restaurant-licence application made by the first respondent (judgment, page 16 para 15)

WHEREAS

the learned Judge should have held that the provision of the RSDF upon which the applicant relies does prevent the third respondent from granting the first respondent's restaurant-licence application, and accordingly that the applicant is entitled to the declaratory and interdictory relief claimed by the applicant in prayers 1 to 6 of the notice of motion.

13. The learned Judge dismissed the application (judgment, page 17 para 17)

WHEREAS

the learned Judge should have granted the applicant the relief sought in prayers 1 to 6 of the notice of motion.

14. The learned Judge ordered the applicant to pay the costs of the first, second and third respondents (judgment, page 17 para 17)

WHEREAS

the learned Judge should have ordered the first, second and third respondents to pay the applicant's costs in respect of the main application and should in addition have ordered the first and second respondents to pay the costs of the opposed application made by the first and second respondents to compel the applicant to furnish security for the costs of the main application, which application for security was not proceeded with by the first and second respondents after it became opposed by the applicant.

DATED at JOHANNESBURG this 25th day of February 2010.

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TO : THE REGISTRAR OF THE ABOVE
HONOURABLE COURT
JOHANNESBURG

AND TO: SCHINDLERS ATTORNEYS
FIRST AND SECOND RESPONDENTS'
ATTORNEYS
SECOND FLOOR
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REF: LISA SHER/ms/G06349

RECEIVED COPY HEREOF THIS
25TH DAY OF FEBRUARY 2010

FOR: FIRST AND SECOND
RESPONDENTS' ATTORNEYS

AND TO: LENNON MOLEELE & PARTNERS
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FOR: THIRD RESPONDENT'S
ATTORNEYS