

SUMMARY OF THE JUDGMENT

IMPROPER PLAN AND ZONING APPROVAL: DEMOLISH 5 OF 9 STOREYS

**Aboobaker N.O and Others v Serengeti Rise Body Corporate and Another
(12052/2014) [2015] ZAKZDHC 54 (29 June 2015)**

If a local authority and developer do not follow required notification procedures where a rezoning application is considered and subsequently building plans aligned to such rezoning are approved, property owners are not left without recourse, even if the building works had reached an advanced stage. The court here answered the affected owners' call for review of the irregular decisions, in consequence of which it ordered demolition of the building work that was done subsequent to irregular municipal approvals.

The Judgment can be viewed [here](#).

FACTS

Mr Aboobaker and others, owners in the vicinity of a property being developed by Serengeti Rise Body Corporate (Serengeti) in Berea, Kwa-Zulu Natal, approached the High Court for an order that the eThekweni Municipality's (the municipality) approval of the rezoning and construction of a building be declared illegal and that the structure be demolished.

Serengeti's initial plan approval was obtained in August 2010 when the property was zoned General Residential I and the proposed building was aligned to such zoning, providing for a four storey building. Subsequently the site was rezoned in December 2011 from a GR1 zone to a GR5 zone and Serengeti submitted a deviation plan which sought to increase the bulk of the building from approximately 1800 to 9786 square metres. The deviation plan was approved by the municipality in February 2014 and was in stark contrast to the initial plans, the new structure consisting of nine storeys.

The development, as it stood at the time of the court application, had the effect of towering over all the surrounding properties, obstructing the view of the owners and occupiers and compromising the privacy of the surrounding properties. As a result of the location of their properties, the majority of applicants enjoyed panoramic views of the city and sea until Serengeti's erected the structure giving rise to this review. In seeking review, Aboobaker challenged the municipality's approval of Serengeti's building plans and its application and approval for rezoning of the property. He argued that the rezoning of the site from GR1 to GR5 was not achieved by due process, nor was the rezoning in accordance with the applicable law.

At the time of application for the rezoning, notices were sent to owners in the vicinity, but Aboobaker argued that not all owners received these and that the notices were defective in that inadequate details were provided therein.

In addition to contesting the validity of the approval of the building plans and the rezoning, Mr Aboobaker contended that the municipality, as the custodian of orderly development in accordance with applicable legislation, failed in its duties and acted without due regard for the law.

HELD:

Rezoning

- A rezoning application required notice of the intended rezoning to affected parties in terms of the relevant ordinance.
- Serengeti's notices however failed to notify those who were affected as to the intended zonal change or the purpose of the rezoning. Serengeti also could not show that the notification was sent to each and every affected land owner or occupier of land adjacent to the property.
- The notification to the public was therefore wholly inadequate and did not meet the requirements of the relevant ordinance. Neither could the developer or the municipality show that the rezoning was rational or lawful.
- As such, the conduct of the municipality in approving the rezoning, constituting administrative action, affected the legal rights of Aboobaker and other owners in a manner that was neither fair nor just. It violated the principle of legality and constituted unfair administrative action as espoused in the Promotion of Administrative Justice Act, 3 of 2000.

The building deviation plan

- The municipality and its building control officer should have adopted strict procedures when considering whether the deviation plans met the requirements of section 7(1)(b) of the National Building Regulations and Building Standards Act (the Building Act) that requires such officer, amongst other things, to decline approval if the proposed building would have the effect that (i) the area in which it is to be erected will probably or in fact be disfigured thereby; (ii) it will probably or in fact be unsightly or objectionable; (iii) it will probably or in fact derogate from the value of adjoining or neighbouring properties; (iv) will probably or in fact be dangerous to life or property.

- The municipality conceded that the structure would have been the first building in the area based on a GR5 zoning. The municipality failed to give reasons as to how the conclusion was reached in respect of the deviation plans and why it met the requirements of section 7(1)(b).
- As the building plans did not meet with the applicable statutory requirements contained in the Building Standards Act, the municipality's approval was open to review.
- Reviewing the process followed, the court found that whilst the initial plans were properly approved, the subsequent plans were not.

Has the jurisdictional basis for a demolition order been established?

- The present building was based on a GR5 zoning, which the court has found was unlawful and invalid. Without a GR5 zoning, Serengeti had erected an illegal structure because the plan authorising the building could not have been authorised in terms of a GR1 zoning which permits for a building no higher than four storeys. (It was common cause that Serengeti's initial plans were submitted in accordance with the GR1 zoning and that no serious challenge was launched against those plans.)
- Once a ground of review under PAJA has been established then the court had to deal with its consequence. In terms of section 172(1)(a) of the Constitution the administrative action by the municipality had to be declared unlawful.
- What remained valid was that part of the building that was built in accordance with the GR1 zoning and the plan approved by the municipality in August 2010.

As there was an obligation on a court to uphold the law, Serengeti was ordered to demolish that the part of the structure that was illegal.

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