CASE NO.: A 138/2011

REPORTABLE

IN THE HIGH COURT OF NAMIBIA

In the matter between:

GISELIND MARIA HELGA ROLAND	**1ST APPLICANT**
FRAUKE JUTTA RENATE RECHHOLTZ	**2ND APPLICANT**
JOBRA (PTY) LTD	**3RD APPLICANT**

And

THE CHAIRPERSON OF THE COUNCIL OF THE MUNICIPALITYOF WINDHOEK	**1ST RESPONDENT**
THE COUNCIL OF THE MUNICIPALITY OF WINDHOEK	**2ND RESPONDENT**
TATENDA MAWIRE	**3RD RESPONDENT**
THE MINISTER OF REGIONAL AND LOCAL GOVERNMENTAND HOUSING AND RURAL DEVELOPMENT	**4TH RESPONDENT**

CORAM: **MILLER, AJ**

Heard on: 14 March 2012
Delivered on: 31 July 2012

JUDGMENT

MILLER, AJ.: [1] In this matter the applicants seek the following relief set out in the Amended Notice of Motion.

"

1. Calling upon the second respondent ("the Council" – in terms of the Rule 53 - to show cause why –

   1.1 The purported decision(s) taken during 2010, alternatively 2011 (the precise date(s) being unknown to the applicants and such decision(s) only coming to the applicants' knowledge on 27 May 2012) by officials of the second respondent, alternatively the second respondent itself, to approve the third respondent's building plans in respect of Erf 2021, Ludwigsdorf, Klein Windhoek and/or in relation thereto to relax certain restrictive conditions of the Windhoek Town Planning Scheme, as amended, and approved by the fourth respondent in terms of section 26 (1) and 26 (2) read with section 27 (1) of the Town Planning Ordinance, No. 18 of 1954, should not be declared to be:

   1.1.1 in conflict with the Constitution;

   1.1.2 *ultra vires*,

   and accordingly null and void.

   1.2 Alternatively, that the decision(s) should not be reviewed and set aside in terms of Rule 53 (1)(b).

2. Ordering the second and third respondents to pay the costs of this application.

3. Ordering costs against such other respondents (jointly and severally with the second and third respondents, the one paying the other to be absolved, only in the event of any of them opposing this application.
4. Granting further and/or alternative relief to the applicants."

[2] I had, on a previous occasion granted the applicants certain interim relief pending the finalization of the claim for final relief, in the following terms:

"

1. That non-compliance with the Rules of this Honourable Court is condoned, and the application be heard on an urgent basis as envisaged by Rule 6(12) of the aforesaid Rules.
2. That an order is granted:
   2.1 Interdicting and restraining the third respondent from proceeding with any further building work or construction above level "A", as reflected on the third respondent's building plan (annexure "TM 1" hereto) on the third respondent's property situated at Erf 2021, Ludwigsdorf, Klein Windhoek, pending the final determination of:
      2.1.1 The review proceedings, set out in Part A of the notice of motion in this application;
      2.1.2 An application to be brought for the demolition of any construction on the third respondent's property aforesaid which contravenes the provisions of the Windhoek Town Planning Scheme, such application to be launched within 15 (fifteen) days from final judgment in the review proceedings.

3. That the costs of this application to stand over for determination in the main application."

[3] **Factual Background**

The third respondent is the owner of Erf 2021, situated in Ludwigsdorf, Windhoek. Since it is situated within the municipal boundaries of the City of Windhoek it is subject to *inter alia* the applicable Town Planning Scheme and Building Regulations, the relevant portions of which I shall refer to at an appropriate stage.

[4] The erf is in a sense somewhat insular inasmuch as it is bordered on three sides by public streets, being Anna Street, Dorothy Street and Cathy Street. A further distinguishing feature is that the land slopes downward from Dorothy Street in an easterly direction.

[5] There is a fall of about 9 metres from Dorothy Street where the erf is at its highest to the eastern border of the erf, where there is a small river and the erf is at its lowest.

[6] Cathy Street and Anna Street run along the slope on the southern and northern boundaries of Erf 2021. As I had indicated the erf is bordered on the western side by Dorothy Street.

[7] The third respondent, during the year 2010 submitted building plans to the first and second respondents for the approval of a residential building which he

intended to erect on Erf 2021. These were approved by the first and second respondents on 12 April 2010. The plans approved provide for a residential building to be constructed on three levels. Provisions was also made for a landing of the staircase leading to the third level and on the top of the third level. It is the approval of the building plans submitted which is attacked by the applicants in the Notice of Motion.

[8] In order to create a level surface upon which to construct the building the higher portions of the land on the western side were excavated and the excavated soil was used to fill up the lower portions on the eastern side whereupon the erection of the building commenced.

[9] The building operations continued apparently unabated until February 2011. It was then interrupted due to a shortage of steel until the middle of May 2011.

[10] This application was launched when the columns for the third level of the building were erected. The interim relief I granted prevented the third respondent from continuing with the further construction of the third level; leaving the third respondent free to complete the construction of the remaining two levels should he so wish.

[11] **<u>The remaining issue</u>**

When the applicants launched these proceedings the decision to approve the plans was attacked on various grounds. These included the relaxation of the building lines determined by the Town Planning Scheme amongst others.

[12] During the course of the proceedings the dispute became narrowed down to a single one, that being the approval of the plans to construct a third level.

[13] Mr. Corbett, who appeared for the applicants, at an early stage indicated, properly in my view that the applicants do not intend to pursue the remaining grounds.

[14] The applicants base their attack on the remaining ground on the provisions of section 21 (3) of the Windhoek Town Planning Scheme which reads as follows:

> "...no dwelling unit or residential building may be erected in excess of two storeys on land zoned "residential" without council approval. Council shall, in considering the application, have regard to the impact real or potential of the additional storeys on the neighbouring property".

[15] The applicants reside in or own property which although not immediate and adjoining properties, are neighbouring nonetheless in the sense that the properties are separated from that of the third respondent by the public streets I have mentioned. In common parlance they live across the road. It follows in my view that they have *locus standi*. The respondent did not seriously content this fact.

[16] It is common cause between the parties that in considering the third respondent's application for the approval of his building plans, the first and second respondents paid no regard to the provisions of section 29 (3) of the Town Planning Scheme.

[17] That is so because the first and second respondents reasoned that the building which the third respondent intended to erect was not a building "...in excess of two storeys". The applicants as I indicated contend that it is. Instead the first and second respondents considered that the building consisted of a basement and two storeys.

[18] The first and second respondents draw their support for their understanding of the nature of the building from the provisions of the Municipality of Windhoek Building Regulations which were promulgated by Government Notice 57 of 1969 and published in Official Gazette No. 2992 dated 28 April 1969.

[19] Regulation 29B(1)(a) provides that:

"

(a) "basement storey" or "cellar" shall mean any storey of a building which is under the ground storey."

Regulation 29B(1)(c) in turn provides that:

> "(1)(c) "a ground storey" shall mean that storey at a building to which there is an entrance from outside on or near the level of the ground, and where there are two storeys then the lower of the two: Provided that no storey of which the upper surface of the floor is more than four feet below the level of the adjoining pavement, shall be deemed to be a ground storey."

[20] To apply these definitions to the building in question creates difficulty. If for instance one was to take the pavement along Dorothy Street as a point of reference, the lower level of construction is more than four feet below the level of the pavement and thus in terms of the proviso in Regulation 29B(1)(c) deemed not to be a ground storey.

[21] Conversely if one were to take the pavement along Cathy Street from the point where it intersects with Dorothy street and follow it in an easterly direction to the eastern boundary of Erf 2021, the lower level will at some point become higher than that adjoining pavement.

[22] As a consequence the results will be anomalous.

[23] The approached adopted by the first and second respondents to this problem appear from an affidavit by Mr. Billawer, a town planning officer employed by the first and second respondents in terms of reasons as follows:

> "The Building Regulations further state that any floor that is four feet under street level cannot be counted as a ground storey, thus the City correctly approved the basement in this case as such. I submit that the level of the ground referred to in the definition of the word ground storey refers to unexcavated land. In any event, I submit that the definition of a basement storey and a ground storey is only confined to the scope of Regulation 29(B). This is so in that section 29(B) (1) of the Building Regulations expressly states that the meanings attached to the defined words is confined to regulation 29(B) only and it does not apply generally to all the other provisions of the regulation."

[24] Mr. Ntshebeze SC who together with Mr. Khama appeared for the first and second respondents used this as a base from which to launch a two-pronged attack. Firstly it was contented that I should in the circumstances show deference to the decision taken as to whether the lowest level constituted a basement as a ground storey. For this submission Mr. Ntshebeze relied upon the decision in ***Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs & another 2004 (4) SA 490 CC.*** In the context of that case it was held that the Court should be slow to usurp the functions of administrative agencies.

[25] In that case the decision under review dealt with the allocation of fishing quotas. It involved matters of policy and technical expertise which the Court did not possess.

[26] The matter before me falls into a different category. It concerns only the application or otherwise of the provisions of the Town Planning Scheme and the

Building Regulations to the building the third respondent intended to erect. There is no need in such circumstances to display judicial deference to the decision taken by the first and second respondent.

[27] Secondly reliance was placed on Regulation 29B (6) of the Building Regulations which reads as follows:

> "Any dispute in connection with the position of the ground level the decision of the Council shall be conclusive."

[28] I agree with Mr. Corbett that in *casu* there is no dispute about the ground level. The dispute concerns the status of the lowest level as either a basement or a ground storey.

[29] Mr. Ntshebeze SC further submitted in his Heads of Argument that since a portion of the lowest level is more than four feet below the adjoining pavement, the deeming provision in Regulation 29B (1)(c) applies with the result that the lowest level is a basement.

[30] Mr. Corbett argued on this latter point that in order to make sense of the definition of a "ground floor" the Court should average out the different points where there are three streets at different levels. If on average the major portion is not more than four feet below the adjoining pavements the result is that the level is a basement.

[31] The difficultly I have with these submissions is that I am invited to read into the provision rather extensive provisions which are not there. The result in either case will be that I will in the result effect extensive amendments to the regulation concerned. For good reason Courts are reluctant to embark on such a course of action.

Venter v R 1907 TS 910.

S v Negongo 1992 NR 352.

[32] Having given the matter consideration I take the view that as a starting point I should as far as I am able to determine the intention of the legislature. As a general proposition it appears to me that the legislature is concerned that residential buildings in residential areas should be not higher than two storeys because of the impact their height may have on neighbouring properties. Hence they will only be permitted once the Council has in each case considered what their impact in that respect will be. That is what Section 21 of the Town Planning Scheme contemplates.

[33] Secondly an unless it is provided for otherwise, legislation is intended to apply universally to all affected by it and not only to some. To literally apply the proviso definition in this case would have the result that it is confined to properties which are bordered by a single pavement bordering one boundary of the property. I cannot accept that such a situation was intended.

[34] It also raises the question as to what a pavement in fact is. The question I have in mind is whether the pavement adjoining Erf 2021 is in fact one pavement running along the three streets bordering it or whether there are three pavements each running along an individual street. I am inclined to the view that the pavement adjoining Erf 2021 is a single pavement adjoining it on three of its boundaries. I note from the proviso in Regulation 29B (1)(c) that the proviso does not refer to the pavement of a street but speaks only of the pavement adjoining the property. The logical conclusion must then inevitably be that the proviso will not apply where any portion of the level is not more than four feet below the level of the pavement.

[35] I consider that given the anomalies created by a literal reading of the proviso and assuming that there are in *casu* more than pavement adjoining the property, that this is a proper case to read into the provisio the word "any" in place of the word "the", where it appears immediately prior to the words "adjoining pavement".

[36] In so doing I bear in mind the approach in ***Venter and Negongo*** to which I mentioned earlier. I consider this however to be one of the exceptional circumstances where I may adopt this approach.

[37] Finally on this point, and assuming that the proviso finds no application on the facts of this case, one is then driven to apply Regulation 29B (1)(c) without reference to the proviso. In that case on the facts and, absent the proviso, the lowest level is a ground storey.

[38] I conclude in the result that the lowest level of the building is a ground storey and not a basement.

[39] I need only deal with the point taken in the Heads of Argument of the first and second respondents to the effect that the applicant should have first exhausted their alternative remedies. Section 51 of the Town Planning Scheme makes provision for an appeal to the Minister of Regional and Local Government and Housing against a decision taken by the Council. The Section is not cast in peremptory terms and provide an additional or alternative remedy to which an aggrieved person may or not avail himself of.

[40] It follows therefore that the decision taken by the first and second respondents fails to be reviewed and set aside. Costs should follow the result.

[41] The applicants complain about the fact that subsequent to the interim relief having been granted, the first and second respondents took steps un anticipation of finding that the building is one consisting of more than two storeys, to regularize their position. I need only state that I do not deem it necessary or appropriate to consider that at this stage.

[42] In the result I make the following orders:

1) The decision taken by the first and second respondents to approve the building plans submitted by the third respondent on the basis that the

building was not one consisting of more than two storeys is reviewed and set aside.

2) The first and second respondents are ordered jointly or severally to pay the applicants costs on the basis of one instructing and two instructed counsel.

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MILLER AJ

ON BEHALF OF THE APPLICANTS:	Mr. Corbett
INSTRUCTED BY:	Fischer, Quarmby & Pfeiffer
ON BEHALF OF THE 1ST & 2ND RESPONDENTS:	Mr. Ntsebeza SC, assisted by Mr. Khama
INSTRUCTED BY:	Sebeya & Partners Legal Practitioners
ON BEHALF OF THE 3RD RESPONDENT:	Mr. Marcus
INSTRUCTED BY:	Nixon Marcus Public Law Office