THE REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case No: 15000/2013

In the matter between:

MARIA ELIZABETH THERON obo WONDERLAND EDUCARE **Applicant**

And

THE CITY OF CAPE TOWN **1st Respondent**

DIRECTOR: PLANNING AND BUILDING DEVELOPMENT MANAGEMENT **2nd Respondent**

GOODWOOD DISTRICT MANAGER **3rd Respondent**

SECTION HEAD: LAND USE MANAGEMENT **4th Respondent**

Coram: **KOEN AJ**

Heard: **15 February 2016**

Delivered: **19 February 2016**

JUDGMENT

KOEN AJ

[1] This is an application for judicial review in terms of the Promotion of Administrative Justice Act, Act 2 of 2000 ("*PAJA*"). The review is in respect of a decision purportedly taken by the second respondent on 14 June 2013 refusing an appeal by the applicant in terms of section 62 of the Local Government: Municipal Systems Act 32 of 2000 ("*the Systems Act*").

[2] The applicant launched the appeal as a result of a refusal by the first respondent ("*the City*") to approve an application in terms of section 15(1) of the Land Use Planning Ordinance 15 of 1985 ("*Lupo*"), for a building line departure, and Regulation 25 of the Land Use Planning Regulations ("*the Regulations*"), for a consent use ("*the consent use and departure application*").

[3] The consent use and departure application sought permission for the applicant to operate a large scale crèche facility ("*the facility*") at a residential property located at [6……] [M……] Road, [G…….], Cape Town ("*the property*"). The relief which the applicant seeks entails the substitution of the City's decision "*with a determination that Applicant's application for consent use and regulation departure in respect of erf [8……..], [G…….], be approved*".

[4] The City has, in its turn, launched a conditional counter application in terms of which, in the event that the applicant's review application is unsuccessful, an interdict is granted (subject to a rule *nisi*) compelling the applicant to cease operation of the facility.

[5] After deliberating on the applicant's consent use and departure application the relevant sub-council refused it on 2 April 2012. The reasons for this refusal were, in summary, as follows: the proposed large-scale crèche was in conflict with the City's Early Childhood Development Policy, particularly in terms of location criteria and parking facilities; the crèche was considered to have an adverse impact particularly in terms of traffic generation and noise; the use of the property as a crèche would conflict with the existing residential character of the neighbourhood; and the departure would not comply with the zoning scheme regulations insofar as setbacks from boundaries were concerned.

[6] On 21 September 2012 the applicant appealed against the sub-council's decision in terms of s 62 of Systems Act.

[7] The appeal came to be heard on 14 June 2013. Mrs Theron appeared on behalf of the applicant before the City's Planning and General Appeals Committee ("*the Appeals committee*") which was comprised of four members of the council. Councillor Herron was the acting chairperson of the Appeals committee. The other three committee members were Councillor Gqola, and Aldermen Bredenhand and Nieuwoudt.

[8] The transcript reflects that, after hearing submissions from Mrs Theron and Alderman Justus, the chairperson of the committee stated that *"we will now deliberate and make a decision Mrs Theron and you will get a formal response within two weeks"*. The transcript reflects, further, that the recording then stopped

and was resumed. On resumption it appears that there was discussion between the committee members. The transcript concludes as follows: *"CHAIRPERSON: ... So it is two dismiss and two uphold. END OF RECORDING."*

[9] A minute which was subsequently produced records something quite different. The relevant portion states that:

> *"In the event of an equality of votes (2 in favour and 2 against) it was RESOLVED that:*
>
> *(a) The appeal submitted by the appellant, Ms M E Theron, BE DISMISSED for the following reasons…".*

[10] It is apparent that there was an equality of votes in the Appeals committee. How, then, can it be said that this meant that the committee dismissed the appeal? The answering affidavit contained the following submission: *"It is correct that the Planning Appeals Committee was divided on the outcome of the appeal, and there was an equality of votes. In these circumstances the decision of the sub-council stood, (I am advised that the position to be adopted by a chairperson in an instance such as this is that he or she must declare the motion (or in this instance, the appeal) as not carried)".* This submission was based on the common law applicable to meetings, so it was submitted on behalf of the respondents in argument.

[11] There are three difficulties with this proposition. Firstly, it is not borne out by the facts. The transcript does not say that the members of the Appeal committee decided to dismiss the appeal, or that the chairperson *"declared the appeal not carried"*. On the contrary, the transcript does not evidence the taking of any decision, notwithstanding that the chairperson said a decision would be taken.

[12] Secondly, who the author of the minute was and the process by which it came to reflect that a "resolution" to dismiss the appeal was taken by the Appeal committee is not explained, at least not by any of the members of the Appeal committee. The minute simply cannot be reconciled with the transcript of what transpired at the hearing.

[13] Thirdly, and in any event, I cannot see that the law applicable to meetings is of application to appeals under section 62 of the Systems Act. Section 62 of the Systems Act governs appeals, not meetings. They are not the same. An appeal under section 62 of the Systems Act is an appeal in the wide sense, involving *"a rehearing related to the limited issue of whether the party appealing should have been successful"* (see *Groenewald v M5 Developments* 2010 (5) SA 82 (SCA) at paragraph [25]). In terms of section 62 (3) of the Systems Act the *"appeal authority must consider the appeal, and confirm, vary or revoke the decision…"* which is the subject of the appeal. The Appeals committee exercises a power conferred by statute. It follows that the members of the appeal committee are required to consider the facts of the appeal, apply their minds and take a decision, not vote, upon the merits of the appeal. There is no decision, as I see it, if the members of the Appeals committee are evenly split on the question before them.

[14] A meeting is a different thing. A person exercising a vote at a meeting does not usually do so in the exercise of a power conferred by statute. Such a person is in the normal course entitled to exercise a vote which advances his or her self-interest. Unlike the decision of an Appeal committee, or any other kind of

administrative action, a vote at a meeting need not be exercised in a rational, or fair, manner.

[15] For these reasons, I do not see how one can equate a motion under consideration at a meeting to an appeal under section 62 of the Systems Act. The common law rule devised to break a deadlock in the case of a meeting at which there is a parity of votes cannot be imported into our system of administrative law. Entirely different considerations apply, in my view.

[16] There is nothing in the Systems Act which indicates what is to happen in the event that an equal number of members of an Appeal committee confirm, and revoke, the decision which is the subject of the appeal. In the absence of a law governing the manner of the taking of a decision of an Appeals committee it seems to me that one must be guided by principle. In this respect the right to administrative action which is lawful, reasonable and procedurally fair, guaranteed by section 33 of the Constitution, and section 3 (1) of PAJA, are of application. It can hardly be reasonable or fair if a deadlock at an Appeal committee hearing meant that the appeal under consideration was dismissed. If anything that is a purely arbitrary resolution to the problem, much like tossing a coin.

[17] It seems to me that it is reasonable and fair if the decision of the Appeal committee is the decision of the majority of its members. That is how decisions are arrived at in our Courts. There is obviously the potential for a deadlock to occur in the case of an Appeal committee comprised of an even number of members. But

that is easily avoided if Appeal committees are constituted of an odd number of members.

[18] That the Appeal committee did not take a decision in regard to the appeal before it was not a point relied upon by the applicant as ground of review. In *Paddock Motors (Pty) Ltd v Igesund* 1976 (3) SA 16 (AD) the Court observed that it would be *"an intolerable position if a Court were to be precluded from giving the right decision on accepted facts, merely because a party failed to raise a legal point, as a result of an error of law on his part"* (at 23 F–G). In this case the facts are before me, and were fully canvassed in the papers, and there is no reason why I cannot uphold the review on this basis.

[19] In terms of section 8 (1) of PAJA, having found that a reviewable irregularity has occurred, this Court has the power to grant any order that is just and equitable. I think that it would be just and equitable for the matter to be remitted to an Appeal committee under section 62 of the Systems Act for a hearing *de novo*. It seems to be undesirable that the same members should serve on the Appeal committee and, in the interests of fairness and transparency, I intend to make an order to this effect.

[20] I should add that I think that it is unwise for me to devote any attention to the merits of the appeal which was heard by the Appeal committee. I intend to remit the matter for an appeal *de novo*, and do not want anything I might have to say about the merits of the matter to influence the minds of those who will be tasked with a consideration of the appeal.

[21] In view of the conclusion which I have reached it is not necessary to refer to the conditional counter application made by the respondents.

[22] That leaves the question of costs. In my view the applicant has been materially successful in this application. I see no reason why costs should not follow the result.

[23] I therefore make the following order:

(a) The applicant's appeal in terms of section 62 of the Local Government: Municipal Systems Act, 32 of 2000, against the refusal by the first respondent on 4 September 2012 of the applicants application for consent and regulation departures must be heard *de novo*;
(b) The appeal authority must not be comprised of the same members who heard the appeal on 14 June 2013;
(c) The appeal *de novo* must commence within a period of six weeks calculated from the date of this judgment;
(d) The first respondent is ordered to pay the costs of this application.

KOEN AJ

APPEARANCES

For the Applicants:	Mr T Twalo Instructed by: Mate Attorneys
For the 1st Respondent:	Mr M Greig Instructed by: Webber Wentzel