IN THE KWAZULU-NATAL HIGH COURT, DURBAN

(REPUBLIC OF SOUTH AFRICA)

Case No : 2806/2006

In the matter between :

Eagle Creek Investment 138 (Pty) Ltd
Plaintiff

and

Hibiscus Coast Municipality First
Defendant

Udidi Project Development Company (Pty) Ltd
Reg No 1997/019192/07
[incorporating Metplan (Pietermaritzburg)
Incorporated t/a Metroplan]] Third
Party

J U D G M E N T

LOPES J

[1] Eagle Creek Investments 138 (Pty) Ltd ("the plaintiff") instituted action against the Hibiscus Coast Municipality ("the municipality") for payment of the sum of R1 018 079,64 being damages it allegedly sustained when, as the owner of certain immovable property situated in Shelley Beach in KwaZulu-Natal ("the property"), it decided to build a motor-dealership on the property.

[2] The plaintiff alleges that, relying upon a written zoning certificate dated the 3rd November, 2004 issued by the municipality indicating that the property was zoned "General Commercial 2", it took the following steps :-

a) it instructed an architect to prepare building plans for the construction of the motor-dealership and to oversee the construction and building works;

it appointed a quantity surveyor to assist and advise it with regard to the construction and building works;
it appointed a contractor to build the motor-dealership in accordance with the architect's plans.

[3] The building plans which had been prepared in accordance with the controls applicable to a zoning of "General Commercial 2" were then submitted to the municipality.

[4] By the 28th December, 2004 the Building Control Officer of the municipality had recommended the approval of the building plans.

[5] Work then started on the construction of the dealership, but during February 2005, the municipality demanded that the plaintiff forthwith stop construction. It did so because of objections it received from neighbouring landowners following which the municipality discovered that the property was in

fact zoned “Limited Commercial” and not “General Commercial 2”. If the zoning was correctly categorised as “Limited Commercial” then consent for the building plans would not have been granted.

[6] Believing it had been correct in its initial zoning categorisation, on the 12th April 2005 the municipality withdrew its instruction to stop the work in progress and told the plaintiff that it could recommence the works.

[7] During June of 2005 the three neighbouring landowners who had objected to the construction of the motor-dealership secured an interim order from the High Court setting aside the decision of the municipality to approve the development and the building plans, averring that the zoning was incorrect.

[8] In September of 2005 a final order was granted setting aside the approval of the building plans and interdicting the plaintiff from carrying out any further building works or other development of the property. In so doing the Court found that the property was in fact zoned “Limited Commercial”.

[9] The municipality maintains that Udidi Project Development Company (Pty) Ltd, (“the third party”) had been responsible for preparing updated zoning maps and the relevant town planning scheme, and that the third party had breached its duty of care to the municipality to ensure that it did so correctly and had wrongly

reflected in the updated zoning maps that the zoning of the property was "General Commercial 2". This had been responsible for the error in granting consent to the plaintiff.

[10] The matter has now come before me for trial. The plaintiff and the municipality have agreed that, in terms of Rule 33(4) I should firstly decide as a separate issue, a special plea raised by the municipality. The third party was not represented at this hearing.

[11] The special plea alleges that :-

(a) the plaintiff's claim is based upon the vesting in the municipality of certain statutory powers and obligations, a negligent breach of those powers and obligations by the municipality, and that the plaintiff has suffered damages as a consequence;

but, that

(b) the law confers upon the municipality an immunity from claims for damages arising from the negligent exercise of its statutory duties.

[12] In further particulars the plaintiff identified the source of that immunity as being either ;

a) s 23 of the National Building Regulations and Building Standards Act, 1977 ("the National Building Act"); and/or

sub-ss 61(5) and/or 67(3)(a) and/or (b) of the Town Planning Ordinance, 1949 ("the Ordinance"); and/or
the common law.

[13] I am asked to decide whether the first two of those sources provide an immunity to the municipality from liability for the plaintiff's damages. The parties have specifically enjoined me not to make a ruling upon the common law, but to confine myself to the relevant statutory provisions.

[14] I accordingly granted an order in terms of Rule 33(4) as set out in the Consent Order handed in by counsel.

[15] Mr Gajoo SC, who appeared for the municipality, moved for an amendment to the further particulars to his special plea to incorporate the provisions of s 67(8) of the Ordinance, as part of the immunity pleaded. I granted that amendment.

[16] Mr Gajoo submitted that the plaintiff's claim was based upon the negligent breach by the municipality of its statutory duties.

[17] He submitted that the authority of the municipality to pass building plans is to be found in s 4 of the National Building Act, and that s 23 of that Act (or rather the preamble to, and sub-s 23(a)) provided the municipality with an exemption from liability for the plaintiff's damages. This was, so he submitted, because as the

zoning and approval was granted in terms of s 23, so is the applicability of the exemption in that section.

[18] S 23 provides that :-

> "*Exemption from liability - No approval, permission, report, certificate or act granted, issued or performed in terms of this Act by or on behalf of any local authority or the Board in connection with a building or the design, erection, demolition or alteration thereof, shall have the effect that –*
>
> (a) *such local authority or the Board be liable to any person for any loss, damage, injury or death resulting from or arising out of or in any way connected with the manner in which such building was designed, erected, demolished or altered or the material used in the erection of such building or the quality of workmanship in the erection, demolition or alteration of such building;*
>
> *…"*

[19] Mr Ploos van Amstel SC who appeared together with Mr Crots for the plaintiff, analysed s 23 as providing for exemption from loss or damage arising out of or in any way connected with :-

a) the manner in which a building is designed or erected; and/or

   the material used in the construction of such building; and/or
b) the quality of the workmanship in the construction of the building.

[20] He submitted that it is only where one of these three items is present, and is connected with the damage arising, that the exemption from liability will operate.

[21] In interpreting the provisions of s 23 I have borne in mind :-

a) that such a provision should be strictly construed;

Commissioner SARS v TFN Diamond Cutting Works (Pty) Ltd 2005(5) SA 113 (SCA) @ 118 para 12.

b) that I should avoid an interpretation of the section which will nullify its intent, albeit that the section is clearly intended to interfere with the common law;

Moodley v Umzinto North Town Board 1998(2) SA 188 (SCA) @ 202 B – C.

c) the dicta of van Heerden JA in Bastian Financial Services (Pty) Ltd v General Hendrik Schoeman Primary School 2008(5) SA 1 (SCA) paras 16 – 19.

[22] The section seeks to indemnify the local authority concerned for loss or damage arising out of, or connected with, the three situations envisaged above. None of these situations would normally involve conduct on the part of the municipality or its employees in the sense that they would primarily be responsible for the design or construction of the building or the choice of materials to be used.

[23] This is so even if its employees may be responsible for approving plans based upon a particular design, method of construction or use of certain materials.

[24] In addition, the plaintiff has not sought to rely on any of the three aspects set out above as a ground for establishing liability on the part of the municipality.

[25] That being so, s 23 is clearly not intended to exempt the municipality and its employees from liability other than on the basis set out therein. In the present matter the incorrect assumption of the zoning of the property by the municipality is not the type of conduct protected by the section, and s 23 does not protect the municipality.

[26] Mr Gajoo recorded that because s 61(5) or the Ordinance provides that compensation shall not be payable in respect of any building erected or any work done in contravention of any provisions of an approved scheme, and because the scheme with which we are here concerned is the Margate Town Planning Scheme in the course of preparation (and not an "approved scheme" as defined in the Ordinance), the municipality would no longer rely upon the provisions of s 61(5).

[27] With regard to the remaining provisions of the Ordinance, Mr Gajoo relied upon the provisions of sub-ss 67(3)(a) and/or (b) read with sub-s 67(8).

[28] Sub-s 67(3)(a) prohibits a municipality from granting authority to develop or use land or build any structure in conflict with any duly adopted provisions of any

scheme in the course of preparation.

[29] Sub-s 67(3)(b) renders any such grant of authority null and void.

[30] Sub-s 67(8) provides that :-

> ‘‘*No compensation shall be payable in respect of the exercise by a local authority … of its powers under this section.”*

[31] Mr Gajoo maintained that the phrase “no compensation” would include the payment of damages.

[32] Mr Ploos van Amstel pointed to the difference in wording between s 23 which refers to a restriction on “any loss, damage, …”, and sub-s 67(8) which refers to “compensation” and does not refer to “damages”.

[33] Whatever semantic differences may exist between “compensation” and “damages”, I am not certain that they will serve to assist in the ultimate interpretation of sub-s 67(8).

[34] What does seem clear is that the legislature intended that nothing would be payable as a recompense for the consequences of a local authority exercising its powers under section 67.

[35] Mr Ploos van Amstel points out that s 60 of the Ordinance provides for a system of compensation in three categories :-

a) where property is injured by the coming into operation of a scheme, or by work under a scheme; or

any action of a responsible authority in terms of s 56 (removal of works, etc pursuant to the carrying into effect of a scheme); or
the incurring of abortive expenditure by the variation or revocation of a scheme.

[36] Aspects of that compensation are excluded in terms of s 61. Sections 62 – 66 deal with the basis upon which, and the procedure for, the recovery of compensation or betterment under various circumstances. None of these sections, however, appear to contemplate an exemption from liability for culpable conduct on the part of a municipality.

[37] Mr Ploos van Amstel submitted that the need for, and approval of plans is dealt with in terms of sections 4 and 7 of the National Building Act and not s 67 of the Ordinance, and the claim of the plaintiff cannot be categorised as a claim for compensation.

[38] S 67 deals not only with the grant of authority in certain circumstances, but also with prohibitions on the conduct of persons acting without the authority of the municipality and the lapsing of such authority in certain circumstances. The section also deals with the time periods within which a municipality must come to its decision, as well as the consequences of its not doing so.

[39] The grant of authority by the municipality in s 67 relates to the uses to which land or buildings may be put in accordance with the applicable scheme.

[40] Sub-s 67(1) provides that :-

> "*(1) No person in any area in respect of which a resolution to prepare a scheme shall have taken effect shall –*
>
> *(a) erect a building or structure or alter or extend a building or structure; or*
> (b) *develop or use any land, or use any building or structure for any purpose different from the purpose for which it was being developed or used, as the case may be, at the date when the resolution to prepare a scheme took effect; or*
> *(c) use any building or structure erected after the date when the resolution to prepare a scheme took effect for a purpose different from the purpose for which it was erected; or*
>
> *in an area to which the provisions of Chapter III of this Ordinance do not apply, subdivide any land,*
>
> *unless in any such cases he has first applied in writing to the municipality for authority to do so, and the said municipality has granted it written authority therefor, either with or without conditions; …"*

[41] Mr Ploos van Amstel submitted that the plaintiff's claim was not a claim for compensation in terms of s 67 and further that the approval or authority granted by the municipality was not one in terms of s 67. In those circumstances no question of any immunity in terms of sub-s 67(8) can arise.

[42] With regard to his first submission, s 67 does not provide for

compensation to be paid by a local authority, but rather simply precludes such payment where a municipality has exercised its powers in terms of s 67.

[43] Whilst the approval of plans by the municipality was the basis of the plaintiff's claim, and whilst these plans are alleged by the plaintiff to have been submitted in terms of s 7 of the National Building Act, does that mean that the authority was not granted in terms of s 67?

[44] In this matter the conduct of which the plaintiff complains is that the municipality passed its building plans and permitted construction to proceed based upon it communicating an incorrect zoning of the property to the plaintiff. That was pursuant to, or part of, an application for authority to build which was undoubtedly encompassed in the phrase "*erect a building or structure or alter or extend a building or structure*" in an area in respect of which a resolution to prepare a scheme had taken effect. (It is common cause that the property fell within a town planning scheme in the course of preparation.)

[45] The phrase used in the preamble to sub-s 67(1) that "*… in any area in respect of which a resolution to prepare a scheme shall have taken effect …"* would appear to achieve no more than the fixing of a time from which the provisions of the section would be operative. Accordingly, from the time such a resolution is taken (and logically this must have been prior to the scheme actually being implemented), the relevant consent in terms of section 67 would have been

required. It seems clear that the applicable zoning categorisation was central to the approval of the plans, and the need to submit plans was covered by the authority required in sub-s 67(1).

[46] In those circumstances, the grant of the authority by the municipality was carried out in the exercise by the municipality of its powers in terms of s 67 of the Ordinance, as well as in terms of ss 4 and 7 of the National Building Act.

[47] The provisions of sub-s 67(8) are accordingly applicable to this action. The damages claimed by the plaintiff are ones which may ordinarily be considered to be "compensation" in the normal way in which that word may be used ie "*Recompense for loss or damage …*" The Shorter English Distionary – Volume 1 at page 382. See also Sandton Town Council v Erf 89 Sandown Extension 2 (Pty) Ltd 1986(4) SA 567 (WLD) @ 579 D – 580 C.

[48] The parties were agreed that in such circumstances I should dismiss the plaintiff's claim with costs, and I make that order.

Date of hearing : 12th July 2010

Date of judgment : 16th July 2010

Counsel for the Plaintiff : J A Ploos van Amstel SC with E Crots (instructed by Tomlinson Mnguni James)

Counsel for the Defendant : V I Gajoo SC (instructed by Seethal Attorneys)