CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 18/10
[2010] ZACC 19

In the matter between:

CAMPS BAY RATEPAYERS' AND RESIDENTS' ASSOCIATION	First Applicant
PS BOOKSELLERS (PTY) LTD	Second Applicant
and	
GERDA YVONNE ADA HARRISON	First Respondent
MUNICIPALITY OF THE CITY OF CAPE TOWN	Second Respondent

Heard on : 5 August 2010

Decided on : 4 November 2010

JUDGMENT

BRAND AJ:

[1] This is an application for leave to appeal against the judgment of the Supreme Court of Appeal.[1] It is the culmination of a legal wrangle between the parties that dates back close on five years. It has its origin in a decision by the Municipality of the City of

[1] Per Maya JA with Navsa, Nugent, Van Heerden and Mlambo JJA concurring. The judgment has since been reported as *Camps Bay Ratepayers' and Residents' Association v Harrison* [2010] 2 All SA 519 (SCA).

Cape Town (the City) to approve a set of plans for the building of a house on the property of the first respondent, Ms Harrison, on the corner of Geneva Drive and Blinkwater Road, Camps Bay. The City is cited as the second respondent. The first applicant, the Camps Bay Ratepayers' and Residents' Association, is a voluntary association. Part of its objects is to safeguard the rights and interests of the residents of the rather affluent suburbs of Cape Town on the Atlantic Seaboard, including Camps Bay. The second applicant, PS Booksellers (Pty) Ltd, is also the owner of property on Blinkwater Road, Camps Bay which is situated more or less diagonally behind the property of Ms Harrison. Though the property of the second applicant is described as its principal place of business, it is in reality the family home of its director, Mr Anthony Herman, who is a partner in the firm of attorneys who represented both applicants throughout the litigation history between the parties, to which I now turn.

Litigation history

[2] A convenient starting point for the chronicle is when Ms Harrison acquired her property in September 2004. At that time the only building on the property was a modestly styled single storey cottage. But soon after taking occupation, Ms Harrison applied to the City for the approval of a set of plans which would authorise the construction on her property of a three storey house. These plans were approved by the City on 24 February 2005 and became known throughout the proceedings as "the original plans" or "the February 2005 plans". Once Ms Harrison had obtained this approval she caused the cottage on the property to be demolished and the construction of the new

building to commence on 17 March 2005. Shortly thereafter, she advertised the property with the improvement of the new three storey house for resale at a price of R12,75 million.

[3] When the building activities became apparent, the applicants viewed the plans at the City's offices and made their objections to the proposed building known to both Ms Harrison and the City. As a result of these objections, Ms Harrison submitted substantially revised plans. The revised plans, described in town planning parlance as "rider plans", were approved by the City on 8 September 2005, "the September 2005 plans". Despite the approval, the applicants were not satisfied that the revision of the plans met their concerns. In November 2005 they thus instituted an application in the Western Cape High Court, Cape Town (High Court) for an order interdicting Ms Harrison from proceeding with the building operations in accordance with the September 2005 plans and from selling or otherwise alienating the property pending the proceedings specified in the order. The proceedings specified an internal appeal to be launched by the applicants under section 62 of the Local Government: Municipal Systems Act[2] (Systems Act) against the approval of the September 2005 plans and a proposed application for the demolition of any construction which contravened the restrictions in the title deed conditions of the property.

[2] 32 of 2000.

[4] In spite of opposition by the respondents, Meer J granted an interdict in the terms sought. Her judgment has been reported as *PS Booksellers (Pty) Ltd and Another v Harrison and Others*.[3] As appears from the reported judgment, the applicants' objections against the September 2005 plans – which thereafter became a recurring theme throughout the various proceedings that were to follow – were essentially twofold. Their first objection[4] was that the building authorised by the plans would contravene the restriction imposed by the then Administrator of the Cape[5] as is reflected in clause D(d) of the title deed conditions of the property. It provides:

> "That no building or structure or any portion thereof, except boundary walls and fences, shall be erected nearer than 3,15 metres to the street line which forms a boundary of this erf."

[5] The applicants' second objection[6] was that the building as reflected in the approved plans relies on the manipulation of natural ground levels by means of structures erected in contravention of the restriction, in order to evade the prohibition contained in section 98(2) of the Zoning Scheme Regulations applicable to Camps Bay.[7] The part of section 98(2) relied upon provides that:

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[3] 2008 (3) SA 633 (C) (reported judgment).

[4] Id at para 11.1.

[5] In terms of the provisions of section 18(3) of the Townships Ordinance No. 33 of 1934 (Cape).

[6] Above n 3 at para 11.2.

[7] Approved by the then Administrator of the Cape in terms of section 9(2) of the Land Use Planning Ordinance 15 of 1985 (Cape) and published as the Municipality of the City of Cape Town: Zoning Scheme: Amended Scheme Regulations (Zoning Scheme Regulations) in the *Provincial Gazette* 4649 of 29 June 1990 and not the *Provincial Gazette* 4684 of 1 March 1991 as indicated in the reported judgment above n 3 at para 11.2 and in the Supreme Court of Appeal judgment above n 1 at para 8 n 4.

> "No point on the facade of any building . . . shall be more than 10 m above the level of the ground abutting such facade immediately below such point."

[6] In the event, Meer J was persuaded to grant the interdict sought essentially on the basis that some of the structures indicated on the plans as "boundary walls" were in truth retaining walls in that they not only supported a swimming pool and a so-called "planter" but also retained a substantial amount of compacted fill material behind them. In the light of this, Meer J held, these walls constituted "structures" other than boundary walls or fences, as envisaged by clause D(d), that were nearer than 3,15 metres from the street lines bounding the property. In consequence, Meer J held that they constituted contraventions of the title deed restriction in that clause.[8]

[7] In order to steer clear of confusion later, it is necessary to identify the boundary walls of the property that were of prime concern to Meer J. Broadly speaking, to avoid entanglement by detail, the property slopes rather steeply from its Blinkwater Road boundary in the east to Geneva Drive on its northern and western sides. The offending walls that supported the swimming pool, the planter and the compacted fill, which Meer J consequently identified as contravening clause D(d), were those on the Geneva Drive boundaries where the property is higher than street level. These walls should be distinguished from the wall on Blinkwater Road which features later in this application.

[8] Above n 3 at paras 62-77.

[8] Meer J also found some merit in the applicants' objection based on section 98(2) of the Zoning Scheme Regulations. In keeping with her findings on the clause D(d) issue, she held that it had also been established by the applicants, at least on a *prima facie* basis, that the ground level from which the height of the proposed façade of the building was measured had been artificially manipulated by the use of the unlawful retaining walls on Geneva Drive and the compacted fill behind them, thus concealing an infringement of the 10 metre height restriction imposed by section 98(2).[9]

[9] The applicants' internal appeal under section 62 of the Systems Act was also decided in their favour, again on the basis that the Geneva Drive boundary walls on the September 2005 plans were in fact "structures" in the form of retaining walls which contravened title deed condition D(d). In the light of this decision on appeal, the parties proceeded on the basis that the September 2005 plans had been duly set aside and arranged their affairs accordingly.[10] On this assumption, Ms Harrison submitted for approval yet a further set of plans on 30 May 2006 as another rider to the February 2005 plans. The most significant amendment brought about by the new plans was that the swimming pool, the planter and the compacted fill behind the Geneva Drive walls were removed so that these became free standing boundary walls.

[9] Above n 3 at paras 78-97.

[10] The Full Bench of the High Court subsequently held in *Reader and Another v Ikin and Another* 2008 (2) SA 582 (C) at para 32 that the mechanism created by section 62 of the Systems Act was only for the benefit of an aggrieved applicant who had failed to secure the permission sought and was therefore not available to objecting neighbours and other third parties. This decision was later confirmed by the Supreme Court of Appeal in *City of Cape Town v Reader and Others* 2009 (1) SA 555 (SCA). As indicated, these decisions did not, however, deter the parties in this matter from their approach that the September 2005 plans were validly set aside by the decision in the section 62 appeal. In consequence, it is unnecessary to touch on the correctness of these decisions in this case.

[10] The City informed each of the applicants about the submission of the new plans and invited them to advance representations as to why it should not be approved. Mr Herman, acting as attorney for both applicants, availed himself of this opportunity by writing two comprehensive and rather prolix letters of objection, first on 27 October 2006 and then again on 15 January 2007. These objections notwithstanding, the plans were approved by the City in September 2007 and hence became known in the proceedings as "the September 2007 plans" or, since it turned out to be the subject of the present litigation, "the impugned plans".

[11] On 23 October 2007 the applicants launched an application in the High Court to review and set aside the approval of the September 2007 plans.[11] When that application proved to be unsuccessful, they appealed to the Supreme Court of Appeal. The dismissal of that appeal, in turn, gave rise to the present application for leave to appeal to this Court.

In the High Court

[12] Like the earlier interdict application, the review application relied on the grounds that the September 2007 plans still contravened the 3,15 metre setback requirement (from

[11] *The Camps Bay Ratepayers' and Residents' Association and Another v Gerda Yvonne Ada Harrison and Others*, Case No. 15113/2007; *The Camps Bay Ratepayers' and Residents' Association and Another v Gerda Yvonne Ada Harrison and Others*, Case No. 9470/2006, 25 July 2008, unreported. The first case concerns a review application and the second concerns a demolition application, however, by agreement of the parties and by order of the Judge President, the cases were heard together. Because the review application was unsuccessful the demolition application fell away.

the street boundaries) required by title deed condition D(d) as well as the 10 metre height restriction imposed by section 98(2) of the Zoning Scheme Regulations. Apart from these, the applicants relied on the procedural ground that the officials of the City had failed to give due consideration to their objections, raised in the two letters by Mr Herman and that they had consequently failed to have regard to the unlawful features of the plans that were pointed out to them. The procedural objection will be best understood against the background of the statutory framework pursuant to which the City approved the September 2007 plans and the procedures adopted by its officials prior to that approval.

[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[12] (Building Act). The starting point is in section 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 section 6. One of these powers, in section 6(1)(a), is to make recommendations with regard to plans submitted for approval under section 4.

[12] 103 of 1977.

[14] The process of approving plans is provided for in section 7 of the Building Act.[13] I shall soon return to the provisions of section 7 in detail. Two comments are, however, pertinent for present purposes. Firstly, section 7(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 section 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 section 7.[14] 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 or property.

[15] As to the procedures observed by the City with regard to the impugned September 2007 plans, it appears that the plans were first sent to various departments for scrutiny. Included amongst these was the department responsible for verification and confirmation that plans submitted were consistent with the Zoning Scheme Regulations and title deed conditions, including height restrictions and building lines. Once the plans had been cleared by all these departments, it was submitted to the building control officer of the City, Mr C J Moir, for consideration. According to Mr Moir, he had particular regard to the objections raised in Mr Herman's letters of 27 October 2006 and 15 January 2007.

[13] See [32] below for section 7(1) of the Building Act, which is the only relevant subsection for present purposes.

[14] See for example *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* [1999] ZACC 11; 2000 (1) SA 1 (CC); 1999 (10) BCLR 1059 (CC) at para 168 and *Paola v Jeeva NO and Others* 2004 (1) SA 396 (SCA) at para 11.

He considered these objections in the light of other information before him, including the fact that the plans had been cleared by the various departments. He also visited the site and eventually concluded that the objections had no merit. Accordingly, he decided to recommend the approval of the plans. To this end he prepared a memorandum motivating his recommendation which was submitted to Mr S N Holden, to whom the City had delegated its authority to grant or refuse the approval of building plans under section 7 of the Building Act.[15] According to Mr Holden he considered all the information available to him, including the objections by the applicants summarised in the memorandum of Mr Moir. Ultimately, so he said, he was guided by Mr Moir's recommendation in his decision to approve the plans.

[16] Against this background, the applicants' procedural ground of objection, as developed in their affidavits before the High Court, was that the decision-maker, Mr Holden, had no proper appreciation of their objections. This, they contended, was because Mr Holden did not have their letters before him but merely relied on a list of the principle grounds of objection in the memorandum of Mr Moir which, according to the applicants, proved to be both inaccurate and wholly inadequate. The affidavits then proceeded to develop this theme by analysing the contents of the letters in great detail and then comparing them with the contents of Mr Moir's memorandum. What also appears clearly from the applicants' affidavits was that even with regard to their

[15] Section 28(4) of the Building Act permits "any local authority . . . [to] delegate any power conferred upon it by or under this Act, other than a power referred to in section 5 . . . to any person in its employ. . . ."

procedural grounds, their focus was on the recurring theme that the proposed building would contravene the height restriction imposed by the Zoning Scheme Regulations and the setback requirements in clause D(d) of the title deed conditions.

[17] In their replying affidavits before the High Court the applicants then for the first time sought to introduce a ground of review that they had never referred to at any prior stage of the protracted conflict. It relied on the contention that the September 2007 plans should not have been approved because they did not comply with the building line restrictions imposed by section 47 of the Zoning Scheme Regulations.[16] The relevant part of this section provides:

> "(1) Except as provided in subsection (2), no building which is a dwelling house . . . shall be erected nearer than 4,5 m to any street boundary of the site of such building provided that:
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> . . . .
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> (2) Where the average depth of the site of any building referred to in subsection (1) measured at right angles to a street boundary of such site does not exceed 20 m, such building may be erected nearer than 4,5 m but not nearer than 3 m to the street boundary concerned.
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> (3) Where the boundaries of a site are so irregular that doubt or uncertainty exists as to the correct value of the average depth of the site, the Council shall define such average depth in accordance with the intent of this section."

[16] See above n 7.

[18] Relying on these provisions, the applicants maintained in their replying papers that the building proposed by the impugned plans would be set back only 3,233 metres, as opposed to 4,5 metres, from its Blinkwater Road boundary.

[19] In answer to these new allegations the respondents filed a further set of affidavits. Apart from objecting in principle to a ground of review raised for the first time in reply, they responded to the factual allegations advanced in its support. Though admitting that the building was set back only 3,233 metres from the Blinkwater Road boundary, they contended that it would comply with section 47(2) because the average depth of the site, so they said, did not exceed 20 metres. Additionally, they relied on the exception in section 47(3) on the basis that the boundaries of the site were irregular to the extent contemplated by this subsection and that the City therefore complied with its obligation under the subsection by defining the average depth of the property as being less than 20 metres "in accordance with the intent of this section".[17]

[20] The High Court refused to entertain the challenge based on section 47 on the procedural basis that it was raised for the first time in reply and that the arguments relating to the interpretation of section 47 were, consequently, not adequately ventilated on the papers.[18] With regard to the alleged contraventions of the 10 metre height restriction in section 98(2) of the Zoning Scheme Regulations and the 3,15 metre set back

[17] See the wording of section 47(3) of the Zoning Scheme Regulations above [17].

[18] Above n 11 at paras 66-7.

required in clause D(d) of the title deed restrictions, the High Court held that these had not been established by the applicants on the facts. In view of the amendments to the September 2005 plans, the court held that the boundary walls on the September 2007 plans could no longer be described as "retaining walls". Consequently they did not contravene the title deed restrictions. The alleged contravention of the height limitation, so the court held, was the subject of a factual dispute between experts which, by the nature of motion proceedings, had to be decided in favour of the respondents.[19]

[21] As to the procedural ground of review that the decision-maker, Mr Holden, had not been properly and adequately informed of the objections raised by the applicants in their letters, the High Court gave a twofold answer. Firstly, although Mr Holden did not consider the actual letters of objection, he had Mr Moir's summary before him which adequately and accurately captured the essence of the applicants' objections. Secondly, and in any event, even if the memorandum was inadequate or inaccurate, it pertained to objections regarding height restrictions and building lines which proved to be unsupported by the facts.[20]

[19] Id at paras 42-61.

[20] Id at paras 75-8 and 87-8.

In the Supreme Court of Appeal

[22] After the matter had been argued in the High Court, this Court handed down its judgment in *Walele v City of Cape Town and Others*,[21] to which I shall presently return. Pertinent at this stage, however, is that *Walele* decided issues turning on: (a) section 7(1)(b)(ii)(ccc) of the Building Act which deals with the refusal of a building plan on the basis that the proposed building will derogate from the value of neighbouring properties; and (b) the requirements of an adequate "recommendation" by the building control officer in terms of section 7(1) of the Building Act.[22] When the applicants reached the Supreme Court of Appeal they accordingly added two *Walele* strings to their bow. Apart from relying on the same grounds of review as in the High Court, they also contended: (a) that the City had failed to pay due regard to their objections based on the derogation in the value of the second applicant's property; and (b) that Mr Moir had failed to furnish the decision-maker, Mr Holden, with a proper recommendation, particularly with regard to the negative effect of the proposed building on neighbouring properties as required by section 7(1)(b) of the Building Act.

[23] These new issues were disposed of summarily by the Supreme Court of Appeal on the basis that no issue relating to the derogation of value of joining or neighbouring properties had ever been raised as a ground of review in the High Court.[23] Had these

[21] [2008] ZACC 11; 2008 (6) SA 129 (CC); 2008 (11) BCLR 1067 (CC).

[22] Id at paras 9 and 22.

[23] Above n 1 at paras 19-21.

been raised, so the court held, the respondents may well have produced a valid answer. What the applicants thus sought to do, so the court concluded, was to rely on grounds of review introduced for the first time on appeal, which were neither raised in their papers, nor canvassed at all in the court below. That, the court held, could not be permitted.

[24] As to the grounds of review that were relied on by the applicants in the High Court, the Supreme Court of Appeal agreed, save for one exception, with the reasoning and the findings of that court.[24] The exception related to the objection based on section 47 of the Zoning Scheme Regulations that was raised for the first time in the replying affidavits. In the view of the Supreme Court of Appeal, the High Court should not have refused to consider this ground on the basis that it raised issues of fact not properly canvassed on the papers. On a proper analysis of the dispute raised, the Supreme Court of Appeal held, it did not relate to a question of fact but concerned only the interpretation and application of statutory provisions. Furthermore, so the Supreme Court of Appeal held, what should finally have swayed the High Court to consider this ground was the fact that the respondents had dealt with this objection on its merits and that they did not contend that they suffered any prejudice because it had not been raised at an earlier stage.[25]

[24] Id at paras 24-30 and 36-46.

[25] Id at paras 44-6.

[25] The Supreme Court of Appeal thus decided to consider the section 47 ground. Yet in doing so it came to the conclusion that the alleged infringement of these provisions already appeared in the original plans that had been approved in February 2005. Since the objection was only raised in replying affidavits filed in May 2008, the Supreme Court of Appeal held, it fell foul of section 7(1) of the Promotion of Administrative Justice Act[26] (PAJA). Section 7(1)(b) of PAJA requires that:

> "(1) Any proceedings for judicial review . . . must be instituted without unreasonable delay and not later than 180 days after the date —
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> . . . .
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> (b) . . . on which the person concerned was 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."

Consequently the Supreme Court of Appeal considered whether it should, in the interests of justice, extend the 180 day period under section 9(2) of PAJA.[27] The conclusion it came to was that the delay of more than three years was inordinate and that, because the

[26] 3 of 2000. See above n 1 at paras 52-5.

[27] The relevant part of this section provides:

> "(1) The period of—
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> . . . .
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> (b) 90 days or 180 days referred to in sections 5 and 7 may be extended for a fixed period, by agreement between the parties or, failing such agreement, by a court or tribunal on application by the person or administrator concerned.
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> (2) The court or tribunal may grant an application in terms of subsection (1) where the interests of justice so require."

reasons advanced by the applicants for the delay were insufficient, it should not be condoned.[28]

In this Court

[26] This brings me to the application for leave to appeal to this Court. According to well-established principle, an application for leave to appeal to this Court must meet two threshold requirements.[29] Firstly, the case must raise a constitutional issue or issues. Secondly, it must be in the interests of justice that leave to appeal should be granted, which includes that the appeal must have some prospects of success. In their endeavour to meet these requirements, the applicants advanced three grounds:

(a) There is uncertainty about the proper interpretation of section 7(1) of the Building Act in that certain aspects of this Court's decision in *Walele*[30] were departed from by the Supreme Court of Appeal in *True Motives 84 (Pty) Ltd v Mahdi and Another*[31] and in this case. This uncertainty, so the applicants contended, is inimical to the principles of sound public administration and more particularly to the correct and uniform application of the statutory provisions involved. A pronouncement by this Court on the correct interpretation of section 7(1) is therefore required.

[28] Above n 1 at paras 52-62.

[29] See for example *Walele* above n 21 at para 14-5.

[30] Id at paras 16-7.

[31] 2009 (4) SA 153 (SCA).

(b) In the light of the interpretation that the Supreme Court of Appeal attributed to section 7(1) of PAJA, the question arises whether an applicant who has timeously instituted review proceedings under PAJA within the 180 day period prescribed by the section, requires condonation under section 9(2) of the same Act to raise a new ground of review outside the 180 day period, or whether it can be raised as of right. This question constitutes a constitutional issue because it results in a limitation of both their right to just administration under section 33 of the Constitution and their right of access to courts in terms of section 34 of the Constitution.[32]

(c) The Supreme Court of Appeal's rejection of their objection based on clause D(d) of the title deed conditions amounted to condonation of the decision by the City to ignore that title deed condition. This in turn amounted to a

[32] Section 33 provides:

> "(1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.
> (2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.
> (3) National legislation must be enacted to give effect to these rights, and must—
> (a) provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal;
> (b) impose a duty on the state to give effect to the rights in subsections (1) and (2); and
> (c) promote an efficient administration."

Section 34 provides:

> "Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum."

negation of both their right to just administration under section 33 and their right to property in terms of section 25 of the Constitution.[33]

Section 7(1)(b) of the Building Act

[27] I start my investigation into the soundness of these contentions with reference to ground (a) which turns on section 7(1) of the Building Act. In my view it can be accepted that if the applicants' formulation of the issues that were decided by the Supreme Court of Appeal in this regard were held to be accurate, the two requirements for leave to appeal would be met. Section 7(1) of the Building Act concerns the exercise of an important public power and the interpretation of that section, plainly raises matters of constitutional import.[34] As to the interests of justice requirement, it seems to follow on the applicants' analysis of what the Supreme Court of Appeal held, that the difference in interpretation attributed to section 7(1)(b)(ii) by this Court, on the one hand, and the Supreme Court of Appeal, on the other, could very well give rise to uncertainty and inconsistency in the application of an important regulatory provision at the level of local government. This could hardly promote sound and uniform public administration.

[28] Moreover, in seeking to meet the two threshold requirements for leave to appeal, the applicants further argued that this Court should now confirm that the interpretation of

[33] Section 25(1) of the Constitution provides: "No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property."

[34] See for example *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others* [2004] ZACC 15; 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC) at para 25.

section 7(1) of the Building Act it adopted in *Walele* constitutes binding authority from which the Supreme Court of Appeal was not entitled to deviate as it did in *True Motives* and in this case. This argument raises issues concerning the principle that finds application in the Latin maxim of *stare decisis* (to stand by decisions previously taken) or the doctrine of precedent. Considerations underlying the doctrine were formulated extensively by Hahlo and Kahn.[35] What it boils down to, according to the authors, is: "certainty, predictability, reliability, equality, uniformity, convenience: these are the principal advantages to be gained by a legal system from the principle of *stare decisis*."[36] Observance of the doctrine has been insisted upon, both by this Court[37] and by the Supreme Court of Appeal.[38] And I believe rightly so. The doctrine of precedent not only binds lower courts but also binds courts of final jurisdiction to their own decisions. These courts can depart from a previous decision of their own only when satisfied that that decision is clearly wrong. *Stare decisis* is therefore not simply a matter of respect for courts of higher authority. It is a manifestation of the rule of law itself, which in turn is a founding value of our Constitution.[39] To deviate from this rule is to invite legal chaos.

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[35] Hahlo & Kahn *The South African Legal System and its Background* (Juta, Cape Town 1968) 214-5, referred to with approval in *Ex Parte Minister of Safety and Security and Others: In Re S v Walters and Another* [2002] ZACC 6; 2002 (4) SA 613 (CC); 2002 (7) BCLR 663 (CC) at para 57 and in *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA) at para 30.

[36] Hahlo & Kahn id (Footnotes omitted).

[37] See for example *Gcaba v Minister for Safety and Security and Others* [2009] ZACC 26; 2010 (1) SA 238 (CC); 2010 (1) BCLR 35 (CC) at paras 58-62; *Daniels v Campbell NO and Others* [2004] ZACC 14; 2004 (5) SA 331 (CC); 2004 (7) BCLR 735 (CC) at paras 94-5; *Van der Walt v Metcash Trading Ltd* [2002] ZACC 4; 2002 (4) SA 317 (CC); 2002 (5) BCLR 454 (CC) at para 39 and *Walters* above n 35 at paras 55-61.

[38] See for example *True Motives* above n 31 at paras 100-7 and *Afrox Healthcare* above n 35 at paras 26-33.

[39] Section 1(c) of the Constitution.

[29] I am mindful of the proposition that, when strictly applied, the doctrine of precedent may inhibit judges in lower courts from performing their constitutional duty under section 39(2) of the Constitution.[40] But we do not have to concern ourselves with the effect of section 39(2) on the binding authority of pre-constitutional decisions[41] because *Walele* obviously does not fall into that category. As to the influence of section 39(2) on post-constitutional decisions of higher tribunals, this Court expressed itself in no uncertain terms when it said:[42]

> "It does not matter . . . that the Constitution enjoins all courts to interpret legislation and to develop the common law in accordance with the spirit, purport and objects of the Bill of Rights. In doing so, courts are bound to accept the authority and the binding force of applicable decisions of higher tribunals.
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> . . . .
>
> High Courts are obliged to follow legal interpretations of the Supreme Court of Appeal, whether they relate to constitutional issues or to other issues, and remain so obliged unless and until the Supreme Court of Appeal itself decides otherwise or this Court does so in respect of a constitutional issue."

[30] Of course, it is trite that the binding authority of precedent is limited to the *ratio decidendi* (rationale or basis of deciding) and that it does not extend to *obiter dicta* or what was said "by the way". But the fact that a higher court decides more than one issue in arriving at its ultimate disposition of the matter before it does not render the reasoning leading to any one of these decisions *obiter*, leaving lower courts free to elect whichever

[40] Section 39(2) provides: "When interpreting any legislation, and when developing the common law or customary law, every court . . . must promote the spirit, purport and objects of the Bill of Rights."

[41] Which was the subject of consideration in *Afrox Healthcare* above n 35 at paras 27-30.

[42] *Walters* above n 35 at paras 60-1.

reasoning they prefer to follow. It is tempting to avoid a decision by higher authority when one believes it to be plainly wrong. Judges who embark upon this exercise of avoidance are invariably convinced that they are "doing the right thing". Yet, they must bear in mind that unwarranted evasion of a binding decision undermines the doctrine of precedent and eventually may lead to the breakdown of the rule of law itself. If judges believe that there are good reasons why a decision binding on them should be changed, the way to go about it is to formulate those reasons and urge the court of higher authority to effect the change. Needless to say this should be done in a manner which shows courtesy and respect. Not only because it relates to a higher court but because collegiality and mutual respect is owed to all judicial officers, whatever their standing in the judicial hierarchy.

[31] Yet, as I explained at the outset, the question whether the application based on this ground meets the two threshold requirements for leave, is entirely dependent on the accuracy of the applicants' analysis of what the Supreme Court of Appeal decided. Emanating from that analysis, this Court directed the focus of written and oral argument to the following issues:

(a) Whether the proper interpretation and application of section 7(1) of the Building Act arises in this matter and, if so;

(b) Its proper interpretation and application in the light of this Court's judgment in *Walele* and the judgment of the Supreme Court of Appeal in *True Motives*.

[32] I find a convenient point of departure for the appraisal of the applicants' response to these directions in the wording of section 7(1) itself. The relevant part of the section provides:

> "(1) If a local authority, having considered a recommendation [by the building control officer] 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 manner or will be of such 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 reasons for such refusal . . . ."

[33] Crucial for the evaluation of the applicants' contentions rooted in section 7(1) is the appreciation that the difference between the judgment of this Court in *Walele* and the Supreme Court of Appeal in *True Motives* is strictly confined to the interpretation of section 7(1)(b)(ii). What the difference comes down to is this: according to *Walele* the local authority cannot approve plans unless it positively satisfies itself that the proposed

building will not trigger any of the disqualifying factors referred to in section 7(1)(b)(ii).[43] If in doubt, the local authority must consequently refuse to approve the plans. According to *True Motives*, on the other hand, a local authority is bound to approve plans unless it is satisfied that the proposed building will probably, or in fact, trigger one of the disqualifying factors referred to in section 7(1)(b)(ii).[44] If in doubt, the building authority must consequently approve the plans. The practical implication of the difference appears to be this: under *Walele* it is the applicant for approval of the plans who must satisfy the local authority that the disqualifying factors do not exist. Under *True Motives* it is the objector to the plans who must satisfy the local authority about the positive existence of the disqualifying factors. Moreover, while *Walele* imposes an obligation on the local authority to ensure the absence of the disqualifying factors, no such duty arises from *True Motives*.

[34] It follows that the difference between *Walele* and *True Motives* has no bearing on the interpretation or the application of section 7(1)(a). Nor does it pertain to the issue of what would constitute an adequate recommendation by the building control officer under section 7(1) on the facts of a particular case. Common to the majority and the minority judgments in both *Walele* and *True Motives* was the acceptance that the "recommendation" is a jurisdictional fact for the decision under section 7(1) and that the contents of the recommendation, together with all the other information at the decision-

[43] *Walele* above n 21 at para 55.

[44] *True Motives* above n 31 at para 21.

maker's disposal, must be sufficient to enable him or her to make a proper decision in the light of all the facts and circumstances of the particular case.[45]

[35] The affidavit filed on behalf of the applicants in support of their application in this Court, shows an appreciation of all this when it is stated by the deponent that:

> "While the distinction between these cases [*Walele* and *True Motives*] is not relevant in the assessment of those objections by the Appellants made in terms of section 7(1)(a) of the Building Standards Act, the distinction is crucial in relation to the Applicants' objections in respect thereof, in relation to section 7(1)(b)(ii) of that Act."

[36] That narrows the enquiry down to this: did the applicants raise any objection with reference to section 7(1)(b)(ii) of the Building Act? The applicants' contention is that they did. In support of this contention they rely on the letters of 27 October 2006 and 15 January 2007 by Mr Herman to the City in which the objection was raised, albeit obliquely, that the building approved in the September 2007 plans would derogate from the value of the second applicant's property. This objection, so they say, must be regarded as having been raised under section 7(1)(b)(ii). The Supreme Court of Appeal considered this argument and came to the conclusion that no objection based on section 7(1)(b)(ii) was ever raised as a review ground in the applicants' papers in the High Court

[45] Compare *Walele* above n 21 at para 5 (description of the "recommendation" in that case), paras 59-72 (reasoning of the majority), and paras 118-9 (reasoning of the minority) with *True Motives* above n 31 at paras 39-57 (Heher JA, reasoning for the majority) and para 91 (Jafta JA, reasoning for the minority).

and that their opportunistic attempt – in the wake of *Walele* – to introduce section 7(1)(b)(ii) as part of their case on appeal, could not be countenanced.[46]

[37] In this Court the applicants did not claim that they had pertinently raised derogation of value as a review ground. Yet they maintained that they had always raised a section 7(1)(b)(ii) issue as part of their case. Their argument in support of this claim went along the following lines:

- In Mr Herman's letters to the City he explicitly raised the potential derogation in the value of second applicant's property as a ground of objection to the September 2007 plans.
- This ground of objection must be understood to be based on section 7(1)(b)(ii).
- One of the review grounds pertinently relied upon from the start, so the applicants contended, was that Mr Moir's recommendation was inadequate and misleading in that it had failed to inform the decision-maker, even in summary, of all the objections raised by the applicants.
- This must be understood to include their objection based on section 7(1)(b)(ii).
- In this way, so the applicants' argument concluded, derogation of value, which is a section 7(1)(b)(ii) issue, had been introduced as part of their case.

[46] Above n 1 at paras 19-21.

[38] I do not agree with this line of reasoning. The flaw lies in the assumption that derogation of value of neighbouring property is always a section 7(1)(b)(ii) issue. This is not so. "Value" must, in the context of section 7(1)(b)(ii), be understood as "market value". Traditionally market value is said to be the price that an informed buyer will pay an informed seller, both of them having regard to all the potential risks – both realised and unrealised – pertaining to the subject property.[47] One of the unrealised risks that the hypothetical parties will contemplate is that a neighbouring property, unimproved at the time of valuation, might be built upon, or even when built upon, might be replaced by a new building which may, for example, be more obstructive to the view enjoyed from the subject property. This will be of particular relevance in a case where the view from the subject property is of special import. That is why a property fronting directly on the ocean is generally worth substantially more than the property behind it, even when neither has been developed. While the latter bears the risk of being deprived of its view, the former does not.

[39] As a counterbalance to the risk that a new building may be more intrusive or render the subject property less attractive, the hypothetical buyer will have regard to the consideration that the new building will be constrained by the restrictions imposed by the Town Planning Scheme, the Zoning Scheme Regulations, the title deed conditions and so forth. The realisation of a risk already discounted will generally not have an influence on the market price. In consequence, the fact that a new building is then erected on the

[47] Compare *True Motives* above n 31 at para 30.

neighbouring property which interferes with previously existing attributes of the subject property, will not, in itself, be regarded as derogating from the value of the latter. This is so long as the new building complies with the restrictions imposed by law.

[40] Derogation from market value, therefore, only commences: (a) when the negative influence of the new building on the subject property contravenes the restrictions imposed by law; or (b) because the new building, though in accordance with legally imposed restrictions, is, for example, so unattractive or intrusive that it exceeds the legitimate expectations of the parties to the hypothetical sale. In (a) the cause of the depreciation will flow from a non-compliance with section 7(1)(a). It is only in the event of (b) that section 7(1)(b)(ii) comes into play.

[41] This, as I understand the applicants' letters of objection, is how they also saw the position at the time. Though they complained about the derogation from the value of the second applicant's property that would result from the proposed building that complaint was directly linked to their objections under section 7(1)(a), ie that the planned building would contravene the height restrictions of the Zoning Scheme Regulations and the setback requirements of the title deed conditions. I believe this is well illustrated in the letter of objection by Mr Herman on behalf of both applicants, dated 27 October 2006 when he said:

> "The approval of these building plans with their reliance on a fictitious and unattainable finished level of the ground abutting the façade of the building would permit the retention of the currently illegal building when the height of the façade would exceed the 10 m limitation (by some 2 m) were it not for the contrived and unattainable raised ground level which is depicted on the plans. That is, the unlawfully constructed three storey building achieves, and would retain, a physical height of one storey higher than the legitimate expectations of the owners of adjoining and neighbouring properties.
>
> We accordingly submit that the building in question ' . . . is to be erected' . . . in such a manner that it will be . . . undesirable and will . . . derogate from the value of adjoining and neighbouring properties, and that the Council is therefore compelled to reject the building plan application by virtue of the provisions of section 7(1)(b) of the [Building Act]".

[42] As I see it, the same can be said about the letter of 15 January 2007. The whole tenor of the complaint is that the execution of the September 2007 plans would result in an evasion of the height restrictions imposed by the Zoning Scheme Regulations through the mechanism of structures which would, in turn, contravene the title deed conditions of the property. Right at the end of the letter Mr Herman referred to the derogation of the value of the neighbouring properties that would allegedly follow. In support of this allegation, he relied on the affidavit by a sworn valuer, Mr J P van der Spuy, annexed to the letter. In his affidavit, Mr Van der Spuy referred to the significant contribution of an uninterrupted view to the value of seaside properties in general and to the value of the second applicant's property in particular. Departing from this premise he then pointed out that the "current structure" of the new building would have a severe impact on the panoramic view previously enjoyed from the second applicant's property and therefore

on its price. What Mr Van der Spuy did not say, is why he would regard that interference with the view as unwarranted. A reason that would best accord with the tenor of the applicants' objections would, however, flow from the fact that the "current structure" of the building offends against the legally imposed restrictions.

[43] In short, though the objection regarding the alleged derogation of value is tagged with section 7(1)(b)(ii), it is in reality a section 7(1)(a) objection propped up by the argument that the alleged contravention of legally imposed restrictions will result in a derogation of the second applicant's property value. What sets the seal on my understanding as the true import of Mr Herman's letters is the fact that the applicants, in their papers before the High Court, never even once referred to any derogation of value. Not even once did they suggest that, apart from their objections under section 7(1)(a), they wanted to raise a derogation from value objection under section 7(1)(b)(ii). The affidavit by Mr Van der Spuy was not even mentioned. As I see it, the only reasonable inference to be drawn from all this, is that even the applicants themselves never thought that they had raised a section 7(1)(b)(ii) objection, separately from their objections about the legality of the impugned plans under section 7(1)(a).

[44] It follows that the applicants' attempt to dress up their case as one under section 7(1)(b), for the first time on appeal to the Supreme Court of Appeal, was nothing more than an attempt to bring themselves within the *Walele* judgment. What is more, had the complaint been squarely raised on the applicants' papers that they had relied on section

7(1)(b)(ii) in their letters of complaint, and that Mr Moir had failed to convey that objection to the decision-maker, Mr Holden, these two officials would have been obliged to respond. Absent any allegation to that effect, we don't know what answer they might have given. I therefore find that section 7(1)(b)(ii) never formed part of the applicants' case until they sought to introduce it for the first time on appeal to the Supreme Court of Appeal.[48]

[45] This would have been the end of the applicants' case under the rubric of the difference between *Walele* and *True Motives*, but for another line of argument introduced by the applicants' counsel in this Court. It essentially went as follows:

- Even on the assumption that the complaints raised in their letters of objection to the City all related to an alleged non-compliance with section 7(1)(a), their case has always been that the memorandum by the building control officer, Mr Moir, to the decision-maker, Mr Holden, did not contain a fair and accurate summary of their objections to the plans.
- What this amounted to, so the applicants contended, was a complaint that the memorandum did not meet the standards of an adequate recommendation as required by section 7(1).
- This complaint, so the applicants' argument concluded, rendered the issues in their case indistinguishable from those raised in *Walele*.[49]

[48] Above n 1 at paras 19-21.

[49] In support of this contention they referred to *Walele* above n 21 at paras 55-63.

[46] As I see it, this whole line of argument misses the point. Under the present rubric the question is whether this case raises the different interpretations afforded to section 7(1)(b)(ii) in *Walele*, on the one hand, and *True Motives*, on the other. That has nothing to do with the question of fact whether or not the recommendation in this case was adequate to enable the decision-maker, Mr Holden, to make an informed decision. Whether the same question of fact arose in *Walele* or *True Motives* or both, is equally irrelevant in the present context. In this case the question of fact had been squarely raised by the applicants and answered against them by both the High Court and the Supreme Court of Appeal.[50] What counsel's contention therefore amounted to was that it will be in the interests of justice for this Court to embark upon the same factual enquiry, exclusively relevant to this case. For reasons I find self-evident, that contention cannot be sustained.

[47] Coming back to the issues on which this Court required the parties to direct their focus, I believe that the analysis of the applicants' argument shows that:

(a) Though the application of section 7(1)(a) of the Building Act arose in this matter, section 7(1)(b)(ii) did not.

(b) Since the difference between *Walele* and *True Motives* is strictly confined to section 7(1)(b)(ii), that difference does not arise in this case.

[50] See above n 1 at paras 24-30.

(c) Even on the assumption that that difference raises a constitutional issue, it is therefore not necessary nor in the interests of justice for this Court to revisit its interpretation of section 7(1)(b)(ii) in *Walele* for purposes of this case.

(d) By the same token it is neither necessary nor in the interests of justice for this Court to consider, for purposes of this matter, whether the majority of the Supreme Court of Appeal in *True Motives* was right in concluding[51] that this Court's interpretation of section 7(1)(b)(ii) in *Walele* did not form part of its *ratio decidendi* in that case and was therefore *obiter*.

Section 7(1) of PAJA

[48] This brings me to that part of the application which rests on the Supreme Court of Appeal's interpretation of section 7(1) of PAJA. The question arising under this heading was crystallised by this Court's directions which required argument on the following issue:

> "[T]he proper interpretation and application of section 7(1) of [PAJA] in relation to the applicants' challenge of the alleged contravention of section 47 of the applicable Zoning Scheme Regulations."

[49] To regain perspective, it will be recalled that the decision to approve the impugned plans was taken by the City in September 2007 and that the review application was

[51] See *True Motives* above n 31 at paras 35-7 (Heher JA) and 113-7 (Cameron JA concurring). Compare the dissenting judgment of Jafta JA at paras 85-90.

launched just over one month later in October 2007. There is no suggestion that there was any unreasonable delay in the bringing of the review application. In any event, it is clear that it was launched well within the 180 day period contemplated in section 7(1) of PAJA.[52] The provisions of the section arose with reference to the fact that the applicants had raised a new ground of review, based on section 47 of the Zoning Scheme Regulations, for the first time in their replying affidavits which were filed in May 2008. The City objected to this additional ground on the basis of the trite principle that it was impermissible to introduce new matters in reply. The applicants' explanation for doing so was, inter alia, that the provisions of section 47 were only brought to their notice in the course of investigations and preparations for compiling their replying affidavits. The High Court found this explanation wanting and agreed with the objection raised by the City.[53]

[50] The Supreme Court of Appeal held, however, that the High Court should not have refused to entertain the section 47 ground solely on the basis that it was raised for the first time in reply. The new ground, so the Supreme Court of Appeal held, raised no issue of

[52] Section 7(1) of PAJA provides:

> "Any proceedings for judicial review in terms of section 6(1) must be instituted without unreasonable delay and not later than 180 days after the date—
> (a) subject to subsection (2)(c), on which any proceedings instituted in terms of internal remedies as contemplated in subsection (2)(a) have been concluded; or
> (b) where no such remedies exist, on which the person concerned was 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."

[53] Above n 11 at paras 62-7.

fact. It concerned only the interpretation and application of a statutory provision. In consequence, so the Supreme Court of Appeal concluded, the respondents would not have been prejudiced if the High Court had entertained the new ground.[54] Yet, the Supreme Court of Appeal also refused to consider the merits of the section 47 ground. It did so because it decided that the introduction of this ground for the first time in May 2008, constituted a contravention of the 180 day limitation in terms of section 7(1) of PAJA and refused to allow an extension of that limitation under section 9(2) of the same Act.[55]

[51] There can be no doubt that the issue raised by the applicants under section 7(1) of PAJA is of a constitutional nature. The degree of confidence with which this statement is made derives from this Court's decision that the interpretation and application of PAJA – on which the challenged decision of the Supreme Court of Appeal turned – will always constitute constitutional matters because PAJA had been enacted to give content to the constitutional right to just administrative action enshrined in section 33 of the Constitution.[56] This holds true even where the outcome of the issue raised under PAJA depends on the determination of factual disputes.[57] The question is, however, whether it will be in the interests of justice to hear the appeal on this ground. As I see it that would

[54] Above n 1 at paras 44-6.

[55] Id at paras 52-62.

[56] Above n 34. See also *Alexkor Ltd and Another v The Richtersveld Community and Others* [2003] ZACC 18; 2004 (5) SA 460 (CC); 2003 (12) BCLR 1301 (CC) at para 23, in relation to the Restitution of Land Rights Act 22 of 1994.

[57] *Rail Commuters Action Group and Others v Transnet Ltd t/a Metrorail and Others* [2004] ZACC 20; 2005 (2) SA 359 (CC); 2005 (4) BCLR 301 (CC) at paras 51-2.

mainly depend on whether the appeal on this ground has some prospects of a successful outcome. The latter question in turn requires an investigation into the correctness of the Supreme Court of Appeal's decision on the facts that the applicants' introduction of the section 47 ground in May 2008 constituted a contravention of the 180 day limitation in section 7(1) of PAJA.

[52] The nub of the applicants' objection to the Supreme Court of Appeal's decision appears in their heads of argument:

> ". . . [t]he *mero motu* raising of section 7(1) of PAJA by the [Supreme Court of Appeal] and its consideration of a notional application for the extension of the 180 day time frame in respect thereof related only to one additional ground of review which was introduced into an extant application for review in the replying affidavits thereof, and not to the institution of those review proceedings *per se*."

[53] As appears from the statement, the applicants' argument sought to introduce two separate questions of principle. Firstly, whether it was permissible for the Supreme Court of Appeal to introduce a contravention of the 180 day limitation in section 7(1) of PAJA, *mero motu*. Secondly, whether the 180 day limitation applies to the introduction of a new ground of review into an existing application for review which had been brought timeously. As to the first question, there is authority for the proposition in *Mamabolo v Rustenburg Regional Local Council*[58] that at common law it is open to a court to raise the

[58] 2001 (1) SA 135 (SCA) at para 10. See also *Scott and Others v Hanekom and Others* 1980 (3) SA 1182 (C) at 1192E-1194A.

issue of inordinate delay in bringing a review application *mero motu*. As I see it this is in accordance with the established principle that courts have the power, as part of their inherent jurisdiction to regulate their own proceedings, to refuse a review application if the aggrieved party was guilty of unreasonable delay in initiating the proceedings.[59] I can think of no reason in principle why this should not be the position under the Constitution and PAJA as well.

[54] Of course, similarly to what was held in *Mamabolo*, a court will only raise section 7(1) of PAJA of its own accord where the delay is manifestly inordinate and even then, only when the applicant had been given an opportunity to explain the delay.[60] In this case, the applicants not only had an opportunity to do so, but in fact attempted to explain their delay, albeit in an endeavour to justify their belated introduction of a new ground of review, in reply. On the Supreme Court of Appeal's appraisal of the facts, to which I shall presently return, the delay amounted to a period of more than three years, which was clearly inordinate.[61]

[55] As to the second question the applicants seek to introduce, they contended that an interpretation of section 7(1) of PAJA that prevents the introduction of a new ground of

[59] See for example *Associated Institutions Pension Fund and Others v Van Zyl and Others* 2005 (2) SA 302 (SCA) at paras 47-8.

[60] See above n 58.

[61] In my view this renders this case distinguishable from *Eskom Holdings Ltd and Another v New Reclamation Group (Pty) Ltd* 2009 (4) SA 628 (SCA) – which the applicants sought to rely on – in which it was held that the delay was not such as to require an explanation (see specifically paras 15-7 of that judgment).

review – outside the 180 day period – into an extant application for review which was timeously brought, would constitute an undue restriction of their rights under both section 33 and section 34 of the Constitution. In support of this contention they referred to the fact that an applicant for review may very well find a new ground, for the first time, in the record of the challenged decision filed after the review application had been brought, or even from the answering affidavits filed on behalf of the decision-maker. This, so the argument went, may very well occur after the 180 day period in section 7(1) of PAJA had elapsed, although the application itself had been brought within that period.

[56] As far as it goes, there appears to be some merit in the applicants' argument. I believe, however, that the argument stems from a misunderstanding of what the Supreme Court of Appeal held. The Supreme Court of Appeal did not hold that a new ground of review cannot be introduced into an existing application after 180 days. What it did find was that, on a proper analysis of the facts, the applicants' section 47 ground was aimed at a decision that had already been taken in February 2005 and not at a decision which was taken in September 2007. That appears, I believe, from the following passage in the judgment of the Supreme Court of Appeal:

> "The infringement that is now complained of appeared on the original plan that was approved in February 2005. Yet the challenge was raised for the first time by the appellants more than three years later in the replying affidavits that were filed in May 2008."[62]

[62] Above n 1 at para 52.

[57] Whether or not the Supreme Court of Appeal was correct in its approach, first raises the issue regarding the interpretation of section 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. What that decision entails, is a question that cannot be answered in the abstract. It must depend on an evaluation of the facts.

[58] As to the facts of this case, it will be remembered that the objection which the applicants sought to raise under section 47 of the Zoning Scheme Regulations was based on the allegation that the building was too close to the Blinkwater Road boundary. But it is common cause that the "footprint" of the building, predominantly its setback from the boundary concerned had been established and approved as part of the original plans in February 2005. Likewise it is common cause that construction commenced on the basis of that approval in March 2005 which was also the time when the applicants became aware of the details of the original plans and when they complained about several aspects, the footprint not being one of them. In September 2005, rider plans were approved. Applicants challenged that approval but did not object to the legality of the

footprint of the building. In May 2006, further rider plans were submitted for approval. The applicants objected to those plans in two lengthy letters in which various detailed complaints were raised, but on neither occasion did they challenge the legality of the footprint. In September 2007 these further rider plans were approved. That, as we know, is the decision that the applicants took on review. In the circumstances, it would be safe to assume that in the absence of any objection against the footprint since February 2005 the officials of the City had no reason to revisit the footprint issue when they considered the September 2007 plans, nor was it suggested on the papers that they did. This is how I understand the reasoning of the Supreme Court of Appeal that led to its conclusion that the footprint issue had been decided in February 2005 and not in September 2007.

[59] In support of the argument that the Supreme Court of Appeal had erred in arriving at that conclusion, counsel for the applicants relied on a hypothetical case. As I understood the example it went as follows: Plan A is passed despite the fact that it contains an unlawful element. It is then challenged and set aside on the basis of that unlawful element. More than a 180 days later plan B is presented which contains the same unlawful element and it is again approved. Can it be suggested, so counsel for the applicants rhetorically asked, that plan B could not be challenged on that ground because it fell foul of the 180 days provision?

[60] In response, counsel for the City relied on the following notional case of their own. Let us assume, they contended, that 30 years ago Ms Harrison applied for building

approval under the Building Act and approval was granted. Assume that the approval was incorrectly granted as the building was insufficiently set back from the road in terms of section 47 of the Zoning Scheme Regulations. Assume that 30 years ago Ms Harrison proceeded to erect the building. Assume further that Mr Herman was her neighbour at that time but did nothing to challenge the approval. Now assume that in 2010, Ms Harrison applied for further building approval which was also granted. Assume that this time Mr Herman challenged it on review. Could it be argued, so counsel for the City rhetorically asked, that Mr Herman should be permitted to raise as of right the incorrect granting of approval in 1980, contrary to section 47 of the Zoning Scheme Regulations?

[61] Both hypotheticals are removed from the facts of this case. What they do illustrate, however, is that in applying section 7(1) of PAJA the question as to what 'decision' is being challenged, is one of fact. Undoubtedly that question can sometimes be difficult to answer, particularly because review proceedings are often directed at composite decisions. But it remains a question of fact.

[62] During argument counsel for the applicants also seemed to make something of the fact that the September 2007 plans were presented as a rider to the February 2005 plans and that the former therefore depended on the validity of the latter. I accept that that is so. The conclusion that an attack on the former must consequently be understood to be an automatic attack on the latter, however, is a *non sequitur*. As was explained in

Oudekraal Estates (Pty) Ltd v City of Cape Town and Others,[63] administrative decisions are often built on the supposition that previous decisions were validly taken and unless that previous decision is challenged and set aside by a competent court, its substantive validity is accepted as a fact. Whether or not it was indeed valid is of no consequence. Applied to the present facts this means that the approval of the February 2005 plans must be accepted as a fact. If the footprint issue was part of that approval, that decision must likewise be accepted as a fact unless and until it is validly challenged and set aside.

[63] The conclusion arrived at by the Supreme Court of Appeal on the facts was that the applicants' challenge of the footprint decision must be understood as an attack on the approval of the February 2005 plans. Despite the applicants' arguments to the contrary I remain unpersuaded that that conclusion was wrong. Reverting to the question at which this Court directed the argument under this heading, I therefore find that neither the Supreme Court of Appeal's interpretation of section 7(1) of PAJA, nor its application of the section to the applicants' introduction of the section 47 ground, can be faulted. It follows that the application for leave to appeal on this ground must fail because it bears no prospects of success.

The title deed conditions

[63] 2004 (6) SA 222 (SCA) at para 31.

[64] The final basis on which the applicants sought to motivate their application for leave to appeal turned on the restriction in clause D(d) of the title deed conditions of the property:

> "That no building or structure or any portion thereof, except boundary walls and fences, shall be erected nearer than 3,15 metres to the street line which forms a boundary of this erf."

[65] At the heart of the applicants' argument under this heading was their contention that the wall on the Blinkwater Road boundary of the property, as depicted on the September 2007 plans, constituted a contravention of clause D(d), which the City unlawfully ignored and that the Supreme Court of Appeal effectively condoned this unlawful conduct by rejecting their complaint.

[66] Again I am of the view that the applicants' contention raises a constitutional matter. At face value the contention relies on both the protection of property rights under section 25 and the right to just administrative action under section 33 of the Constitution read with PAJA. The latter, as I have said earlier, is per se a matter of constitutional import. What is more, if the Supreme Court of Appeal were wrong in its factual findings on this issue, the applicants would have wrongly been deprived of an opportunity to advance the contention that the action of the City "contravene[d] a law" as contemplated

in section 6(2)(f)(i) of PAJA.[64] This, as I see it, would render it in the interests of justice that this Court should decide the issue on appeal, subject to prospects of success.

[67] Flowing from the way in which the applicants formulated their contention, this Court directed that argument be presented on the following issue:

> "The nature of the restrictive conditions in clause [D(d)] of the title deed and whether a contravention of those conditions, if established, could lawfully be approved by [the City] in relation to the impugned development."

[68] The applicants' argument in response to these directions departed from the premise that the City unlawfully ignored a contravention of clause D(d), which unlawful conduct had in turn been condoned by the Supreme Court of Appeal. As I see it, a proper evaluation of the applicants' argument therefore calls for an antecedent enquiry into the accuracy of their contentions as to what the City decided and what the Supreme Court of Appeal held. In support of their contentions in this regard the applicants relied on the decision by Meer J in the interdict proceedings that some of the boundary walls on the September 2005 plans were in fact retaining walls which constituted structures in contravention of clause D(d). It is clear, however, that the wall deliberated upon by the Supreme Court of Appeal was a different one. While Meer J was dealing with walls on

[64] Section 6(2) of PAJA provides:

> " A court or tribunal has the power to judicially review an administrative action if—
>
> . . . .
>
> (f) the action itself—
>
> (i) contravenes a law or is not authorised by the empowering provision".

the Geneva Drive boundary of the property,[65] the Supreme Court of Appeal dealt with a wall on the Blinkwater Road side.[66] In the present context, the contrast between these different walls resulted from the fact that the property slopes steeply from Blinkwater Road in the east to Geneva Drive its northern and western sides so that, while on Geneva Drive the property is higher than street level, it is below the street level on Blinkwater Road.

[69] The September 2005 plans which Meer J considered contemplated boundary walls on Geneva Drive that would serve as retaining walls for structures and compact soil on the property. In deciding that these walls constituted "structures" that contravene title deed clause D(d), Meer J relied[67] on the following succinct statement by Grosskopf J in *BEF (Pty) Ltd v Cape Town Municipality and Others*:[68]

> "In ordinary parlance . . . 'boundary wall' means, in my view, a wall which encloses an open area. In particular I do not consider that a wall which forms the side of a building, or a retaining wall, would be described as a boundary wall even if such walls happen to be positioned on the boundary of the site."

[70] On the September 2007 plans the walls on Geneva Drive no longer performed a retaining function because the structures behind them had been removed. The only boundary wall that still performed a retaining function was the one on Blinkwater Road

[65] Above n 3 at paras 63-5.

[66] Above n 1 at paras 36-7.

[67] Above n 3 at paras 72-3.

[68] 1983 (2) SA 387 (C) at 396F-G.

where, as we know, the street level is higher than the level of the property. All this wall therefore retained was a footpath on municipal land. On these facts the City decided that this wall did not infringe the restriction in the title deed clause D(d). The Supreme Court of Appeal agreed with this decision. Relying on the same statement by Grosskopf J in *BEF* it said apropos the Blinkwater Road wall:[69]

> "It merely performs a boundary function as it encloses an open space, which is permitted by the restriction, and benefits the municipality on a portion of the latter's land external to the property. It seems inconceivable that this was the contemplated target of the restriction and I can find no transgression of the provisions of clause D(d)." (Footnote omitted.)

[71] The decision by the City, which was endorsed by the Supreme Court of Appeal, was therefore that on a proper construction of title deed clause D(d) the Blinkwater Road wall did not contravene the clause. The City never decided to ignore clause D(d), nor did the Supreme Court of Appeal condone any decision to that effect. The short answer to the applicants' objection against the Supreme Court of Appeal's finding in this regard is therefore that it departed from the wrong premise.

[72] But the applicants further contended that both the City and the Supreme Court of Appeal had erred in its factual finding that the Blinkwater Road wall did not contravene clause D(d). In support of this contention they argued that clause D(d) draws no distinction between a retaining wall which retains ground on the property and a retaining

[69] Above n 1 at para 37.

wall which retains ground outside the property. As I see it, however, the argument is flawed. Clause D(d) does not refer to a "retaining wall" at all. It distinguishes between "boundary walls" and other structures. While boundary walls are permitted closer than 3,15 metres from the street line, other structures are not. However, as in this case, the problem often arises in practice to establish whether a wall on the boundary which also performs other functions should be regarded as the one or the other. The test formulated by Grosskopf J in *BEF*, that the applicants subscribe to – in my view rightly so – was aimed at resolving this practical difficulty. On the application of this test I agree with the Supreme Court of Appeal, for the reasons it had given, that the wall on Blinkwater Road was indeed a boundary wall which did not contravene clause D(d).

[73] In this light, I think the questions at which this Court directed argument should therefore be answered thus:

(a) A contravention of the restrictive condition in clause D(d) has not been established.

(b) Questions as to the exact legal nature of the restriction and whether its contravention can be lawfully ignored by the City, therefore do not arise.

[74] In the result, the application for leave to appeal on this ground must fail for lack of prospects of success.

Conclusion

[75] The overall conclusion I arrive at is therefore that the application for leave to appeal must be refused on all three grounds because the interests of justice requirement has not been satisfied.

[76] As to the question of costs, I see no reason why the applicants should not bear the costs of these proceedings. As the applicants' counsel quite rightly argued, the rule in constitutional matters is that an unsuccessful party is not ordinarily ordered to pay costs, lest litigants be discouraged from asserting their constitutional rights.[70] We now know, however, that this is in reality a property dispute between two neighbours.[71] It is also true that the first applicant is to some extent a public interest organisation. Yet it allowed itself to be drawn into a dispute between two neighbouring property owners and it now has to bear the consequences of that decision. Though I do not wish to cast any aspersions on the motives of either applicant, it is a well known principle that good intentions per se do not afford protection against an adverse costs order.[72]

Order

[77] For these reasons the following order is made:

(a) The application for leave to appeal is dismissed.

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[70] See for example *Dikoko v Mokhatla* [2006] ZACC 10; 2006 (6) 235 (CC); 2007 (1) BCLR 1 (CC) at para 103 and *Affordable Medicines Trust and Others v Minister of Health and Others* [2005] ZACC 3; 2006 (3) SA 247 (CC); 2005 (6) BCLR 529 (CC) at para 138.

[71] Compare *Biowatch Trust v Registrar, Genetic Resources, and Others* [2009] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC) at paras 24-5.

[72] See for example *Claase v Information Officer, South African Airways (Pty) Ltd* 2007 (5) SA 469 (SCA) at para 11 and *In re Alluvial Creek, Ltd* 1929 [CPD] 532 at 535.

(b) The first and second applicants are ordered, jointly and severally, to pay the costs of the first and second respondent incurred in these proceedings, in both instances including the costs of two counsel.

Ngcobo CJ, Moseneke DCJ, Cameron J, Froneman J, Jafta J, Khampepe J, Mogoeng J, Nkabinde J, Skweyiya J and Yacoob J concur in the judgment of Brand AJ.

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