

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

Case number: 22197/12

In the matter between:

First Applicant	MADELENE DE JONG
Second Applicant	GREGORY NIGEL JOSEPH WHITE
Third Applicant	MARTINIUS JOHANNES ELS
Fourth Applicant	MARGARET JEAN WOUTERS
Fifth Applicant	JOSHUA SAMUEL JOHNSON SOUTH
Sixth Applicant	NICOLE GENEVIEVE KYTE
Seventh Applicant	JACQUES SCHMIDT
Eighth Applicant	SUZANNE WEHMEYER (SCHMIDT)
Ninth Applicant	EXCLUSIVE ACCESS TRADING 585 (PTY) LTD

EMANUEL FEGUERA DE ABREU

Tenth Applicant

SHIRAAZ JOOSUB

Eleventh Applicant

BARRISTER INVESTMENTS (PTY) LTD

Twelfth Applicant

AMBER VAN DER WALT

Thirteenth Applicant

SARAH ELIZABETH HALLAS

Fourteenth Applicant

JOAO JOSE RIBEIRO DA CRUZ

Fifteenth Applicant

SKYE MIDDLETON

Sixteenth Applicant

RICHARD DANIEL KYTE

Seventeenth Applicant

and

THE TRUSTEES OF THE SIMCHA TRUST (IT 1342/93)

First Respondent

THE CITY OF CAPE TOWN

Second Respondent

JUDGMENT DELIVERED THIS 12th DAY OF DECEMBER 2012

DOLAMO, AJ

INTRODUCTION:

1. The seventeen applicants brought an urgent application for an interim relief interdicting the first respondent from proceeding with any further construction work on Erf 5284 Cape Town situate at 41 Buitenkant Street, Cape Town ('the first respondent's property') pending a review, to be instituted within 14 days of the relief sought in this application being granted, of the second respondent's approval, on 20 September 2008, of building plans submitted to it by the first respondent in terms of the National Building Regulations and Building Standards Act 103 of 1977 ('the Building Act').

2. The first respondent opposed the application but the second respondent does not. I shall henceforth refer to the respondent simply as the respondent and the second respondent as "the City".

THE FACTUAL BACKGROUND:

3. The applicants are all owners of sectional title units in the Four Seasons Sectional Title Scheme situated at 43 to 47 Buitenkant Street, Cape Town ('Four Seasons') the eight respondent having recently bought her unit. The respondent's property is situated at the corner of Buitenkant and Commercial Streets and adjoins Four Seasons. The first respondent purchased the property in October 2006 and thereafter submitted building plans to the City for the development thereof on 23 January 2008. These plans were eventually approved on 20 September 2008. Thereafter the respondent commenced with the development of the property which took place in two stages. The first stage started in 2009 and comprised of the demolition of those parts of the existing structure which the respondent did not wish to retain as well as

stabilisation work. The second phase, the building work proper, commenced on 14

May 2012.

4. Around the time when respondent commenced with the building activities the trustees of the Four Seasons requested its managing agent to investigate the matter. As a result on 28 June 2012 Mr Cor van der Merwe of Tommy Brümmer and Associates, a town planning firm, produced a report identifying what was referred to as 'the split zoning problem'. This report was distributed to the owners at Four Seasons on 24 July 2012. A meeting, called 'an information sharing meeting' regarding the matter, was subsequently held with the owners on 3 September 2012. On 26 September 2012 minutes of the information sharing meeting were distributed which reflect that at that meeting the owners agreed to nominate a Mr Willem Bührmann to appeal to the respondent to limit the impact of its building and to assess whether the building complied with the national building regulations. On 3 October 2012 a Mr Keefe addressed an e-mail to the owners at Four Seasons setting out the history of the matter and advising them that the trustees had decided that they were unable to take the matter further (i.e. to engage the first respondent) due to the cost implications. The owners were advised that if they wished to continue with the matter they should organise themselves accordingly.
5. The first applicant, who lives in Pretoria, organised a group of owners to act as advised and take the matter further. She eventually approached a firm of attorneys who, after taking instructions, addressed a letter to both the respondent and the City on 23 October 2012. The letter set out what is referred to as the split zoning problem;

reminded the City and the respondent that it is a jurisdictional fact of building plan approval that the decision be informed by a report by the building control officer ("BCO"); contended that the respondent's building ought not to have been approved by reason of its magnitude, height and close proximity to Four Seasons which factors would reduce the amenities enjoyed from Four Seasons and the value of the units; and called upon the respondent to cease building work failing which (a) an application would be launched and (b) advising it that if it continued, would be building at its own risk. The letter sent to the respondent was accompanied by a copy of a letter sent to the City wherein the applicant's objections were raised. Paragraph 14 and subsequent paragraphs of the letter to the City are of particular importance and I shall revert to them in the course of this judgment.

6. On 30 October 2012 respondent's attorneys responded to the letter by Applicant's attorneys of 23 October 2012. The response dealt with the allegations made therein and concluded by stating that the respondent was prepared to reach such reasonable compromise as may be necessary with the applicants. The letter extended an invitation to meet as an alternative to proceeding to litigation.

7. On 1 November 2012 the applicants' new attorneys wrote to respondent's attorneys taking up the invitation to meet. A meeting was held between the representatives of the parties on 5 November 2012. Settlement negotiations then took place between 5 November 2012 and 21 November 2012 but failed to produce any agreement. The present application was launched on 21 November 2012, as a result of a failure to settle.

8. The applicants alleged that the approval of the respondent's plans was unlawful, is susceptible to review and liable to be set aside in that:

8.1. The building depicted by the plans derogates impermissibly from the value of Four Seasons;

8.2. The plans contravene the applicable zoning scheme regulations; and

8.3. Some of the building work being carried out by the respondent was not approved by the City at all.

9. The decision of the City was also said to be unconstitutional. It is alleged that the City's conduct in approving the plans was inconsistent with the Constitution and it follows that the Court hearing the review application will be required to make a declaration of invalidity as contemplated by s 172(1)(a) of the Constitution of the Republic of South Africa.

10. The respondent opposed the application first because the review application which the applicant intended to institute will be unreasonably delayed and certainly outside of the 180 days period stipulated in the Promotion of Administrative Justice Act 3 of 2000 ('PAJA'). The consequence thereof is that the applicants have not established a *prima facie* right to the relief sought in the review and that this application ought to be dismissed. Secondly the respondent opposed the application on the basis that any interdict which may at this stage be granted will not prevent the harm alleged by

the applicant and will accordingly serve no purpose. In the third place the

respondent alleged that there was no urgency.

11. The crisp question for determination is whether in the light of the respondent's ground for opposing the Applicants have made out a case for the relief sought. A starting point will be to determine whether there is urgency in the matter and, if so, to determine whether there was compliance with the other requirements for an interim relief.

URGENCY

12. The applicants alleged that they have acted with all reasonable expedition. They claim that this is especially so because in this case it was the first respondent who, in response to a demand from the applicants to cease works, advocated for a compromise rather than litigation only to then proceed to build as fast as possible in the face of a possible application for review. The respondent was asked to cease building and forewarned of the application on 23 October 2012. The applicants argue that instead of heeding the warning it elected built in a hurry and in the face of a threatened application. They submitted that this conduct of the respondent should weigh heavily with this Court.

13. The applicants allege that they became aware of the split zoning problem on 24 July 2012 when Mr van der Merwe's report was received by them; of the derogation from value problem at the end of September 2012 when the first respondent's building

passed the 7th level (parking garages) of Four Seasons without being stepped back to any extent; and of the lack of the building control officer's recommendation on 3 December 2012. The applicants therefore allege to be well within the 180 days PJA time frame.

14. Respondent's main reason for opposing the application is that the Applicants and the body corporate were extremely tardy, even after the second phase of construction commenced in May 2012. It alleged that months went by without any decisive action being taken. This was not because the Applicants' advisors were holding them up, but because of the body corporate and later the Applicants themselves failing to take action. None of these delays according to the respondent was explained. Respondent submitted that this was not a case where the delay does not cause prejudice. The respondent's conclusion in this respect is that the Applicants' delay has indeed tilted the balance of convenience against them. Respondent further submitted that construction had by now reached a stage where a large number of expensive items for installation in the interior of the building have been ordered. These orders cannot be cancelled. If the interdict is granted, the respondent will remain liable for these items.

15. The respondent stated that had the application for an interim interdict been brought earlier, then the project could possibly have been suspended, pending the review. This was no longer practical, the respondent submitted, given the financial commitments made and the losses on the investment which a stoppage will cause.

Respondent further stated that in planning and building matters there is a need to bring review applications swiftly because of reliance typically being placed on the validity of building plan approvals.

16. Respondent argued that a temporary interdict at this stage would have severe financial implications while the reason why the Applicant cannot obtain relief in the ordinary course is because of their delay. Had the review application been launched in 2008/2009 after the first phase of construction, there would have been no need for interim relief, it argued. Respondent further postulated that the position may even have been different if the review was timeously instituted after the second phase of construction had started. At this stage, it submitted, any urgency which may exist is entirely self-created.

17. The respondent also raised non-compliance with the provisions of PAJA as a bar to the review application. The applicants according to the argument have delayed in bringing the review application and therefore will not meet the 180 day period stipulated in section 7(1) of PAJA and consequently fail to establish a *prima facie* right to the relief sought in the review. For this reason I take it, its conclusion is that this application must fail.

18. The respondent submitted that whether an applicant has succeeded in satisfying the requirements of urgency must be determined by the contents of the founding affidavit. The Respondent did not agree with the Applicant's submissions

regarding when, as far as *unreasonable delay* is concerned, the 180-day period commenced. It was submitted that the 180 days period only began to run when the Applicants became aware (or should have become aware) of the characteristics of the administrative action which they contend were unlawful. The respondent further argued against the applicants' contention that in the present instance, in respect of the "*derogation of value*" problem this was at the end of September 2012 when the Respondent's building passed the height of the Four Seasons parking garage; and in respect of the "*split zoning*" problem, this was on 24 July when the Van der Merwe report was furnished to them. The Respondent alleged that the first contention runs contrary to the judgment of the Constitutional Court in *Camps Bay Ratepayers' & Residents' Assoc v Harrison* 2011 (4) SA 42 (CC) at para 57 where the Court held as follows (our underlining):

"[57] Whether or not the Supreme Court of Appeal was correct in its approach, first raises the issue regarding the interpretation of s 7(1)(b) of PAJA. In terms of the section, the 180-day period starts to run when the person concerned . . . became aware of the action and the reasons for it. Before 'the action' nothing happens. In the final analysis it is awareness of 'the action' that sets the clock ticking. That raises the question: what 'action' did the legislature have in mind? The answer, I think, is the 'administrative action', and, according to the definition of that term in PAJA, 'the decision' that is challenged in the review proceedings."

19. Respondent concluded that the clock did not start ticking when the applicant became aware of "the problem" with the administrative action, i.e. possible grounds for challenging the administrative action. This can never be the position because it

will mean that an applicant will always be able to attribute the delay to the time it took to "uncover" the "problem". In terms of *Harrison*, according to the respondent, the clock starts ticking when the applicants became aware of the action itself, i.e. the building plan approval. The decision sought to be reviewed is the approval of the building plans by the City which was taken on 20 September 2008. That was four years before the application was launched. The only basis for reducing this period is, according to the respondent, to deduct periods when the Applicants were not "aware" or could not "reasonably have been aware" of the action. The applicants should have been aware of the action when the first phase of construction commenced already in 2008/2009. At the very latest, the respondent argued, Applicants should have been aware of the action when the second phase of construction commenced on 14 May 2012 and when the building plans were put up on the ground floor of the building on the Respondent's property.

20. Mr Dickerson SC who appeared for the applicants refuted the respondent's interpretation and application of PAJA to the present matter. According to the applicants time only began to run in the context of this application when they knew or ought to have known of the characteristics of the administrative action which they contend is unlawful. The applicants found support for this view in the judgment of Davis J in *Van der Westhuizen v Butler* 2009(6) SA 174 at 185A-D.

21. In determining whether there was undue delay in bringing this application a distinction must be drawn between the question of urgency and compliance with

provision of PAJA regarding the time frames for bringing an application for judicial review of an administrative action. The question of the review application, having to be brought within the 180 days period after the date on which the applicants were informed of the administrative action, became aware of the action and the reasons for it or might reasonably have been expected to have become aware of the action and the reasons, is in my view, separate and distinct from the question of urgency. These two should not be conflated. The question of compliance with the 180 days limitation in section 7 of PAJA is only relevant in so far as this court must determine the applicants' prospects of success with the review application (i.e. whether they have established a *prima facie* right) and is not determinative of the question of urgency. Should the applicants succeed with this application to stop the respondent from further building pending the institution of the envisaged review application, such application would have to be brought within the purview of PAJA which, *inter alia*, has remedies in section 9(2) to cater for an applicant who can show that the interest of justice require the extension of the 180 days period to enable him/her to apply for review. Whether there was compliance with PAJA will constitute a separate enquiry, and determined in the review application.

22. The question of whether there is inordinate delay or not will be determined by reference to the circumstances of each case. In paragraph 2 of its heads of argument the respondent set out the chronology of events which culminated in the present application. The respondent complained about a month being wasted after the plans were e-mailed to the body corporate, a further month wasted before the

reports are disseminated to the owners, another two months before the planning expert was replaced (or why another report was requested) and why it took a further two months before the institution of this application. These delays according to the respondent were not explained.

23. I do not agree with respondent that these delays were not explained. The applicant dealt in full with the chronology of events from the time when they became aware of the administrative action in question until the launching of this application.

24. Crucial in the explanation given by the applicant, in my view, was when respondent was alerted of a possible challenge to his building plans. In response the respondent called for negotiations rather than litigation. It would have been foolhardy for the applicants to embark immediately on litigation when a window for negotiations was still open. It was only when negotiations failed to resolve the problem that they resorted to litigation. The period of two months it took to bring this application, in the circumstances of the case, is not unreasonable. I am accordingly satisfied that the applicants did act without undue delay. It stands to reason that having shown urgency the next question is whether the applicants complied with the further requirements for an interim relief.

25. The requirements which an applicant for an interim interdict has to satisfy are the following:

25.1 A *prima facie* right;

25.2 A well grounded apprehension of irreparable harm if the

interim relief is not granted and the ultimate relief is

eventually granted;

25.3 A balance of convenience in favour of the granting of the

interim relief; and

25.4 The absence of a satisfactory alternative remedy.

(See *Setlogelo v Setlogelo* 1914 AD 221 at 227; *Olympic Passenger Service (Pty) Ltd v Ramlagan* 1957 (2) SA 382 (D) at 383A-C; *Pietermaritzburg City Council v Local Road Transportation Board* 1959 (2) SA 758 (N) at 772C-E.)

26. In *Camps Bay Residents and Ratepayers Association v Augoustides* 2009(6) SA 190 (WCC) at 195C Dlodlo J stated that in determining whether a *prima facie* right has been established, the right need not be shown by a balance of probabilities. If it is *prima facie* established though open to some doubt, that is sufficient. (See also *Webster v Mitchell* 1948 (1) SA 1186 (W) at 1189. See further *Knox-D'Arcy Ltd v Jamieson* 1995 (2) SA 579 (W) at 592H – 593B.) Dlodlo J went on to point out (at 195H-J) that in cases where there is a dispute of fact, the proper approach is to take the facts set out by the applicant, together with any facts as set out by the respondent which the applicant cannot dispute, and to consider whether, having regard to the inherent probabilities, the applicant should on those facts obtain final

27. I agree with the applicants' exposition of the legal position and the manner in which the Courts in this division have addressed applications for the interim cessation of building works pending review proceedings. These legal principles are well-established and laid down in a series of decisions. What appears from this line of decisions is the following: The prospects of success in the contemplated review proceedings represents the measure of the strength or otherwise of the alleged right

remedies.

or weakness of the applicant's right, the balance of convenience, the nature of the so-called discretion, save for mentioning the obvious examples such as the strength not defined the considerations which may be taken into account in exercising the In *Knox D'Arcy Ltd* judgment *supra* at 362 it was pointed out that, the Courts 'have and overriding discretion whether to grant or refuse an application for interim relief. *Ramlagan* 1957 (2) SA 382 (D) at 383D-F.) Finally the Court possesses a general of convenience to favour him. (See *Olympic Passenger Service (Pty) Ltd v applicant*; the weaker the prospects of success, the greater the need for the balance the applicant's case), the less the need for the balance of convenience to favour the (C) at 267E-F.) In general the stronger the prospects of success (i.e. the strength of 128D; *LF Boshoff Investments (Pty) Ltd v Cape Town Municipality* 1969 (2) SA 256 obtaining temporary relief. (See also *Fourie v Uys* 1957 (2) SA 125 (C) at 127H - If serious doubt is thrown upon the case of the applicant, he cannot succeed in relief. The facts set up in contradiction by the respondent then fail to be considered.

that the applicant must establish *prima facie* in order to obtain interim relief; (See *Searle v Mossel Bay Municipality and Other* [2009] ZAWCHC 9 at para [6].) The stronger the prospects of success in the review proceedings (i.e. the *prima facie* right) the greater the subordination of prejudice occasioned by a cessation of building work. Otherwise stated, the principle of legality tends to operate decisively in this context. (See *Searle v Mossel Bay Municipality and Other* [2009] ZAWCHC 9 (12 February 2009, per Binns-Ward AJ) at paras [10] and [26]; *Camps Bay Residents and Ratepayers Association v Angoustides supra* at 197E). If the applicants are likely to be proved right in the review proceedings it is desirable that the building operations should be stopped now, that is to say, sooner rather than later. (See *Beck and Others v The Premier of the Western Cape* (CPD case number 12596/96, 11 October 1996, unreported, per Conradie J). An important purpose and function of an interim interdict in this context is to prevent a respondent from building itself into an impregnable position and then rely on the Court's disinclination to order demolition of a completed (albeit unlawful) structure.

28. Having outlined the legal position I shall proceed to determine whether the applicants have met the requirement for an interim relief in the terms prayed for. The applicants allege that the approval of the respondent's plans was unlawful susceptible to review and liable to be set aside because the building depicted by the plans derogated impermissibly from the value of Four Seasons; contravenes the applicable zoning scheme regulation and the BCO did not make a proper

recommendation as required by the Building Act. I deal hereinafter with each of

these allegations.

DEROGATION OF VALUE:

29. The applicant submitted that although the respondent is permitted to build at 0 metres from the common boundary with Four Seasons, it is simply not reasonable to do so at levels 8 and 10 of Four Seasons having regard to the rights of the owners of the units situated there. The applicants submitted that a more rational and reasonable approach would have been to step the respondent's building back slightly at the Four Seasons levels 8 to 10. A building that does this may well have been within the contemplation of the notional parties to the sale agreement. For these reasons the Applicants submitted that the Applicants have good prospects of persuading the review court to set aside the City's purported approval of the first respondent's plans on the basis that the approval was precluded by section 7(1)(b)(ii)(aa) of the Building Act.

30. Applicants submitted that the City was obliged to refuse building plans when it is satisfied that the plans do not comply with the Building Act and other applicable laws, which should have been the case in this matter or when it remains in doubt about that. The Respondent, however, submitted that the issue of derogation of value should be approached as follows by this Court: the City could only withhold approval if positively satisfied that the Respondent's building will or probably will cause a derogation in value. If uncertain or not so satisfied, the City

was obliged to grant approval; compliance with the regulations and the scheme results in a strong *prima facie* indication that approval should be granted, provided that the official concerned does not ignore other factors which may point in a different direction; the factors which may "point the other way" are factors that the building is so unattractive or intrusive that it exceeds the legitimate expectations of the parties to the hypothetical sale in respect of what can be constructed within the limits of the zoning scheme.

31. It was submitted by the Respondent that it was not demonstrated by the Applicants and their expert, Mr Van der Spuy, that the building, though in accordance with legally imposed restrictions, is "so unattractive or intrusive that it exceeds the legitimate expectations of the parties to the hypothetical sale." Van der Spuy according to the respondent merely stated that the building is intrusive and overbearing at the 8th to 10th levels of Four Seasons, that it could not have been expected by the reasonable notional purchaser even though it may comply with the scheme regulations. Respondent alleged that why this is so was not explained. The respondent argued that Mr Van der Spuy certainly did not deal with the similar developments elsewhere, but bases his findings on developments which have street views.

32. Respondent further argued that in any event, there can be no merit in the argument that the building is unattractive or intrusive in this sense because the reasonable notional purchaser would certainly know that the developers of the Four Seasons

most unusually designed habitable rooms on the common boundary, with windows facing the common boundary; the reasonable notional purchaser would certainly know that in the inner city adjacent even are zoned to allow 100% coverage with a zero setback. This is why facades facing common boundaries are normally architecturally reserved for store rooms, lifts, services, stairwells, passages. Thus, a notional purchaser of an apartment in the Four Seasons complex facing the common boundary, would be aware of the risk posed by the unusual design and would not be swayed by the (false) expectation of continued views and spacious areas around the building and that there were many similar multi-storey buildings in close proximity, many of which have been developed in terms of the zero metre common boundary setback, and that informed buyers would know that significant redevelopment potential exists where low rise buildings are found in the relevant area.

33. It was contended by the applicants in reply that the BCO must set out a reasoned basis for his conclusions regarding derogation of value. This may not be in the form of advice but he must furnish a written, reasoned and properly motivated report. The decision maker must then consider the reasoned recommendation and arrive at an independent conclusion on the matter. Applicant argued that in his affidavit, Moir does not refer to a report compiled by him. As a result of this, the Applicants' attorney spoke to Moir, who was at the airport at the time, and the latter stated that prior to the constitutional court decision in *Walele v City of Cape Town and Others* 2008 (6) SA 129 (CC), it was not standard practice to write such report, but simply

to tick a box on what was known as the "A" form, which was what happened in the present instance.

34. The applicants aver that they were not in possession of the BCO's report and that it would be made available in the review by the delivery of the rule 53 record by the City. At that stage they anticipate, given the alleged evidence of impermissible derogation, that the report would be open to serious attack and reveal that the BCO did not properly apply his mind to the matter.

35. They also allege that the affidavit obtained by the respondent from Moir was terse and suggested that he merely 'indicated' his positive conclusion regarding the plan approval to the decision maker. It was further alleged that, as stated *supra*, this was confirmed by Mr Moir himself who advised the applicants' attorney, that he prepared no report in the matter and simply indicated his positive conclusion by ticking the appropriate box on what was termed form "A".

36. The respondent argued that there was no mention in the founding affidavit of the "procedural / technical" ground on which the Applicants rely in the replying affidavit, which is that the decision-maker did not have a report before him/her in which the BCO deals with all the factors listed in section 7(1) b) of the NBR. Mr Hodes SC, who appeared for the Respondent, submitted that the new argument cannot be entertained for two reasons: It is well-established that an applicant cannot

make out a new case in a replying affidavit and secondly this replying affidavit contained impermissible hearsay evidence.

37. In addition to objecting to the introduction of new grounds in reply respondent argued that in any event, the belated attempt to rely on *Walele* does not assist the Applicants. According to respondent *Walele* does not require the recommendation of the BCO to be contained in specific form as is contended for by the Applicants. More specifically, *Walele* does not require the report to be in written form. The respondent argued that what happened in *Walele* was that the BCO merely signed "recommended" on the relevant form and this was found to be insufficient to comply with section 7 of the NBR. According to the respondent the present matter differs materially from *Walele* in that Moir stated (on oath and in his affidavit) that:

"In the time available it has not been possible to analyse the documentation regarding my recommendation to the delegated authority, the section head building development management (Mr Jaco Theron) for the approval of the First Respondent's building plans, but revealed that there was considerable interaction between myself and Margot van Heerden (the professional responsible for land use management) and Mr Graig Rolfe (NBR plans examiner, responsible for the assessing the application and making a recommendation to me) regarding inter alia, the use of the building, the rational fire design, potential noise impact from the

activity in the building and general requirements in terms of the NBR and finally, on making my recommendation, between myself and Mr Theron."

38. As far as section 7(1)(b) of the NBR is concerned, Mr Moir alleged to have properly applied his mind to the factors listed in that section and indicated to the responsible delegated official in the City that these were not applicable. In this regard, he claimed to have taken into account, *inter alia*, that the building was in keeping with others in the surrounding area; that it was designed by a respected architect; and that it was to be constructed with conventional building material. There was therefore according to him no reason to conclude that the building would be unsightly; objectionable or not in keeping with the area. For this reason the respondent argued that Mr Moir did apply his mind in compliance with his obligations.

39. Respondent submitted that the *purpose* of the recommendation from the BCO is to furnish the decision maker with a basis for forming his or her opinion. In the absence of any evidence to the contrary, Moir's statement that there was considerable interaction between himself and the decision-maker regarding the requirements fully satisfies that purpose.

SPLIT ZONING

40. The principal statutory tools for regulating land use in the City is the Land Use Planning Ordinance 15 of 1985 ('LUPO') and the zoning scheme regulations. The zoning scheme regulations applicable in the present case are the Municipality of Cape Town Zoning Scheme. Scheme Regulations as amended ('the scheme regulations'). Section 1 of the scheme regulations provide that they are to be "read in conjunction with the Register and the Map." The map is defined as the "zoning map" as defined in LUPO. In terms of the zoning map applicable in this matter, both Four Seasons and the first respondent's properties are zoned C4 and C5, i.e. part of the buildings falls within zone C4 and part of the buildings falls within the C5 zone. This is the split zoning referred to *supra*.

41. The parties are agreed that the first respondent's property falls within the two general commercial use sub-zones C4 and C5. In other words the property is subject to a split zoning. There are two main differences between the two sub-zones. The first pertains to the permissible floor area or 'bulk' as it is known and the second pertains to the permissible height of the building. *In casu* only the height of the building is in issue. The C4 sub-zone restricts the building to 25 metres in height while C5 sub-zone allows the building to reach 37 metres. The applicants allege that both Mr van der Merwe and Mr Bühmann had advised them that the City erred in determining the dividing line between the two sub-zones when approving the respondent's building plans. In short, the City determined that the C5 subzone existed for 30 or 31 metres from the Buitenkant Street boundary whereas

in truth it exited for approximately 23 metres from boundary. Mr van der Merwe and Mr Bührmann have also allegedly advised the applicants that the error came about because the City used the incorrect map in making their determination. The City used what is commonly referred to as 'the bulk map' to make its determination. The effect of the City's error according to the applicant was that approximately 7 to 8 metres of the respondent's building as measured from the Buitenkant street boundary was wrongly declared to fall within a sub-zone C5. The applicants' case is that the zoning map is definitive of the matter and that the depth of the C5 zone is approximately 23 metres from the Buitenkant Street boundary. It follows so they argue that between 7 to 8 metres of the top level of the respondent's building is illegal and ought not to have been approved by the City.

42. In response the respondent submitted that the split zoning was carefully considered by the City when it approved the Four Seasons plans. The developer furnished opinions to the effect that the plan, TPX 3756, was definitive of the zoning because it was more specific and because it was referred to in terms of the zoning scheme regulations.

APPREHENSION OF HARM:

43. The applicants submitted that the building work is fairly advanced. It was submitted that as at 14 November 2012 the slab of the seventh floor of the building was being cast. That is the uppermost floor of the building and the level upon which a pool will be constructed. Applicant argued that should the respondent be allowed to continue

45. Respondent alleged that the applicants have failed to demonstrate irreparable harm. It alleged that on their own version, it will be relatively easy to address their complaints if they are successful on review, more specifically in that: If the split zoning argument was upheld then First Respondent will be required to chop off approximately 60m² of the restaurant on the eighth floor and approximately 60m² of

44. The applicants alleged, as regards the split zoning issue, that the first respondent will place itself in a position in which the City will be under pressure to incline towards the regularisation of the unlawful structure notwithstanding its non-compliance with the zoning scheme regulations. If the City follows this course in order to salvage its position having been responsible by its unlawful approval of the building plans which will have resulted in the structure, the applicants would be faced with the danger of being forced into a further round of litigation to enforce their rights.

building pending the outcome of the review application, it will build itself into an impregnable position and the applicants will be faced with a *fait accompli*. In that event, even if the applicants succeed in setting aside the approval of the building plans on review, the prospects of the court ordering a demolition of the building (in the case of derogation) or the offending components of the building (in the case of split zoning) will be greatly diminished. Despite that vindication the applicants will be left saddled with vastly reduced investments.

the bar situated on the seventh floor. Both these floors have a service area of 510m² and the effect will accordingly be relatively small and that if the derogation of value argument were upheld, the slabs cast can be chopped off in order to implement the stepped back design contended for by the Applicants. Consequently it submitted that it was not a matter where a review court will not order demolition of the offending parts of the building or where the City will "bend *over backwards*" to approve the plans if the review succeeds and the plans are remitted to it for reconsideration. The respondent argued that there was therefore no reason why the Applicants cannot obtain relief in due course in the review and submitted that the Applicants have accordingly failed to meet the second requirement for the granting of interdictory relief as well.

46. The respondent further submitted that the Applicants have quantified their loss at 30% of the value of the apartments they own. Respondent alleged that they however have the alternative remedies in that if demolition is not ordered, then the City may be ordered in terms of section 8(1)(c)(ii)(bb) of PAJA to pay compensation; or, if demolition is not ordered, it may be contended that the Respondent should pay such damages as it completed the building and this resulted in situation where demolition is no longer feasible.

47. The respondent further opposed the application on the basis that by the time that the matter is to be heard, the alleged derogation of value would have already occurred. In this regard it submitted that an interdict cannot be invoked to stop harm that has already occurred.

48. As regards the further requirements for an interdict respondent submitted that the Applicants will suffer no prejudice if the interdict is not granted. Given that the external envelope of the building was complete, the interdict will not preserve their views or light or protect them from any "intrusion" until the review is heard. The Respondent, on the other hand, will suffer significant prejudice if the interdict is granted: These prejudice is said to be the following: a quantity surveyor, has calculated the non-recoverable termination costs which will be suffered by the Respondent (should the interdict be granted) at approximately R2 317 900.00; a chartered accountant, has made a calculation of the net loss in income that the Respondent will suffer if the completion of the building is delayed. On his calculation, the Respondent will suffer a loss of R 1 276 908.00 for each month of delay, as far as returns on the capital investment are concerned. On the best case scenario (a 6 month delay) the loss of income to the Respondent would amount to R7 661 448.00. However, given the project's over-all cost (almost R100 million) and the advanced state of the building, it is obvious, the respondent submitted, that delays will cause significant financial prejudice. The respondent's concern was that the building was constructed for commercial purposes and any delay means that profit cannot be generated to pay back the investors who sponsored the construction; the project manager for the building contractor, explained that the decommission costs (in respect of crane, pump, hoarding etc.) will be in the region of R561 000.00 and the monthly loss to the contractor thereafter (crane and scaffolding) will be in the region of R 135 000.00. Some 152

people will lose their jobs if the interdict is granted; and clearly, the prejudice to the Respondent should the interim interdict be granted, will outweigh the prejudice to the Applicants, should it be refused.

49. Before determining whether the applicants have shown a *prima facie* right I deal first with the respondent's argument that the applicants in their replying affidavit, for the first time, introduced another ground on which the City's approval of the plans ought to be reviewed. This is that the BCO did not apply its mind when recommending the plans for approval to Jaco Theron. I was urged by Mr Hodes SC to ignore this new ground for review, alternatively if I intend to consider it, to afford the respondent an opportunity to file a further affidavit in response thereto. I am, however, of the view that this ground was not introduced for the first time in reply. Paragraph 14 of the letter dated 2012-10-25 by the applicant's instructing attorney Adriaan Venter (Annexure MDJT to the founding affidavit) stated that the City was obliged to, duly informed by a report of your BCO, submitted in terms of section 6 of the Act, apply the strict statutory evaluation criteria listed in section 7 before such an application for approval of building plans in terms of section 4 of the Act can be positively be considered. While this clause did not specifically refer to failure to comply with section 6 of the Building Act, a reading of the subsequent paragraph convey the intention to challenge the process followed in recommending the approval of the plans. This letter being part of the founding affidavit dealt with this aspect. Even if I am wrong in my conclusion in this respect I am of the view that I am not precluded from considering this new ground. On a proper analysis this ground does not raise a

new disputed fact but concern only the interpretation and application of statutory provisions. It is common cause that he BCO did not submit a written report but merely completed a questionnaire. The question is whether this constituted full compliance with his duties.

50. The statutory framework within which the BCO must operate was set out in the *Harrison* judgment at paragraph [13] and [14] as follows:

[13] The statutory framework for the approval of all building plans is to be found mainly in the provisions of the National Building Regulations and Building Standards Act (Building Act). The starting point is s 4 of the Building Act, which requires approval by a local authority of building plans before any construction can commence. Section 5 obliges every local authority to appoint a building control officer, who is the vital cog in the approval process. He or she is required to be skilled and specialised and is afforded extensive powers in terms of s 6. One of these powers, in s6(1)(a), is to make recommendations with regard to plans submitted for approval under s 4.

[14] The process of approving plans is provided for in s 7 of the building Act. I shall soon return to the provisions of s7 in detail. Two comments are, however, pertinent for present purposes. Firstly, s7(1) requires a recommendation by the building control officer as a precondition for any decision to be taken by the City, on an application for approval in terms of s 4. In the context of administrative law, that

recommendation is therefore a jurisdictional fact, the existence of which is a prerequisite for the exercise of the power under s 7. Secondly, in sum, the section forbids the approval of plans if the proposed building would contravene any legal requirement or would derogate from the value of neighbouring properties, be otherwise unsightly or objectionable, or be dangerous to life of property."

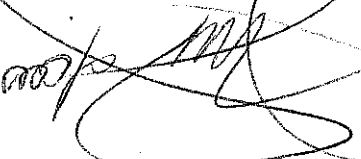
I am of the view that Moir's conduct in resorting to unrecorded consultative processes in this matter is open to doubt as to whether it was in the compliance with his statutory duties. I am in doubt that this "extensive consultative process", which is not documented, constituted motivated advice covering the merits of the application. On this point alone I am satisfied that the applicants have established a *prima facie* right to have the decision of the City reviewed. They have made a compelling case for the granting of an interdict prohibiting the respondent from continuing with building pending a review of the City's decision.

51. I am further of the view that the applicants have established that they face the real prospects of suffering irreparable harm if the respondent were to be allowed to continue with building according to its current plans. Mindful of the respondent's potential losses if it were to halt building pending the review of the City's decision I am nevertheless satisfied that the balance of convenience favours the granting of an interim interdict.

52. The order I make therefore is the following:

52.1 The first respondent is hereby interdicted from carrying out or allowing any further construction work on erf 5284 Cape Town situate at 41 Buitenkant Street, Cape Town pending a final determination of an application to be commenced by the applicant within 14 (fourteen) days from date hereof for the review of the decision of the second respondent of 20 September 2008 to approve building plans submitted to it by the first respondent in terms of the National Building Regulation Standard Act 103 of 1977.

52.2 That the costs of this application are to stand over for determination in the intended review application.



 DOLAMO, AJ