CASE NO.: A 25/96

IN THE HIGH COURT OF NAMIBIA

in the matter between:

WILLEM GROBBELAAR **First Applicant**
CORNER PROPERTIES CC. **Second Applicant**

and

THE COUNCIL OF THE MUNICIPALITY OF WALVIS BAY **First Respondent**
THE CHAIRPERSON OF THE COUNCIL OF THE MUNICIPALITY OF WALVIS BAY **Second Respondent**

CORAM: MARITZ, A.J.

Heard on: 1996-11-4

Delivered on: 1997-11-21

JUDGMENT

MARITZ, A.J. The first applicant, a property developer and member of the second applicant, acquired Erf 1043 Walvis Bay for purposes of the development of a shop and office complex thereon.

That property is situated within the local authority area of the first respondent. During the latter half of 1994 and the beginning of 1995 he commenced with and completed the development whereafter he alienated the property to the second applicant. In the course of the development a dispute arose between the first applicant and the Council of the First Respondent about the first applicant's duty to provide parking space on the property itself or to either acquire another property approved by the first respondent for the provision of parking or pay an amount of N$109 200,00 to the first respondent's "*Parking Development Fund*", the funds whereof were to be applied by the Council towards the acquisition and development of parking facilities in Walvis Bay. This dispute culminated in the adoption of the following resolution by the first respondent's Council (of which the second respondent is the Chairman) on 28 March 1995:

> "*(a) That the developer of Erf 1043, Walvis Bay be informed that Council stands by its principle that over and above the parking provided by Council, a developer in the business area must provide parking at the rate of two parking bays per 100 m² of development on the Erf being developed.*
>
> (b) *That should the developer not be in the position to comply with (a), the developer shall either –*
>
> (i) *acquire the prescribed area of land for the parking facilities elsewhere in a position approved by the*

Council: provided the developer registers a notarial deed against such land to the effect that the Council and the public shall have free access thereto for the purpose of parking and the owner shall be bound to level this land and surface and maintain it to the satisfaction of the Council: the cost of registration of the servitude to be borne by the Council, or

(ii) *pay a cash sum of N$140 per m² which sum shall be paid into a parking development fund.*

(c) *That, should the developer opt for option (b)(ii), the total amount of N$109 200,00 representing 26 parking bays of 30 m² each at a unit cost of N$140,00 per m², be paid to Council within 7 days.*"

The first and second applicants are moving an order to have that decision reviewed and set aside as null and void, as well as an order directing first respondent to refund the amount of N$109 200,00 to the first applicant together with interest thereon. They are also seeking an order of costs against the first respondent.

The applicants are challenging the validity of the first respondent's decision on a number of grounds. They allege that the first respondent's Council had no authority to have taken the decision; that the Town Planning Scheme relied on as authority for the adoption of that resolution was not in force or, if in force, has not been complied

with; that the applicants were not afforded a proper opportunity to be heard on the resolution; that the resolution was invalidly taken with retrospective effect; that the first respondent's Council acted in a discriminatory manner contrary to the provisions of Article 10 of the Namibian Constitution to the detriment of the applicants and that the first respondent's Council acted so unreasonable that that the court is entitled to infer *mala fide* from its conduct.

Mr Swanepoel, who appeared for the applicants focused his main attack on the first respondent's lack of authority to have adopted that resolution. He argued that a Local Authority, as a creature of statute, does not have any inherent powers and that, in the absence of any empowering legislative provisions, the first respondent could not have required payment from the first applicant in the manner and to the extent contemplated by that resolution (to which I shall refer to hereunder as the "decision"). Mr Smuts, appearing for the respondents, challenged those contentions, submitting that the applicants attack on the first respondent's authority to make the decision was in oblique and general terms without the required degree of specificity contemplated by rule 53(2); that the applicants had waved their right to challenge that authority and that the first respondent, in any event, had the authority to require such payment by virtue of the provisions of the Town Planning Scheme of Walvis Bay

(the "*Scheme*") read with the provisions of the Town Planning Ordinance, 1954, alternatively Regulation 15 of 1 February 1969 read with the provisions of the Local Authorities Act, 1992. I shall deal with those submissions *seriatim*.

It is correct that the first applicant initially raised the first respondent's authority in rather general terms in his affidavit. Later on though, he made that challenge in the founding affidavit in no uncertain terms. He alleged, referring to a letter of the first respondent (in which the latter indicated its reliance on the Scheme) that no such Scheme had ever been approved for Walvis Bay; that such Scheme had been in preparation for a long time but that it had never been adopted or promulgated under the Town Planning Ordinance, 1954. He pointed out that as late as September 1995 a Government Notice (No. 265 of 1995) had been published according to which the Council of the first respondent had obtained approval from the Minister of Regional and Local Government and Housing to compile a Town Planning Scheme for Walvis Bay. That according to him, was indicative of the fact that no Scheme had existed at the time the decision was taken.

The respondents replied to those allegations at length. On behalf of the first respondent it was, *inter alia*, stated that "*this policy (i.e. to provide parking or pay a levy) is in accordance with the Walvis Bay Town Planning Scheme of 1977 (in preparation) … pursuant to the*

Town Planning Ordinance, 19 of 1954. The Scheme was duly authorised and approved in accordance with Government Notice 86 of 1973 published in the Official Gazette of 16 July and 1 August 1973." It then quoted certain provisions of that scheme as authority for the Council's decision and further referred to Regulation 15 of 1 February 1969 promulgated under the Municipal Ordinance, 1963.

I am satisfied that the applicants complied with the provisions of Rule 53(2) of the Rules of Court which requires an applicant to set out the grounds and the facts and circumstances upon which he or she relies to have the decision or proceeding set aside or corrected. The respondents were sufficiently appraised of the facts and circumstances underlying the applicants' challenge to its Council's authority.

Mr Smuts also contended that the first applicant had waived his right to challenge the first respondent's authority because he had accepted the first respondent's right to require payment of the sum; because of his agreement to pay a cash sum as a levy instead of having to provide parking bays and because of the circumstances surrounding the subsequent payment of that levy. Needless to say those circumstances relied on by the respondents are hotly contested by the applicants.

It is trite law that, given the factual presumption that a person is not likely deemed to have waived his or her rights, the *onus* to prove the applicant's alleged waiver on a balance of probabilities rests on the respondent. (See: **Hepner v Roodepoort-Maraisburg Town Council**, 1962 (4) SA 772 (A); **Borstlap v Spangenberg en Andere**, 1974 (3) SA 695 (A)). I am also mindful that in deciding disputes of fact in application proceedings, those disputes

> "*should be adjudicated on the basis of the facts averred in the applicant's founding affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, whether or not the latter has been admitted by the applicant, unless a denial by the respondent is not such as to raise a real, genuine or bona fide dispute of fact or a statement in the respondent's affidavit is so far-fetched or clearly untenable that the court is justified in rejecting it merely on the papers... This approach remains the same irrespective of the question which party bears the onus of proof in any particular case.*" (**Kauesa v Minister of Home Affairs & Others**, 1995 (1) SA 51 (NmHC) at 56 I to 57 C and the authorities referred to therein.)

To succeed in such a defence the respondents had to allege and prove that, when the alleged waiver took place, the first applicant had full knowledge of the right which he decided to abandon; that the first applicant either expressly or by necessary implication abandoned that right and that he conveyed his decision to that effect to the first

respondent. See: **Netlon Ltd & Another v Pacnet (Pty) Ltd**, 1977 (3) SA 840 (A) at 873; **Hepner v Roodepoort-Maraisburg Town Council**, *supra*; **Traub v Barclays National Bank Ltd**, 1983 (3) SA 619 (a) at 634.

It is common cause that, although the first applicant indicated in the course of informal discussions that he was in principle agreeable to contribute to the "*Parking Development Fund*" in lieu of having to provide parking facilities on the premises or elsewhere, he never agreed to the payment of an amount of N$109 200,00 and consistently disputed the first respondent's authority to unilaterally determine such an amount. It seems to me that the first applicant's agreement to a contribution was not severable from the amount to be agreed on as a contribution. Without agreement on that amount (and it is common cause that was none), I am unable to find on the papers that the first respondent has proven, on a balance of probabilities, that the first applicant had waived his right to challenge the first respondent's authority to unilaterally impose a levy of N$109 200,00 on him.

The respondent's last line of resistance to applicants' attack on its authority (or rather the lack thereof) was that it had the power to require payment of that sum under the provisions of the Scheme, alternatively by virtue of Regulation 15 of 1 February 1969.

Although the first respondent's Council is a juristic person (section 6(2) of the Local Authorities Act, 1992) it is nevertheless a creature of statute. It does not enjoy the same liberty as private individuals and has no powers other than those which are deduced from the four corners of the statute under which it was constituted. (See: **Braud v Pretoria City Council**, 1981 (1) 680 (T) at 683; **Connolly v Ferguson**, 1909 TS 195 at 198; **De Villiers v Pretoria Municipality**, 1912 TPD 626 at 632; **Burghersdorp Municipality v Coney**, 1936 CPD 305 and Baxter: "Administrative Law" (1984) 387).

The provisions of the Town Planning Ordinance, 1954 were applied by section 3 thereof to local authority areas mentioned in the Third Schedule thereto. In addition to those local authorities, the Minister may under the powers vested in him by section 4 of the Ordinance, in certain circumstances apply the provisions thereof by notice in the Gazette to other local authorities. Lastly, the Ordinances also applies to those local authorities which, of their own initiative, has given notice in the Gazette that a scheme will be prepared and submitted to the Minister as contemplated by section 7 of the Ordinance.

The Municipality of Walvis Bay is not listed in the Third Schedule to that Ordinance and I have been unable to find any proclamation in terms whereof the Administrator (or any of the other constitutional

predecessors of the Minister) applied the provisions of the Ordinance to it under section 4 thereof. The only other manner in which the Ordinance could have been applied to the first respondent was under section 7 thereof. In terms of that section a local authority which has not been otherwise required to submit a scheme to the Minister may at its own initiative prepare and submit such a scheme. Once it has published notice of its intention to prepare such a scheme in the manner prescribed by section 7(2) of the Ordinance, the provisions of the Ordinance apply to that area in respect of which the scheme will be prepared.

In their answering affidavits the respondents refer to two notices which have been published on 16 June 1973 and 1 August 1973 respectively as authority for its proposition that the Ordinance applies to its local authority area. Those notices purports to be notices "*in terms of the provisions of section 17 of the Town Planning Ordinance, 1954 (Ordinance 18 of 1954) that the resolution of the Council, to devise a Town Planning Scheme for the Municipality of Walvis Bay, has been approved by the Executive Committee*". They are not the notices required by section 7(2) of the Ordinance. Although the first applicant, who was a member of the first respondent's Council for approximately ten years prior to In dependence stated in his founding affidavit "*without fear of contradiction that no Town Planning Scheme has ever*

been approved for Walvis Bay", he did not allege that the Ordinance itself had not been applied the local authority area of the first respondent pursuant to the provisions of section 7(2) thereof. He did that in his replying affidavit for the first time ("*... no notice of intention to prepare a scheme for submission to the Administrator (Executive Committee) as contemplated in section 7(2) of the Town Planning Ordinance, No 18 of 1954 was eve given, alternatively properly given ...*"). Neither counsel referred me to or produced a publication of a notice in terms of section 7(2) in the course of legal argument. Counsel for the applicants repeated in the course of his argument that notice in terms of section 7(2) was never given and invited me, on the authority of **Marshall v Marshall (Pty) Ltd, 1954(3) SA 571(N)** (at 576C-D), to rely on those allegations - submitting that if they were not true, the respondents would have responded thereto and produced the requisite proof. Although tempted by that invitation, I was reluctant to accept it in view of the *omne rite esse acta* presumption and the persistent application of the Scheme by the first respondent over decades. Having spend considerable time searching through thousands of unindexed General and Government Notices published since the promulgation of the Ordinance, I established the first respondent published the notice contemplated in section 7(2) in Official Gazette No 3066 dated 15 April 1970. In the circumstances I am satisfied the provisions of the Ordinance were applied to Walvis Bay.

Before a town planning scheme can become an "*approved scheme*" under the Ordinance, it has to be submitted to the Minister for his or her approval (section 22); the Minister has to refer the scheme to the Town and Regional Planning Commission for its consideration and report; that commission has to cause a notice to be published in the Gazette and in local newspapers to inform interested persons of such submission and to invite objections (section 23); that commission has to fix a date, time and place for the hearing of the application and of any objection lodged (section 25(1)); hear such application (section 25(2)); submit a report to the Minister at the conclusion of such hearing (section 25(3)) whereafter the Minister, after consideration of the report may either refuse to approve the scheme or approve it with or without modification (section 26(1)) and, in the event of such approval, give notice thereof in the Gazette whereupon such scheme comes into operation (section 26(2)).

The respondents did not challenge the applicants' assertion that the Scheme has not been approved in that manner. They claimed that the first respondent had given proper notice in terms of section 17 of the Ordinance (published on 16 July 1973 and 1 August 1973 respectively) that its resolution to prepare such a scheme had been approved by the of Executive Committee and that the Scheme had been under had

been under preparation at all relevant times to the application. That being the case, they alleged that, pending approval of the Scheme, section 39 of the Ordinance applied to the area in respect whereof the Scheme was under preparation. The relevant portions of that section of the Ordinance provides as follows:

> "*(1) Where at any time after a resolution to prepare a scheme has taken effect it appears to the Local Authority ... that in the area to which the scheme is to apply, any projected building ... would not conform to ... the amenities of the neighbourhood, or would be in contravention of the scheme in course of preparation, the local authority ... may prohibit the construction or other proposed work ... or may authorise the same on specified conditions: provided that no authority shall be granted which would operate in conflict with any of the provisions of the scheme in course of preparation*"

On that basis respondents contend that the Scheme applied to the first respondent's development and that the provisions of clause 8.4.8 I thereof relating to the "*provision of on-site parking*" was enforceable against him. That clause reads as follows:

> "*8.4.8 .I. In this zone minimum provision shall be made on the site for parking and garaging of vehicles on the following basis:*
>
> (a) *SHOPS AND BUSINESS PREMISES*

In every new building containing shops and business premises provision shall be made for parking bays on a ration of two parking bays for every 100 m² of floor area devoted to the abovementioned uses: provided that the owner shall where in the opinion of the Council it is undesirable or impractical from a planning point of view to provide the required parking area on the site:

(i) *acquire the prescribed area of land for the parking facilities elsewhere in a position approved by the Council; provided he registers a notarial deed against such land to the effect that the Council and the public shall have free access thereto for the purpose of parking, and the owner shall be bound to level this land and surface and maintain it to the satisfaction of the Council: the cost of registration of a servitude to be borne by the Council; or*

(ii) *pay a cash sum to the Council, equal to the rateable valuation per m² of the land on which the parking is to be provided multiplied by the total area required for parking in which event the Council shall itself acquire the necessary land for such parking purpose.*"

I am satisfied that the Scheme applied to Erf 1043 and that the proposed development contemplated in the approved municipal plans contravened that scheme (in the course of preparation) to the extent that no provision was made for parking in that building at the

prescribed ration and that the first respondent was entitled in terms of section 39(1) to authorise the construction of the building on that property on condition that the applicant should either acquire land for the parking facilities elsewhere in a position approved by the Council (as contemplated in subparagraph (i) of clause 8.4.8. I (a) or pay a cash sum to the Council as contemplated in subparagraph (ii) of that clause.

Having indicated that he would rather opt to pay the levy, the first respondent was entitled to calculate a levy along the formula prescribed in clause 8.4.8.I (a)(ii) and to render an account for the payment of such levy or to require of the first applicant to acquire the prescribed area of land elsewhere for the creation of parking.

For purposes of the calculation of that levy, the first respondent added a conservative estimation of the market value of the land in the central business district of Walvis Bay (per m^2 unit) and the development of the costs of a parking area (per m^2) by it together. The sum came to N$140,00 per m^2. On the basis thereof it multiplied it with the area of the parking to be provided and arrived at the figure N$109 200,00 for which it send the first applicant an account. That, it was not entitled to do. Subparagraph (ii) of clause 4.8.4 I (a) of the Scheme expressly stipulates the formula to be applied in calculating the levy i.e. the

rateable value per m² of the land on which the parking is to be provided multiplied by the total area required for parking. In reply the applicant pointed out that the rateable value of the land does not include the development costs of the parking area and, was at all relevant times N$22,00 per m². Whereas I agree that the rateable value of the land does not include any component allowing for development costs of the parking to be provided, I am not prepared to accept the rateable value suggested by the first applicant in his replying affidavit for the first time – especially not in circumstances where he has been shown to have made incorrect factual statements in that affidavit. I agree, however, with the applicants that the first respondent's Council could not have calculated the levy on any other basis. The first respondent had no authority to do so and its decision is, in relation to the determination and payment of that levy *ultra vires* and falls to be set aside.

In the circumstances I do not find it necessary to deal with the other attacks of the applicants on the validity of the First respondent's decision in any detail. Suffice it to say I do not find any merit in them in the circumstances of this case. I am satisfied that the first respondent's Council afforded the applicant sufficient opportunity to make representations and submissions before it took the decision in question and that there is no factual basis (on the Kauesa-approach to the factual disputes) that the respondents or the first respondent's Council acted *mala fides,* arbitrary or grossly unreasonable. The allegation that the first respondent derogated from the applicant's

right to equality entrenched in Article 10 of the Constitution by discriminating against them (because it did not apply the same land value to land in the central business district of Walvis Bay as that in a lesser affluent township) is not deserving consideration. That suggestion is baseless and in my opinion founded on a misconception that the equality clause in our Constitution contemplates mathematical equality instead of normative or real equality. (See: Warwick McKean: Equality and Discrimination under International Law" (1983) p 6.)

In the circumstances I propose to refer to the matter back to the first respondent's Council to determine the levy with due regard to the provisions of clause 8.4.8.I(a)(ii) of the Scheme and the rateable valuation per m^2 of the land on which the parking were to be provided at the time and direct it to repay the balance of the sum of N$109 200,00 to the first respondent (which had been paid under protest) within 30 days from the date of this order. The first applicant's *causa* for the repayment being based that the initial payment was *indebite* and made under protest, he is also entitled to interest on the balance overpaid. (See: De Vos "Verrykingsaanspreekilikheid in die Suid Afrikaanse Reg" (3rd ed.) p200 and the authorities referred to therein)

In the result the following order is made:

1. The first respondent's decision dated 28 March 1995 is set aside.

2. The Council of the first respondent is directed to reconsider the applicant's obligation under clause 8.4.8.I of the Walvis Bay Town

Planning Scheme and to determine the parking levy contemplated in subparagraph (ii) of paragraph (a) of that clause in accordance with the formula prescribed therein at the rateable valuation (per m² unit) of the land applicable on 28 March 1995.

3. The first respondent is ordered to repay the difference between the sum of N$109 200,00 and the levy determined in terms of paragraph 2 of this order to the first applicant within 30 days from the date of this order

4. The first respondent is ordered to pay interest on the amount so calculated at the rate of 20% *per annum* from 11 March 1995 until the date of repayment.

4. The first respondent is ordered to pay the costs of this application.

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Maritz, A.J.