REPORTABLE

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: 09/49826

DATE: 11/11/2010

In the matter between:

DU RAAN, SHARON MARGARET Applicant

and

STUART, ARNOLD ROLAND First Respondent

STUART, DENISE CHARMAINE Second Respondent

J U D G M E N T

KATHREE-SETILOANE, AJ:

[1] The applicant and the respondent own adjoining erven in Malvern Township, Johannesburg. The applicant is the owner of Erf 1778, Malvern Township, Johannesburg, and the respondents are the owners of Erf 1777, Malvern Township, Johannesburg. The two properties share a boundary at the back, but face separate streets. The applicant's property is the higher lying erf while the respondents' property is the lower lying erf.

[2] The applicant seeks a declaratory order that the respondents' property must receive storm water flowing from her property (Erf 1778, Malvern Township), and that she be authorised to insert two weeping holes in the boundary wall between the two properties to allow water to flow from her property to the respondents' property.

[3] It is the applicant's version that after she took occupation of the property, in September 2006, it soon became apparent that storm water accumulated against the back wall of her property and formed a dam, which from time to time pushed up to the buildings and flowed into the cottage in her backyard. The damming of the water occurred as a result of the absence of weeping holes in the wall between the applicant's property and that of the respondents. Despite numerous oral requests by the applicant to the respondents to allow her to insert weeping holes in the boundary wall between the two properties, such permission has been refused.

[4] Approximately 18 months after the applicant took occupation of the property she applied to change the restrictions on her property in order to conduct a reflexology clinic from her home. The application has to date not been approved, and she is awaiting a date for the hearing of the application. The City of Johannesburg's Environmental Management Department supports her application, and so too does its Development, Planning and Control Department. It has, however, imposed the following conditions, namely that provision be made, for the routing of overland flow of storm water in the event of a major storm and, for the disposal and acceptance of stormwater onto the

lower lying properties. The applicant's attorneys of record consequently sent a letter to the respondents explaining the problem, and informing them that, in the absence of their corporation, the applicant will proceed to insert drainage pipes in the boundary wall to allow for the overflow of the stormwater onto their property.

[5] The letter also brought to the respondents' attention clause 15(2) of the Johannesburg Town Planning Scheme of 1979 ("*the Town Planning Scheme*") which provides as follows:

> "*Where, in the opinion of the City Council, it is impracticable for storm water to be drained from higher lying erven direct to a public street, the owner of the erf shall be obliged to accept and/or permit the passage over the erf of such storm water: Provided that the owners of any higher lying erven, the storm water from which is discharged over any lower lying erf, shall be liable to pay a proportionate share of the cost of any pipe line or drain which the owner of such lower lying erf may find necessary to lay or construct for the purpose of conducting the water so discharged over the erf.*"

[6] Accordingly, the main issue for determination relates to whether the City Council of Johannesburg ("the City of Johannesburg") expressed an opinion as contemplated in clause 15(2) of the Town Planning Scheme. The applicant alleges, in a supplementary affidavit, that she has obtained such an opinion from the City of Johannesburg. She concedes, in this respect, that she cannot rely on the basis set out in her founding affidavit, but can only succeed if she is entitled to rely on an opinion provided by the City of Johannesburg in terms of clause 15(2) of the Town Planning Scheme. She relies, in this regard, on a letter received from Mr J Sello ("*Sello*"), dated 29

January 2010, on behalf of the City of Johannesburg: Executive Director of Development Planning and Urban Management. The letter reads as follows:

> "*Our correspondence and the site visit conducted on 29th January 2010 refer.*
>
> *From the above site inspection and the attached contour map it is evident that Storm water from Erf 1778 Malvern can only be discharged to a public street (Galteemore Street) through Erf 1777 Malvern.*
>
> *We further confirm that management of storm water between neighbours of low and high lying erven is prescribed for as per clause 15(2) of the Johannesburg Town Planning Scheme, 1979.*
>
> *Please find attached the relevant extracts from the Scheme.*"

[7] The respondents do not object to the applicant's case as made out in her supplementary affidavit. They, however, deny that the City of Johannesburg had provided the applicant with an opinion in terms of clause 15(2) of the Town Planning Scheme. They contend that they were not consulted by the City of Johannesburg, and that their property was not inspected by any representative of the City. They accordingly dispute the correctness of such "*opinion"* and, in particular, that the storm water can only be discharged to a public street through their property. They furthermore contend that they had no opportunity to make representations on any such "*opinion*" prior to the institution of litigation by the applicant.

[8] On 24 May 2010, the respondents' attorney addressed a formal notice to the City of Johannesburg: Executive Director of Development Planning and Urban Management, in terms of section 5(2) of the Promotion of Administrative Justice Act 3 of 2000 ("PAJA"), requesting reasons for the

"*opinion".* When no response was received from the City of Johannesburg, the respondents' attorney contacted Sello, telephonically, to enquire when a response could be expected. Sello informed the respondents' attorney, during the conversation, that he had visited the applicant's property at her request. She thereafter requested a written response from him. He recorded his "*comments*" in writing and sent them to the applicant. He also informed the respondents' attorney that he did not provide the applicant with an opinion, as contemplated in clause 15(2) of the Town Planning Scheme, when he recorded his comments in writing as he had not inspected the respondents' property. Sello was requested to provide the respondents' attorney with a written response, which he did in a letter dated 21 July 2010. It reads as follows:

> "*The letter addressed to Sharon Du Raan Du Raan* (sic) *dated 29 January 2010 was written as a response to an enquiry made by Sharon Du Raan regarding the storm water management on site.*
>
> *Verbal comments were given to Sharon Du Raan when she came to make an enquiry and further telephonic enquiries.*
>
> *Written comments were requested by Sharon Du Raan duran* (sic)*. A site visit was conducted and comments were given in writing.*
>
> *I am not aware of any enquiry that your client could have made and hence there is no correspondence to your client in this regard.*
>
> *…*"

[9] The respondents contend that it is clear from Sello's letter, dated 21 July 2010, that he was never asked by the applicant to provide an opinion, as contemplated in clause 15(2) of the Town Planning Scheme, and nor did he provide such an opinion. Mr Bester, appearing on behalf of the respondents,

argued that this position is further supported by the respondents' delivery of a notice, in terms of Uniform Rule 35(12), in which they requested, *inter alia,* the correspondence referred to in Sello's letter of 29 January 2010. The applicant's attorneys denied that the applicant was in possession of any such correspondence in a letter dated 20 May 2010. Again, when pointed out by the respondents' attorney in a letter of response, dated 3 June 2010, that "*… it is unlikely that your client sought an opinion from the City and arranged a site meeting orally …*" the applicant's attorney responded by denying that any such correspondence existed.

[10] The question that now arises is whether the City of Johannesburg expressed an opinion in terms of clause 15(2) of the Town Planning Scheme, and whether the applicant requested such an opinion. It is clear from the founding affidavit that the applicant was aware of the existence of clause 15(2) of the Town Planning Scheme at the time of launching her application. There are, however, no averments in the founding affidavit which indicate that the applicant requested an opinion, from the City of Johannesburg, in terms of clause 15(2) of the Town Planning Scheme. Although Annexure "*SDR.6*" to the founding affidavit (which is a letter, dated 23 April 2008, from the applicant's attorneys to the respondents' attorneys) states that the relevant officials of the City of Johannesburg were consulted by the applicant, and that she was advised that it was not only impractical but also impossible for the relevant storm water to be drained to the public street in front of her home as the street is higher lying than her backyard, there are no averments in the founding affidavit which indicate that an opinion, as contemplated in clause

15(2) of the Town Planning Scheme, was requested by the applicant, and that such an opinion was provided by the City of Johannesburg. This coupled with Sello's attitude that he did not provide an opinion, but merely expressed his "*comments*" on being consulted by the applicant, indicates that Sello was neither requested by the applicant to provide an opinion, in terms of clause 15(2) of the Town Planning Scheme, nor did he provide such an opinion.

[11] The provision of an opinion by the City of Johannesburg, in terms of clause 15(2) of the Town Planning Scheme, would constitute administrative action as defined in section 1 of PAJA. The provision of such an opinion, by the City of Johannesburg, involves the exercise of a public power and the performance of a public function that is prescribed by a by-law, namely the Town Planning Scheme (*President of the Republic of South Africa v South African Rugby Football Union and Others 2000 (1) SA 1 (CC)* at para. 142). The City of Johannesburg acts in an administrative capacity and not in an executive capacity when providing an opinion in terms of clause 15(2) of the Town Planning Scheme. The opinion, so provided, is thus of an administrative nature as it concerns the implementation of the Town Planning Scheme. It is conclusively settled by our courts that the implementation of legislation, including sub-ordinate legislation, is an administrative responsibility, which is justiciable, and accordingly constitutes administrative action (*Minister of Health and Another v New Clicks South Africa (Pty) Ltd and Others (Treatment Action Campaign and Another as Amici Curiae)* 2006 (2) SA 311 (CC) paras. 447-450).

[12] Significantly, any opinion provided by the City of Johannesburg, in terms of clause 15(2) of the Town Planning Scheme, would have the capacity to affect the legal rights of both the applicant and the respondents by impacting directly and immediately upon them. Clause 15(2) of the Town Planning Scheme clearly envisages that any opinion provided by the City of Johannesburg would affect the rights of both the owner of the higher lying property and the owner of the lower lying property. Where the City of Johannesburg provides an opinion, in terms of clause 15(2) of the Town Planning Scheme, which states it is impracticable for storm water to be drained from the higher lying property directly to a public street, then the owner of the lower lying property would be obliged to permit the passage of the storm water over his or her property and, if necessary, lay or construct a pipeline or drain for the purpose of conducting the water discharged over his or her property. The owner of the higher lying property would, in turn, be liable for a proportionate share of the costs of the construction or laying of any such pipeline or drain by the owner of the lower lying property. Put simply, any opinion provided by the City of Johannesburg, in terms of clause 15(2) of the Town Planning Scheme, would be binding on the parties. The owner of the lower lying erven would therefore be entitled to be:

(a) consulted by the City of Johannesburg prior to the provision of any such opinion;

(b) given an opportunity to make representations; and

(c) provided with reasons for the decision.

[13] However, as is apparent from the respondents' supplementary affidavit as well as Sello's letter of response, dated 29 July 2010, Sello, acting on behalf of the City of Johannesburg, inspected the property of the applicant at her request and, again at her request, provided a written response in which he recorded his "*comments*". At no stage did he consult with the respondents, inspect their property or provide them with an opportunity to make representations. Nor did he provide them with reasons for the comments which he recorded in writing. Accordingly, a *"comment"* of the nature provided by Sello does not constitute administrative action as defined in section 1 of PAJA, and is therefore not justiciable.

[14] It is important in this respect to draw a distinction between the plain meaning of the word *"opinion",* and what is envisaged by the use of the word in clause 15(2) of the Town Planning Scheme. The Concise Oxford Dictionary (seventh edition) attaches, *inter alia*, the following meaning to *"opinion"*:

> *"a view or judgement not necessarily based on fact or knowledge>the beliefs or views of a large number of people: the changing climate of opinion>an estimation of quality or worth: he had a high opinion of himself ..."*

Hence, a core distinguishing feature between the plain meaning of the word *"opinion",* and the meaning of "*opinion",* as contemplated in clause 15(2) of the Town Planning Scheme, is that the latter is based on law and fact, and is substantiated with reasons thus making it binding and justiciable. An opinion

provided in terms of clause 15(2) of the Town Planning Scheme would, consequently, be more than simply a view or a *"comment"*, as contended for by Mr Lindeque, who appeared on behalf of the applicant.

[15] To the extent that there is an irresolvable dispute of fact in relation to the question of whether or not the City of Johannesburg provided the applicant with an opinion, as contemplated in clause 15(2) of the Town Planning Scheme, I am obliged to follow the approach enunciated in *Plascon-Evans Paints v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634H-635C. Accordingly, the respondents' version must prevail. I therefore accept the respondents' version that Sello did not provide an opinion, as contemplated in clause 15(2) of the Town Planning Scheme, but merely provided a "comment" on behalf of the City of Johannesburg.

[16] The *onus* to prove that the applicant obtained an opinion as contemplated in clause 15(2) of the Scheme rests on the applicant. The applicant has, however, failed to discharge this *onus*. As observed by Hurt AJA, in *Pappalardo v Hau* 2010 (2) SA 451 (SCA) at 461B-C, clause 15(2) of the Town Planning Scheme:

> "*is based upon an assumption that water will be drained onto the street. An owner wishing to drain it through some other course, for instance his neighbour's property, must obtain the opinion of the local authority that there is no other practical means of coping with the storm water before he acquires the right to do so.*

[17] In the result, I make an order dismissing the application with costs.

F KATHREE-SETILOANE
JUDGE OF THE SOUTH GAUTENG
HIGH COURT, JOHANNESBURG

COUNSEL FOR THE APPLICANT: MR I.M. LINDEQUE

ATTORNEYS FOR THE APPLICANT: THERON-RETIEF ATTORNEYS

COUNSEL FOR THE RESPONDENTS: MR A.BESTER

ATTORNEYS FOR THE RESPONDENTS: MATTHEW KERR-PHILIPS

DATE OF HEARING: 13 OCTOBER 2010

DATE OF JUDGMENT: 11 NOVEMBER 2010