NATIONAL BUILDING REGULATIONS & BUILDING STANDARDS ACT

REVIEW BOARD[1]

Held at the Offices of the South African Bureau of Standards

14A Railway Street

Montague Gardens, Cape Town

On Tuesday, 25 October 2016

MISTY SEA TRADING 339 (PTY) LTD **APPELLANT**

(REPRESENTED BY MR DAVID RONAASEN)

and

CITY OF CAPE TOWN MUNICIPALITY **RESPONDENT**

(REPRESENTED BY MR WAYNE VISSER)

REVIEW BOARD: NTANDO NDONGA (Chairperson), G. JOUBERT, V.C. MARINCOWITZ

DECISION

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1. PARTIES:

1.1 Appellant is Misty Sea 339 (Pty) Ltd, the owner of the subject property, being erf 170976, Airport City situated at 5 Falcon Crescent, Airport City Business Park.

1.2 Respondent is the City of Cape Town, the local authority with jurisdiction to approve the erection of buildings on the appellant's property in terms of section 4 of the National Buildings Regulations and Building Standards Act 103 of 1977 (hereinafter referred to as 'the Act')

2. INTRODUCTION

2.1 A warehouse, with accompanying offices, was erected subsequent to the approval[2] on 1 December 2015 of an application in terms of section 4 of the Act.

2.2 The appellant disputes the interpretation of the relevant rules and has lodged an appeal in terms of section 9(1)(c)[3] of the Act. The appeal specifically relates to

[1] Section 9 of the Act
[2] Page 17 of the Bundle.

the application and interpretation of the term *'ancillary use'* as described in rule A20[4] (1) and (2) which reads as follows:

1) *'The occupancy of any building shall be classified and designated according to the appropriate occupancy class given in column 1 of table 1 and such classification shall reflect the primary function of such building: provided that in any building divided into two or more areas not having the same primary function, the occupancy of each such area shall be separately classified*

2) *Notwithstanding the requirements of sub-regulation (1), any area in any building, which is used for any purpose ancillary to that of any occupancy classification contemplated in sub-regulation (1) shall,* ***subject to adequate facilities and safety measures being provided***[5]*, not be classified as a separate occupancy.'*

2.3 The primary motive behind this appeal is to obtain the Board's interpretation by of the issue in dispute, thereby providing setting judicial precedence for the entire industry going forth.

2.4 The appellant prays that the Board finds that the offices which are part of the building structure which is the subject of this appeal are deemed ancillary to the storage area which is also part thereto. The Board should pronounce that rule 4.6[6] is therefore not applicable for this building and fire separation elements (fire doors and fire shutters) are thus not required between the storage and office areas of the building, as set out in Table 4[7] of the aforementioned SANS 10400.

3 POINT *IN LIMINE:*

3.1 The appellant's representative raised a point of procedure regarding a witness (Mr Marius le Roux) whom the respondent intended to call as a witness in order to give testimony in support of its case.

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[3] *"Any person who disputes the interpretation or application by a local authority of any national building regulation or any other building regulation or by-law, may within the period, in the manner and upon payment of fees prescribed by the regulation, appeal to a review board"*

[4] SANS 10400 Part A, as published by the South African Bureau of Standards, 2010

[5] The emphasis was added by the Respondent in his letter dated 7 March 2016, page 27 of the Bundle.

[6] SANS 10400 Part T, as published by the South African Bureau of Standards in 2011.

[7] Table 4 – Fire resistance of occupancy-separating elements, pg. 24 of SANS 10400 Part T, as published by the South African Bureau of Standards in 2011

3.2 Mr Ronaasen objected on the basis that he had not been informed that Mr Le Roux was to be called and that he had no knowledge of the nature of his testimony. He had not prepared for it.

3.3 Mr Ronaasen was also of the view that Mr Le Roux was called with the intention of attacking his professional integrity and competence. It is therefore against this that his testimony as a witness should not be allowed.

3.4 The Board considered the objection and made the following observation:

- The respondent has the right to call a witness to the extent that such a witness is competent to be a witness and is required to testify on aspects relevant to the case before the Board;
- The basis of the objection was in anticipation of the testimony, which the board is unable to predict its content before the witness actually testifies;
- The appellant has the inherent right to object to any evidence, which in its view was prejudicial to its case or that of the representative's professional integrity. The Board would then make a decision at that point;
- The appellant has the right to cross-examine the witness; and
- No prejudice on the part of the appellant could therefore be found in merely allowing Mr Le Roux to testify.

The Board accordingly dismissed the point raised and allowed the testimony of the Mr Le Roux.

4 SUBMISSIONS AND FINDINGS:

4.1 During the appeal proceedings, the parties made reference to the bundle provided by the secretariat to the Board in preparation of the appeal hearing which forms the record of the proceedings. This is a paginated bundle with pages 1 to 60.

4.2 Further to this, the Board was provided at the hearing with a supplementary bundle,

4.3 As part of the supplementary bundle, the appellant submitted an A1 copy of the Fire Plan[8], drawing 0715, at the hearing.

4.4 The testimony of Mr Marius le Roux is of relevance in this regard. The Board however found very little value from his testimony either in assisting the respondent or the Board in arriving at a decision, least of all rebutting the version of the appellant.

4.5 In order to crystallise the issues in dispute, the appellant seeks the Boards view and decision on whether (a) the storage area and the offices areas must be classified as separate occupancy areas and therefore separated by fire rated elements in terms of rule 4.6[9], or (b) that both the storage area and offices form one occupancy, and that the offices must be subject to the same level facilities and safety measures as required by the primary occupancy.

4.6 It is common cause, alternatively not in dispute, that the occupancy classifications are set out according to rule A20[10], Table 1[11].

4.7 It is common cause, alternatively not in dispute, that section A20(2) permits an occupancy classification to be designated as an ancillary use, located within another (primary) use and may be treated as if it is part of the primary use.

4.8 It is common cause, alternatively not in dispute that the various occupancies are indicated on the application drawings, being G1 for the "office component" and J2[12] for the "warehouse component".

4.9 It is common cause, alternatively not in dispute, that the offices are ancillary to the storage, as the sole function of the offices is to manage the storage and provide facilities for the persons operating this storage.

4.10 It is common cause, alternatively not in dispute, that this ancillary use is *'subject to adequate facilities and safety measures being provided'*[13]. This was stressed in

[8] This was included as page 8 in the bundle, but reduced to such an extent as to be illegible.
[9] Section 4.6 of SANS Part T:2011
[10] SANS 10400 - A:2010
[11] Table 1 – Occupancy or Building Classification, page 43, SANS 10400-A:2010, Ed 3
[12] SANS 10400 – A:2010, section A20, Table 1: J2 Moderate risk storage.
[13] SANS 10400 – A:2010, section A20(2)

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a letter[14], dated 7 March 2016, that also listed 5 other aspects considered as relevant by the respondent.

4.11 It is common cause, alternatively not in dispute, that the word *'adequate'* in this context means what is adequate *'in the opinion of any local authority'.*[15]

4.12 It is common cause, alternatively not in dispute that this application for Part T[16] was based on 'Deemed to Satisfy' criteria, and no competent person (fire)[17] was appointed or made any submissions in terms of this application.

4.13 It is common cause, alternatively not in dispute that the local authority had insisted that fire shutters be provided between the offices and the storage. The application was amended to indicate this, and was subsequently approved in terms of section 7(a)[18].

4.14 The appellant alleged that the respondent was applying a 'house rule' in this regard, as there is no specific provision for this in the legislation and an area with lower fire load may be added to that with a higher load, as per section 4.3[19].

4.15 Rule 4.3 provides that:

Any building shall be permitted to have an area of

a) not more than 100m² in total, of an occupancy classified as J1, or not more than 300m² in total of an occupancy classified as J2 or J3, with any other occupancy

b) not more than 100m² of an occupancy not classified as J1, within an occupancy classified as J1.

The appellant pointed out that there is no converse requirement within this section and therefore no limit to the size of another occupancy that may be included within in an occupancy classified as J2 or J3 as an ancillary use. This point was eventually conceded to by the respondent.

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[14] Page 27 of the Bundle, marked Annexure A: Addressed to the Building Control Office by Wayne Visser, Fire & Life Safety, Northern/ Tygerberg Districts

[15] SANS 10400 – A: 2010, section AZ2 Definitions.

[16] SANS 10400 – T: 2011, section 3.7.

[17] SANS 10400 – T: 2011, section 3.24. (see also section 3.23)

[18] section 7(a) of the .National Building Regulations and Building Standards Act 103 of 1977,

[19] SANS 10400 – T: 2011, section 4.3.

4.16 The appellant also pointed the Board to an alleged inconsistency involving another building[20] in the same fire planning district. It is alleged that this building is very similar, consisting of a storage area and an ancillary office component. In this event, there was no requirement for fire separation in terms of section 4.6, Table 4[21]. For ease of reference will refer to this building as the 'RAM' application.

4.17 Based on this, the question posed by the appellant was whether the respondent had changed its policy on the application of *'ancillary use'*.

4.18 The respondent pointed out some differences between these two applications that may have had a bearing on the application requirements and/or outcomes between the two buildings. The differences include the following:

4.18.1 The 'RAM' application was for the extension of an existing building;

4.18.2 The 'RAM' application was not based on *'deemed to satisfy'* principles, but a *'competent person (fire)'* was appointed, who submitted a rational design. This, on its own, may have attracted different consequences;

4.18.3 The storage area in the 'RAM' application is classified as J3 Low risk storage[22], whereas the storage area in the subject application is classified J2 Moderate risk storage; and

4.18.4 The fire load[23] for G1 and J3 is similar[24], being a *'low fire load'* rating, whereas J2 has a *'moderate fire load'* rating.

5 REASON FOR THE DECISION:

5.1 Ultimately, the question that the Board has to address is whether the respondent has applied the relevant requirements of the *'deemed to satisfy rules'* in a fair, reasonable and transparent manner. Further to this, to consider whether the legislation and the

[20] RAM Couriers, Erf 40799, 7 Iscor Street, Sack Circle, Bellville, approved April 2016.
[21] SANS 10400 – T:2011, section 4.6, Table 4
[22] SANS 10400 – A:2010, section A20, Table 1
[23] SANS 10400 – T: 2011, section 3.41.
[24] See SANS 10400 – T: 2011, section 4.2, Table 2.

relevant rules regulating this aspect are sufficient to enable consistent application and enforcement by the respondent.

5.2 This appeal is therefore an attempt to extract some level of certainty for all relevant parties regarding the Fire Department of the City of Cape Town on the interpretation of '*ancillary use*', in particular to the application of SANS 10400 Part T.

5.3 The specific question to this Board, as per the appellant's letter[25] of 3 March 2016 was as follows:

'I therefore request that the Review Board review the attached documents and:

1. *Give a ruling as to whether the storage area and offices each must be classified as separate occupancy areas and therefore be separated by fire rated elements or that both the storage area and offices forms one primary occupancy and that the offices must be subject to same level facilities and safety measures as required by the primary occupancy; and*
2. ...

5.4 The crux of the appellant's argument is that, as the offices are ancillary to the primary use, being J2 moderate risk storage, no fire division is required between the warehouse and the offices, as long as adequate provision is made for facility and safety measures. The appellant therefore contends that this is indeed the case in the current application, which is the subject matter of this appeal.

5.5 The aforementioned position is based on SANS 10400 – Part A:2010, section A20 (2), which reads as follows:

[A20] (2) Notwithstanding the requirements of sub-regulation (1), any area in any building, which is used for any purpose ancillary to that of any occupancy classification contemplated in sub-regulation (1) shall, ***subject to adequate facilities and safety measures being provided****, not be classified as a separate occupancy.*

[respondent's emphasis]

Read with:

[25] Page 2 of the Bundle.

[AZ2 Definitions] ***adequate***

adequate

a) in the opinion of any local authority, or

b) in relation to any document issued by the council, in the opinion of the council

and

[Part T definitions] 3.68 ***rational assessment***

assessment by a competent person of the adequacy of the performance of a solution in relation to requirements including as necessary, a process of reasoning, calculation and consideration of accepted analytical principles, based on a combination of deductions from available information, research and data, appropriate testing and service experience

5.6 It is common cause to both the appellant and the respondent that Regulation A20 (2) allows for considerable discretion, which, when read in conjunction with the definition of **'adequate'** confirms that, such discretion relies on the view of the local authority. Further to this, the local authority needs to be satisfied that the facilities and safety measures are, in fact, adequate.

5.7 The Board is of the firm view that this discretion has to be applied rationally and uniformly in order to avoid subjectivity and arbitrary application.

5.8 It would appear that, if one is to apply the *'deemed to satisfy'* criteria, the respondent has very limited space to circumnavigate and therefore has to apply and enforce the rules strictly in terms of the criteria provided in Table 4[26].

5.9 Should the appellant wish to depart from this, the onus would be on the appellant to demonstrate that the facilities and safety measures provided are adequate. In the normal course of events, this may require a rational design, or assessment, to be submitted with the application.

5.10 Based on the above rationale and on the basis of the evidence and argument presented to us, the Board is confronted with the difficulty that there is no *'one*

[26] SANS 10400 – T: 2011, section 4.6, Table 1.

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size fits all' interpretation to the question of this appeal. Each case will have to be dealt with on its merits.

5.11 In this regard, it is prudent to refer to a previous Review Board case wherein it was held[27]:

8.2 "Municipalities are bound to administer the legislation in a consistent manner, not only in regard to their own internal procedures and precedents, but with reference to the interpretation and applications applied (or likely to be applied) elsewhere. It is not open to a particular municipality or its officials to develop innovative or localised interpretations which would not, of a matter of course, be employed elsewhere."

5.12 It is therefore important that the importance of applying discretion in a transparent, fair and equitable manner is critical to the mandate of the respondent as a creature of our constitution. While the Board notes the content of the submissions made by the respondent in terms of what is considered in deciding what is "adequate". It has to be accepted by all parties that this is open to interpretation and may result in similar challenges on the aspects considered in order to arrive on a conclusion. As captured above, it is not sufficient to merely refer to internal procedures which the party affected by the decision may or may not have access to. There has to be more transparency in how such decisions are arrived at, especially so for the party adversely affected by the decision. This is a principle supported and accepted in our Constitution and specifically the Promotion to Administrative Justice Act[28] as promulgated.

6 DECISION:

The decision of the Review Board is therefore that:

6.1 With respect to prayers as requested by the Appellant in its appeal papers, the Appeal is dismissed.

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[27] item 8.2, Medi-Clinic Southern Africa (Pty) Ltd v City of Cape Town, 11 November 2015
[28] Act 3 of 2000

6.2 However in the interest of fair and transparent administration and consistent application to all concerned the Board recommends that respondent embarks on an inclusive process to establish and publish clear guidelines on the definition of the term **'adequate'** including any other aspect relevant to this issue in dispute which may require further elucidation and clarity.

Signed on behalf of the Review Board this 14th day of November in the year 2016

NTANDO NDONGA
CHAIRMAN: REVIEW BOARD

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