

NATIONAL BUILDING REGULATIONS REVIEW BOARD

(in terms of Section 9, National Building Regulations and Building Standards Act, 103 of 1977)

In the matter between:

BRYON JANSE VAN RENSBURG

Appellant

and

EKURHULENI METROPOLITAN MUNICIPALITY

Respondent

REVIEW BOARD:

N. ADLER, M. BESTER (Chairman) and T. BRÜMMER

DECISION

INTRODUCTION

1. Parties

1.1 Appellant is Mr Byron Janse van Rensburg, the owner of *erf* 331 Jansen Park Extension 33, located within “Rosewood”¹, a cluster development adjoining the “Sienna II” Sectional Title Scheme on *erf* 288 Jansen Park Extension 20².

1.2 Respondent is the Ekurhuleni Metropolitan Municipality, which is the local authority with jurisdiction to approve the erection of buildings on the Property in terms of s.7 of the National Building Regulations and Building Standards Act (Act 103 of 1977) (“the Act”).

2. Background

2.1 The subject of the appeal relates to certain alterations and additions undertaken to Units 12 and 13, part of the structure designated as Building 7 of Sienna II,³ which is located immediately across the common boundary of Appellant’s property. These additions initially took the form of a thatched gazebo or “lapa” providing cover to a Jacuzzi, which

¹ General Plan of the Township of Jansen Park Extension 33, SG No.816/2005

² General Plan of the Township of Jansen Park Extension 20, SG No.3406/2000

³ Sectional Title Scheme diagrams, SG No. D1343/2002, Sheet 2 of 9

was constructed immediately against the existing boundary wall separating the two properties.

- 2.2 The lapa was constructed without advance application for approval of building plans being made to Respondent. In due course, Appellant brought the unlawful construction work to the attention of Respondent which, on or about 28th February 2012, issued an order to the owner, E.E. Myburgh & Manbar Properties (“Myburgh”), to cease work and submit building plans for approvals purposes.⁴
- 2.2 Building plans were submitted on 3rd May 2012⁵ but, in a letter dated 8th October 2013,⁶ Respondent refused to approve the plans. Further email correspondence followed between Respondent and Myburgh’s professional representatives without resolution.⁷
- 2.3 Over this period, Appellant entered into correspondence with the Body Corporate of Sienna II regarding the lapa, culminating in him making a further complaint to Respondent regarding the non-approved structure.⁸ On 29th January 2014, Respondent issued a further notice to Myburgh (a copy of which was provided to Appellant) and thereafter kept Appellant advised of its progress in dealing with the matter.⁹ Appellant also engaged in extended simultaneous email correspondence with the local town councillor.¹⁰
- 2.4 However, after certain alterations were undertaken to the lapa, including construction of a high brick wall on the common-boundary and the installation of new “Harveytile” roofing over the thatch, Myburgh’s plans were finally approved by Respondent on or before 18th February 2014.¹¹
- 2.5 Appellant thereafter again complained to Respondent by letter dated 5th March 2014¹² but, on 13th March 2014, was advised that he could appeal Respondent’s approval of Myburgh’s plans to the Review Board.¹³

⁴ Bundle, p.1

⁵ p.11

⁶ p.2, letter from Myburgh’s Professional Senior Architectural Technologist, 15th October 2013 (*cf.* p.9ff)

⁷ pp.3-10 between 15th October and 19th November 2013

⁸ pp.11-18 between 14th March and 2nd December 2013

⁹ p.19-22

¹⁰ pp.24-41 between 30th January and 20th May 2014

¹¹ p.32

¹² p.46

¹³ Respondent’s letter, p.47

2.6 Accordingly, on 23rd March 2014, Appellant submitted an appeal by means of a letter addressed to the National Regulator for Compulsory Specifications (“NRCS”).¹⁴ The NRCS thereafter entered into correspondence with the parties,¹⁵ receiving an initial response from Respondent’s attorneys on 8th May¹⁶ and its final Response on 28th May 2014.¹⁷

3. Process followed by Review Board

3.1 Delays arose in the Review Board’s attendance to the Appeal, consequent upon the suspension of its operations until mid-November 2014 for organisational reasons internal to the NRCS.

3.2 The Chairman of the Review Board, Mr Michael Bester, subsequently appointed Mr Neville Adler (an architect) and Mr Tommy Brümmer (a town planner) as members of the Review Board for this Appeal in terms of s.9(2)(b) of the Act.

3.3 The Review Board requested the parties to supply additional information to assist it with assessing the Appeal¹⁸ and, at a meeting on 2nd February 2015, decided that a hearing was not necessary for its determination.¹⁹

ISSUES IN LIMINE

4. No issues *in limine* were raised by either party.

NATURE OF DISPUTE

8. Common cause & undisputed facts

The underlying facts in this matter are all either common cause or not in dispute.

9. Reasons for Appeal

Appellant has appealed Respondent’s approval of Myburgh’s plans on the following bases:

10.1 the structure will disfigure the area and be unsightly, and will have a negative effect on the value of his property;²⁰

¹⁴ p.42 with attachments pp.43-47

¹⁵ p.48 letter to Respondent 8th April 2014

¹⁶ pp.49-51

¹⁷ pp.59-61 with annexures pp.62-79

¹⁸ pp.82-96

¹⁹ Government Notice 2074 of 13 September 1985: Review Board Regulation 11(1)(a)

- 10.2 Myburgh's property is zoned "Residential 3" and there should be a two (2) metre building line on the common boundary which has been relaxed without Appellant's consent;¹²
- 10.3 notwithstanding construction of a fire wall, the lapa should be set back from the common boundary by at least one (1) metre;¹²
- 10.4 Respondent has not handled the process of application and approval with due consideration of the interests of all affected parties.²¹

11. Respondent's bases for opposing the Appeal

Respondent has noted the following in response to the Appeal²²:

- 11.1 Respondent's officials and Appellant met on site on 18th December 2012 to consider the lapa structure and jointly agreed that "the then existing wall dividing the Appellant's and [Myburgh's] properties be extended by 3.5 metres". However, this was subsequently demolished at Appellant's insistence and rebuilt within Myburgh's property, adjacent to the boundary wall;
- 11.3 in response to Appellant's further complaints, another site inspection was thereafter undertaken by Respondent's officials. The unfinished state of the wall facing Appellant's property was noted, and Appellant was telephonically advised that he should grant Myburgh's building contractors access for this purpose;²³
- 11.4 Myburgh's plans²⁴ for the lapa were duly submitted after Respondent's notices, scrutinised in accordance with the National Building Regulations and Building Standards Act²⁵ ("the Act")²⁶ and approved with proper regard to Myburgh's appointment of accredited Competent Persons who submitted Rational Designs for the engineering and fire-safety aspects of the building work²⁷.

²⁰ pp.42 and 46

²¹ p.42

²² pp.59-61

²³ Neither this claim nor that in paragraph 11.1 *supra* have been disputed by Appellant *cf.* pp.84-85 and 89-90

²⁴ pp.62-66

²⁵ Act 103 of 1977

²⁶ pp.63-64, 67 and 77-79

²⁷ pp.73-76

ASSESSMENT OF EVIDENCE & ARGUMENT

11. Regulatory Requirements

Appellant's complaints regarding the lapa's compliance with building lines and fire-safety setbacks must be assessed against the requirements of regulation and the constraints of the applicable town-planning scheme. Whether the building complies with these constraints or not is a matter of empirical fact and not one that lies within the discretion of Respondent's officials.

12. Fire Safety

12.1 The South African National Standard, Part T: Fire protection²⁸ is the current standard for the application of the National Building Regulations promulgated under the Act. Paragraph 4.2 specifies the fire-resistance of certain types of external walls for various building occupancies, stipulating that

“Where any external wall of a building is of type FR [i.e.: has a fire resistance equal or more than that tabulated²⁹] and such wall does not contain any window or other opening, there shall be no restriction on the safety distance for such wall.”³⁰

Myburgh's and Appellant's properties are of occupancy types “H3” and “H4” respectively³¹ and a type FR wall therefore requires a thirty (30) minute fire resistance in this context.³²

12.2 Paragraph 4.55 of the same Standard provides the “presumed fire-resistance of building materials and components” and reference to Table 13 thereof indicates that a non-structural wall of unplastered “solid construction clay masonry units” requires a minimum thickness of 75mm in order to provide a thirty (30) minute fire resistance.³³

12.3 Reference to photographs of the high wall constructed against the common boundary on Myburgh's property³⁴ show that the wall is not plastered and is a “one-brick” wall, namely approximately 220mm thick, and therefore unquestionably exceeds the minimum standard specified under paragraph 4.2.

²⁸ SANS 10400-T:2011

²⁹ Paragraph 4.2.1a)

³⁰ Paragraph 4.2.2, emphasis added

³¹ Part A: General principles and requirements, SANS 10400-A:2010 Ed.3, para.A20, Table 1

³² SANS 10400-T:2011, para.4.2.2, Table 1

³³ *op. cit.*

³⁴ pp.54 and 56

13. Town-Planning Scheme – Building Lines

- 13.1 At the Review Board's request, Appellant has supplied Zoning Certificates for both his own property, erf 331, and Myburgh's property in Sienna II.³⁵ Appellant's own property is subject to a five (5) metre building line from the internal roadway within "Rosewood," on the opposite side of his property from the common boundary with Myburgh. However, no building lines are applicable to Sienna II except for a two (2) metre building line alongside "the erf abutting Vickers Street": Appellant's erf does not adjoin Vickers Street.³⁶
- 13.2 Reference to the sectional plans for Sienna II furthermore demonstrates that the buildings pre-existing the current dispute (including Building 7) are constructed, at their closest, 1.23m from its common boundary with the "Rosewood" erven.³⁷
- 13.3 The Review Board has therefore been provided with no evidence in support of Appellant's assertion that Respondent has waived any building-line restriction in favour of Myburgh, unilaterally or otherwise.

14. Unsightliness

- 14.1 Appellant's complaint as to the alleged unsightliness of Myburgh's construction seems to rely on the provisions of section 7(1)(b)(ii)(aa) of the Act,³⁸ i.e.: that the proposed building "will probably or in fact" (a) disfigure the area, (b) be unsightly or objectionable, and/or (c) derogate from the value of adjoining or neighbouring properties.
- 14.2 These provisions of the Act require a local authority's delegated officials to exercise their minds in assessing an application for approval of building plans and reasonably satisfy

³⁵ pp.91 and 92, the latter with "Annexure 830" at p.93.

³⁶ cf. SG no.816/2005

³⁷ SG no. D 1343/2002 sheet 2 of 9

³⁸ "7(1) If a local authority, having considered a recommendation referred to in section 6(1)(a) – ...

(a) is satisfied that the application in question complies with the requirements of this Act and any other applicable law, it shall grant its approval in respect thereof;

(b) (i) is not so satisfied; or

(ii) is satisfied that the building to which the application in question relates –

(aa) is to be erected in such a manner or will be of such a nature or appearance that

(aaa) the area in which it is to be erected will probably or in fact be disfigured thereby;

(bbb) it will probably or in fact be unsightly or objectionable;

(ccc) it will probably or in fact derogate from the value of adjoining or neighbouring properties;

(bb) will probably or in fact be dangerous to life or property,

such local authority shall refuse to grant its approval in respect thereof and give written reasons for such refusal

themselves that the operation of the factors contemplated in s.7(1)(b)(ii) necessitate refusal to approve the application. This requires at least some level of empirical assessment not based on mere speculation or personal opinion: *Paola v Jeeva NO*,³⁹ *Walele v City of Cape Town*,⁴⁰ *True Motives 84 (Pty) Ltd v Madhi*.⁴¹

- 14.3 Section 7(1)(b)(ii) furthermore requires not merely the possibility of the factors listed but their probability or actual factual existence before they can form a basis for refusal of approval – *True Motives*:

“The refusal mandated by section 7(1)(b)(ii) follows when the local authority is satisfied that the building will probably or in fact cause one of the undesirable outcomes. [It] does not authorise a local authority to refuse to grant its approval upon the strength of a mere possibility that one of these outcomes may eventuate. Such an outcome must at the least be ‘probable’.

... on the forgoing analysis, a local authority may entertain some level of concern about whether a proposed building will disfigure the neighbourhood or derogate from the value of the neighbouring properties (and so on), but that concern may not be at a high enough level for it to be satisfied that the undesirable outcome is probable. If that is its state of mind (or that of its authorised decision-maker) with respect to these issues, the local authority must approve the plan.”⁴²

- 14.4 In assessing whether Respondent’s officials properly applied their minds to the potential effects of Myburgh’s lapa on neighbouring properties, the Review Board has taken note of the extended correspondence between Appellant and Respondent, as well as other parties including the Homeowners’ Association of Rosewood, the Body Corporate of Sienna II and the town councillor. In none of this correspondence has any substantive evidence been provided to demonstrate that the deleterious effects contemplated in s.7(1)(b)(ii) will “probably or in fact” occur.
- 14.5 Furthermore, Respondent’s officials have, at least twice, undertaken inspections on Myburgh’s and Appellant’s property to assess the aesthetics and impact of the completed building works. Certain further alterations have been required of Myburgh by Respondent as a result of one of these inspections and apparently complied with.

³⁹ *Paola v Jeeva NO and Others* 2004 (1) SA 396 (SCA) [17-26]

⁴⁰ *Walele v City of Cape Town and Others* CCT 64/07 [2008] ZACC 11 (13 June 2008) [60] which, although found in *True Motives* to be both *obiter* and incorrect in its positivist approach, nonetheless also reinforces the obligation on the decision-maker to apply his mind to available evidence in forming a rational decision

⁴¹ *True Motives 84 (Pty) Ltd v Madhi and Another* 2009 (4) SA 153 (SCA) [25]ff

⁴² *True Motives* [21-23]; also see the dissenting judgement *Walele* [88]

Appellant has evidently failed to convince Respondent's delegated officials that his legitimate interests will necessarily be compromised by Myburgh's building.

- 14.6 It is axiomatic that an appeal body should be hesitant in substituting its own discretionary assessments for that of the approving authority *a quo* when it is clear that the latter has already properly exercised its own powers as it is mandated to do: *Bato Star Fishing v Minister of Environmental Affairs*;⁴³ *Ekurhuleni Metropolitan Municipality v Dada NO*;⁴⁴ *True Motives 84 (Pty) Ltd v Mahdi*⁴⁵
- 14.7 Nonetheless it bears noting that, on the evidence provided, the Review Board does not in any case consider that Myburgh's building is unsightly to the extent that it will have a negative effect on Appellant's property. Its materials are consistent with those of buildings in the area, it is no higher than that routinely permitted, and the quality of finishing at least partly lay within the bounds of influence of Appellant himself.⁴⁶ Furthermore, Appellant's own personal concerns can readily be mitigated by inexpensive interventions on his part, such as landscaping, planting, trellises or similar means.

15. Respondent's consideration of the interests of Appellant

There is no evidence whatever to support Appellant's contention that Respondent has failed to consider his interests in approving Myburgh's plans. On the contrary, the considerable and lengthy correspondence, site inspections and the two formal notices of contravention issued to Myburgh, all demonstrate that Respondent has in fact been rather solicitous to Appellant's concerns. The evidence supports a conclusion that Respondent has been careful in ensuring that the initially unlawful construction has been properly resolved and regularised in proper accordance with its obligations under the Act.

16. Summary of findings

- 16.1 Myburgh's building complies with promulgated fire-protection standards and there is no basis for Appellant's assertion that a one-metre setback should have been imposed by Respondent;

⁴³ *Bato Star Fishing v Minister of Environmental Affairs* 2004 (4) SA 490 (CC)

⁴⁴ *Ekurhuleni Metropolitan Municipality v Dada NO and Others* 2009 (4) SA 463 (SCA) [10]ff

⁴⁵ *True Motives 84 (Pty) Ltd v Mahdi and Others* (543/07) [2009] ZASCA 4 (3 March 2009) at 57


⁴⁶ p.60 of the bundle; n.23 *supra*

- 16.2 Neither Appellant's nor Myburgh's properties are constrained by any building-line restrictions that would require Myburgh's lapa to be constructed further away from the common boundary;
- 16.3 Respondent's officials properly applied their mind to the aesthetic issues raised by Appellant and the Review Board has no basis for overturning their decision in this regard.
- 16.4 Respondent's approvals processes, as applied to Myburgh's lapa, seem to have been appropriate and correct.

DECISION

17. Appellant has provided no basis for his allegation that Myburgh's plans were improperly approved by Respondent and the Appeal is accordingly dismissed.

Signed on behalf of the Review Board this 28th day of March 2015:


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Michael Bester
Chairman: Review Board