

Short notes on:

Constitutional Court rules that municipalities should not approve building plans which will devalue your property

Introduction

Land and property development has been on the lips of every South African, with every person from any segment of the country trying to gain interest or protect their interests in property.

The notion of owning and having access to land is at the core of identity for many South Africans. It represents achievement, security and hope for the future. It has politicians vying for trust with every party promising that our rights to access housing and land will be protected.

However, in bustling cities the issue is complex; and a spate of court ruling are showing the growing sense of urgency for interests in property to be protected. These interests range from basic access to social housing, to development for economic growth, and the ordinary blue - collar workforce not wanting to lose value in the properties they have worked countless hours to own.

Trustees of the Simcha Trust v Da Cruz and Others; City of Cape Town v Da Cruz and Others [2018] ZACC 8

The local Municipality had approved building plans by Four Seasons to build balconies up to the boundary it shared with another property. The zoning regulations for the area permit owners to build up the boundary of the neighbouring properties.

It was usual practice for the Municipality not to approve habitable areas erected to the boundary of neighbouring properties and these approvals were usually granted for areas occupied by fire escapes or other uninhabited spaces.

The approval for the Four Seasons development was contrary to the Municipality's usual approach. The Constitutional Court considered section 7 (1)(b)(ii)(aa) of the National Building Regulations and Building Standards Act¹ which sets out disqualifying factors² for approval.

One factor that must be considered by the Municipality is whether any proposed development would derogate from the value of the adjoining or neighbouring properties. The Court asked that the parties to the case provide written submissions as to the proper test to establish the disqualifying factors.

The Municipality submitted that a legitimate expectations test was appropriate to establish disqualifying factors for building approval. This meant that it is appropriate to consider whether a development would devalue a neighbouring property rather than disfigure an entire area.

They also submitted that it would be unduly burdensome to consult with all the neighbours in a particular area. As to disfigurement of the area, that would be a value judgement made by the building officer.

Mr. Da Cruz for the Four Seasons submitted that a legitimate expectations test was appropriate in establishing disqualifying factors, rather than a valuation test. They submitted that the test concerns the legitimate expectations of not only the neighbours, but the area and community in general.

Findings of the Court

The legitimate expectations test entails that a determination must be made as to whether there will be a decrease in value of the neighbouring properties to the extent that such drop in value is sufficient to disqualify the approval.

¹ 103 of 1997

² Local Authorities must refuse a building application, namely where the proposed building would:

- (aaa) disfigure the area in which it will be erected;
- (bbb) be unsightly or objectionable; or
- (ccc) derogate from the value of the adjoining or neighbouring properties.

The Court found that the test was appropriate in establishing the disqualifying factors for building development approval as it is an objective test based on relevant facts available to the parties and Municipality specifically.

The Court held that the Municipality when approving plans must be satisfied that no disqualifying factors are present and further that the factors must be considered independently from other factors under the Act.

Why is this decision significant?

As a result of this decision, Municipalities must apply the legitimate expectations test to all disqualifying factors and aim to protect the values of the surrounding properties and the appearance of the area in general.

For all your property related questions we recommend that advice is sought from an expert at SchoemanLaw.