REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

Case No: 9871/2008

In the matter between:

DENNIS MARK VAN DER WESTHUIZEN	FIRST APPLICANT
AMANDA LEIGH VAN DER WESTHUIZEN	SECOND APPLICANT
THE CAMPS BAY RESIDENTS AND RATEPAYERS ASSOCIATION	THIRD APPLICANT

AND

DAVID MICHAEL BUTLER	FIRST RESPONDENT
JOHN STEPHEN MCKEON	SECOND RESPONDENT
THE CITY OF CAPE TOWN	THIRD RESPONDENT
THE PREMIER OF THE PROVINCE OF THE WESTERN CAPE	FOURTH RESPONDENT
NEDBANK LIMITED	FIFTH RESPONDENT
THE MEMBER OF THE EXECUTIVE COUNCIL FOR ENVIRONMENTAL AFFAIRS AND DEVELOPMENT PLANNING FOR THE PROVINCE OF THE WESTRN CAPE	SIXTH RESPONDENT

CORAM	**:**	**D M DAVIS J**
JUDGMENT BY	**:**	**DAVIS J**
FOR THE APPLICANT	**:**	**ADV. BINNS – WARD SC & ADV I C BREMRIDGE**
INSTRUCTED BY	**:**	**SLABBERT VENTER YANOUTSAS INC.**
FOR THE RESPONDENTS 1st & 2nd	**:**	**ADV SCHALK BURGER (SC) ADV H C SCHREUDER**
INSTRUCTED BY	**:**	**JOHAN DU PLESSIS ATTORNEY**
DATE OF HEARINGS	**:**	**12 AUGUST 2008**
DATE OF JUDGMENT	**:**	**20 AUGUST 2008**

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CASE NO: 9871/2008

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In the matter between:

DENNIS MARK VAN DER WESTHUIZEN APPLICANT

and

DAVID MICHAEL BUTLER RESPONDENT

JUDGMENT

DAVIS, J

Applicants seek the following interim interdictory relief:-

1. An order interdicting and restraining the first and second respondents from proceeding with any further building work or construction on erf 590, Camps Bay, at No 35 Camps Bay Drive, Camps Bay.
2. An order interdicting and restraining the first and second respondents from selling, transferring or otherwise alienating erf 590, Camps Bay.

These interdicts are sought pending the final determination of:-

1. A review proceeding launched on the same papers for the setting aside of the approval purportedly granted by third respondent in terms of section 7 of the National Building Regulations and Building Standards Act 103 of 1977 ('The Building Act') of building plan applications submitted by first and second respondents in terms of section 4 of the Act in respect of the structure under construction and also setting aside the decisions purportedly in terms of section 15 of the Land Use Planning Ordinance 15 of 1985 (LUPO) granting departure from designing scheme regulations in respect of the use and development of respondents' property, as well as the decision by fourth respondent purporting to relax restrictive conditions of title registered against the title deeds of respondents' property.

2. An application to be brought thereafter for the demolition of the construction on the first and second respondents' property to the extent that this cannot be altered or regularised so as to comply with the zoning regulations and the applicable restrictive conditions at the time.

The respondents have resisted the relief primarily on two grounds:

1. Urgency.

2. Applicants failed to exhaust their internal remedies.

URGENCY

Mr Burger, who appeared together with Mr Schreuder for the first and second respondents, submitted that the grounds of urgency relied upon were based upon the fear that the completed state of the building might render an eventual successful review *brutum fulmen*; in other words, no order for demolition would be granted a successful review notwithstanding due to a reluctance on the part of the Court to order demolition of the completed building. In addition, applicants articulated on apprehension that respondents might dispose of the property pending the resolution of their review application to which I have already made reference. Mr Burger submitted that both of these grounds had been addressed in an undertaking that had been given by the respondents. The undertaking initially proffered by first and second respondents was then amplified in court. In its final form it read thus:

> "The respondents will not rely on the state of completion of the structure post 20 June 2008 in any future application, process or proceeding relating to the building whether dealing with the relaxation or departure of any title or zoning condition."

In addition, Mr Burger submitted that applicant had delayed unreasonably is in launching this application.

Mr Binns-Ward, who appeared together with Mr Bremridge on behalf of the applicant, submitted that the test for urgency was whether the relief sought would be rendered nugatory if the matter were to be heard in the ordinary courts.

The matter was urgent because the undertaking could not adequately safeguard applicant's rights. Further there had been no unreasonable delay on the part of applicants.

In Mr Binns Ward's view, the matter was urgent because the undertaking could not adequately safeguard applicant's rights. Further there had been no unreasonably delay on the part of applicants. These arguments require recourse to the factual background.

BACKGROUND

Building work had been in progress on first and second respondents' property for some while before it had attracted the concern of applicants. To the extent relevant, the progress of events between the commencement of activity prior to building on respondents' property and the institution of the applicant are set out in the founding affidavit as follows:

> "During the course of 2007 second applicant and I noticed that the previously existing dwelling house on the respondents' property was demolished and that certain excavation on the property had started. We became aware some time during the course of 2007, though we cannot recall on what date, that construction on the respondents' property had commenced. At that time we had no reason to suspect that there had been any irregularity in the approval of building plans for construction on the respondent property or the granting of departures in respect thereof. Indeed, we were unaware that any departures had been sought or granted. We furthermore assumed that the local authority would not have approved any departures or deviations from applicable law in respect of the construction on the respondent property without reference to

surrounding property owners, including second applicant and I. We also had no reason to suspect that the construction being carried out on the respondent property was in any way unlawful. In this regard we relied on the local authority to conduct itself in accordance with the applicable law and more particularly to refuse to grant approval of any plan which did not comply therewith. We therefore assumed that any plan which had been passed in respect of construction on respondents' property had been lawfully passed and complied with applicable law and further that no departures or amendments of title deeds had been granted in respect thereof. On that basis similarly assumed that the construction which was taking place on respondents' property was lawful and in accordance with properly approved plans.

The construction on the respondent property continued until approximately the commencement of the builders' holidays in December 2007. At that stage construction on the respondent property had reached the point where the wet works up to and I believe including level 3 of the building had been completed. To the best of our recollection, the

concrete slab for level 3 had been laid and the external and internal walls at level 3 had been constructed at that time. Not suspecting that there was anything untoward or improper with regard to the building activities being carried on on respondents' property, second applicant and I did not at that time take particular notice of the precise extent or nature of construction thereon.

In the period in Christmas 2007 and new year, and while we were in Clanwilliam on holiday, I was introduced to Mr Chris Willemse... In the context of that discussion, Mr Willemse said to me that he thought that there were certain irregularities relating to the construction on the respondents' property and suggested I investigate the situation...

Nevertheless, on my return to Cape Town in January 2008, I visited the third respondent's building inspector, Mr Wilkinson, said to him that I was concerned and that I had been advised that there may be certain irregularities in respect of the construction being carried out on the respondents' property and requested that he investigate and report back to me in this regard... There was,

however, no construction taking place on the respondents' property at this stage due, I understand, to the builders' holidays...

I have subsequently discovered that the building contractor with whom the respondents had contracted to carry out the construction on the property had gone insolvent and that for that reason the building work did not commence in the new year. It apparently took the respondents some time to conclude a contract with a new contractor and it was not until very recently, I believe some time during April or May 2008, that construction re-commenced.

Nevertheless, on 13 February 2008, Mr Willemse, Mr Kinderwater and I attended the third respondent's offices to inspect the plans... I emphasise it was not until I attended at the third respondent's offices with Mr Willemse that second applicant and I became aware that either the first set of plans numbered 484221 or the second set of plans numbered 499482 had been approved by the third respondent. At that stage we were as yet unaware that the departures had been granted or

that title deed had been relaxed as aforesaid...

In the circumstances, second respondent and I instructed a town planning expert, Mr Tommy Brummer, to attend at the offices of the third respondent and investigate the third respondent's file and in particular to consider the plans which had been approved in respect of the respondents' property 2005 and 2007 as explained above. Mr Brummer duly did this and reported back to me in respect thereof on 3 April 2008.

From Mr Brummer's report, it became apparent that the departures referred to above had not been lawfully granted, that the 1,57 metre lateral building plan title condition had been improperly relaxed, that the plans reflected a contravention of the title deed relating to the street building and that there appeared to be an infringement of the zoning scheme with regard to the number of domestic quarters reflected on the plan, and in the light thereof that the first and second set of building plans should not have been approved."

The light of this chronology, as set out by applicants is,

essence, common cause. Mr Binns-Ward submitted that the applicants had not forfeited any claim to urgency by failure to institute proceedings at a sooner date. Their conduct and the inquiries as set out in the founding affidavit which led up the litigation were directed and obtaining the facts clarifying the legal position and seeking to engage with first, second and third respondents in order to avoid litigation. In his view, the progress of building on respondents' property was well short of that reached before similar proceedings were instituted for interdictory relief by a neighbour and by the Ratepayers Association as took place in Camps Bay Residents and Ratepayers Association and Another v Avadon 23 (Pty) Ltd (unreported judgment of Foxcroft J, 18 March 2005: CPD case No 17364/05). See also P S Booksellers (Pty) Ltd and Another v Harrison and Others, 2008(3) SA 633 (C) at paras 101 to 105.

Mr Binns-Ward submitted further that the undertaking offered by first and second respondents which I have set out earlier in this judgment did not in any way subvert applicants' case for urgency. The undertaking notwithstanding, if the construction of the building continued, there would always be the danger that the then existing construction would be taken into account by the relevant authorities or the Court adjudicating the application for review *mero motu* that the Court or a later

relevant authority would consider that first and second respondents had built themselves into an impregnable position and therefore there was no basis by which the Court could order the demolition of the building. Alternatively the impregnable position would then have an influence on proceedings whatever undertaking had been offered in the first place by applicants.

Mr Burger took issue with the submissions made by Mr Binns-Ward concerning the delay in the institution of the proceedings. In his view, third applicant knew about the alleged grounds of review from at least March 2007. First and second applicants and the chairperson of the third applicant discussed the construction as outlined in the affidavit of first applicant during the 2007 December holidays. By then the extent of the structure would have been obvious to anyone who cared to look, especially to the first and the second applicants, the decision sought to be impugned had been taken a long time previously, the application was issued in the court recess on 20 June 2008 and enrolled for hearing on 1 July 2008. By then the construction of the building was in an advanced stage of completion, some R13,4 million of expenditure had been incurred by respondents. The application had therefore been brought with unreasonable delay and accordingly there was no basis to contend that this Court, on the matter of urgency,

should hear the application for interim relief.

I determined at the commencement of the hearing that the matter was in fact urgent and having outlined the full range of arguments presented to me by both parties, it is incumbent upon me to provide reasons for this decision.

In my view, Mr Binns-Ward correctly contended that the 180 day rule which had been raised as support for Respondent's proposition that the application before this Court was not urgent is not applicable directly to the question of urgency in respect of an application for interim relief. The applicants had explained in some detail how and why it had taken such a long time to launch this application. Those explanations are, in my view, plausible. They are the relevant grounds to be assessed in determining whether the applicant had acted in an unreasonable fashion.

Furthermore, I am satisfied that whatever undertaking may be given, there is sufficient precedent to justify the concern that the existence of a completed building would and could have an inference on the ultimate relief granted in a review proceeding and accordingly and for that reason the application as launched was justified.

With the issue of urgency of the present application for interim relief then having been determined, I now turn to the substantive questions regarding the interim relief sought.

REQUISITES FOR INTERIM RELIEF

The requisites for interim relief are trite. Applicants must show:

1. A *prima facie* right.

2. A well-grounded apprehension of irreparable harm if the interim relief is not granted and the ultimate relief is eventually granted.

3. A balance of convenience in favour of the granting of the interim relief.

4. The absence of any other satisfactory remedy.

As stated earlier, much of the argument raised by respondents concerned the question of internal remedies which applicant had failed to exhaust

There was an additional argument developed by Mr Burger in support of the submission that no *prima facie* right existed in

this case sufficient to justify the relief sought. He contended that a unique aspect of this case was that the building had taken place pursuant to permission (although in the case of staff quarters, it appears to be common cause that the construction had exceeded the permission which had been so granted). Respondents' version is contained in the answering affidavit in which the following is stated:

> "The second respondent and I are not acting unlawfully in presently continuing with the construction work. We are doing so strictly in accordance with duly approved building plans. Until such building plans have been reviewed and set aside, the applicants do not have a *prima facie* case for an interim order."

Respondents therefore contend that the existence of building plan approval excludes any proper basis for the applicants to establish even *prima facie* that the construction work they seek to interdict is unlawful. Respondents' contention is essentially based on a judgment delivered by Farlam, A J (as he then was) in Coalcor (Cape) (Pty) Ltd and Others, the Boiler Efficiency Services CC and Others, 1990(4) SA 349 (C) at 358 to 360. In particular Farlam, A J said:

"The basis of applicants' claim is that if the review succeeds and the rezoning of the property is set aside, first respondent will, by operating a coal yard on the property, be acting in contravention of the relevant zoning provisions and therefore illegally and will consequently be competing unlawfully with them and thus committing a delict against them in respect of which they have already obtained a final interdict. If I grant the interim interdict asked for against first respondent, I shall be interdicting it from committing an act I have already held to be unlawful at this stage, and I'll be issuing the interdict merely because the action upon which they are presently engaged may be rendered unlawful at a later stage. In my view, applicants have not established the right to an interim interdict against first respondent because they have not shown, even *prima facie*, that first respondent is at present committing a delict against them...

In my view, second respondent's decision to rezone the property is not void, but at best for the applicants voidable, and as I has not yet been set aside, applicants have not, as I have already said, established one of the requisites for an interim

> interdict in this case, namely a right established *prima facie* even if open to some doubt. The claim for an interdict to prevent a delict must accordingly fail because no delict has been established at this stage, even *prima facie*."

This judgment has not met with universal approval. See for example Conradie, J (as he then was) in Corium (Pty) Ltd v Myburgh Property Langebaan (Pty) Ltd,1993(1) SA 853 (C) at 856.

As representative of an alternative, approach Nicholson J in Ladychin Investments (Pty) Ltd v South African National Roads Agency Ltd and Others, 2001(3) SA 344 (N), at 357C to E held:

> "Numerous examples were bandied about the Court to illustrate in what circumstances the Court would be justified in granting interim relief on the basis that there was a strong case on review. If the advertisement had been published in a foreign language or not published at all, neither counsel had any difficulty in agreeing that interim relief had to be granted. In my view the Court has to evaluate the prospects of success in the review application. If there are such prospects of

success, then the Court has to discretion whether to grant interim relief in the form of a prohibitory interdict."

Mr Binns-Ward submitted that in any event the authority which flowed from Coalcor had been displaced by the approach adopted by the Supreme Court of Appeal in Oudekraal Estates (Pty) Ltd v City of Cape Town, 2004(6) SA 222 (SCA). In that case it was made clear that an unlawfully-made administrative decision was nothing more than a relevant fact to be taken into account.

The importance placed by Mr Binns-Ward on the Oudekraal case necessitates a brief examination of this important decision. In that case, appellant's predecessor in title had secured approval in terms of the Townships Ordinance of 1934 (Cape) during the 1950's from the Administrator of the Cape for the development of certain land on the slopes of Table Mountain. The proposal was therefore to develop a township. It appeared that this decision to grant township development rights to the applicant had ignored the existence on the land of several kramats, that is ancient graves of spiritual leaders of the Moslem community and places of pilgrimage.

The Supreme Court of Appeal found that the presence on the land of religious and cultural sites was of such significance

was a relevant consideration that should have been taken into account before approval was granted. In accordance with general administrative law principles, the Court said that the approval by the administrator of the township was unlawfully invalid at the outset See (para 26). However, the Court went on to hold that this did not mean that the City Council was entitled to ignore the apparent approval and refused to approve the engineering services plan which was necessary to allow appropriate services to be provided to the township.

The relevant passage of the judgment reads:-

> "[W]as the Cape Metropolitan Council entitled to disregard the administrator's approval and all its consequences merely because it believed that they were invalid, provided that its belief was correct? In our view, it was not. Until the Administrator's approval (and thus also the consequences of the approval) is set aside by a court in proceedings for judicial review, it exists in fact and it has legal consequences that cannot simply be overlooked. The proper functioning of a modern state would be considerably compromised if all administrative acts could be given effect to or ignored depending on the view subjects take to the validity of the act in question. No doubt it is for this reason that our laws has always recognised that even an unlawful

> administrative act is capable of producing legally valid consequences for so long as the unlawful act is not set aside." (para 25)

The Court concluded that the administrator's approval existed in fact even if it did not exist in law and the Council could not ignore this decision. It said:

> "[T]he proper inquiry in each case - at least at first - is not whether the initial act was valid, but rather whether its substantive validity was a necessary precondition for the validity of consequent acts. If the validity of consequent acts is dependent on no more than the factual existence of the initial act, then the consequent act will have legal effect for so long as the initial act is not set aside by a competent court." (para 31).

The conclusion reached was therefore that the validity of the act subsequent to the grant of permission did not depend upon the grant of permission did not depend upon the legal validity of the first act but only upon is factual existence. The Council had power to approve the relevant engineering plans even if the administrator's approval was invalid.

Prof Forsyth. 'The theory of the second actor revisited' (2006 Acta Juridica 209 at 224) makes a very important point with

regard to the Oudekraal judgment, which is of relevance to the present dispute:

> "The Court rightly remarks that `the proper inquiry in each case - at least at first time - is not whether the initial act was valid, but rather whether substantive invalidity was a necessary precondition for the validity of subsequent acts."

But it then goes on to conclude without a close analysis for the powers of the Cape Metropolitan Council under the relevant ordinances that the importance of certainty meant that:-

> [A] public authority cannot justify a refusal on its part to perform a public duty by relying without more on the invalidity of the originating administrative act; it is required to take action to have it set aside, not simply to ignore it.
>
> This dictum seems to suggest, in the interests of certainty, a general rule of thumb to the effect that all public authorities must accept as valid the decisions of other authorities - or launch a challenge to their validity in court. But this cannot be a general rule; and the availability of collateral challenges shows that this is so. There are occasions... where the second actor is entitled,

> indeed is bound, `simply to ignore' the invalid first act. Other values (such as personal liberty) as well as the words in the relevant statute will in the appropriate circumstances trump certainty. An analysis of the powers of the Cape Metropolitan Council would probably have concluded that it had power to act on the engineering services plan even if the original approval only existed in fact, but there cannot be a rigid rule that this is the case. It depends in each case on the legal analysis of the powers of the second actor."

This analysis, by way of extension, is, in my view, applicable to the facts in the present case. Even if the initial decision regarding the building remains "valid" until set aside (on review), the Court must decide whether the full consequence of that first act remains to be rigidly enforced until set aside, in which case there could be no interim relief sought or granted or whether it can examine the factors that go to the inquiry to establish interim relief before deciding whether to exercise its discretion. In my view the clear implications of Oudekraal, supra, particularly as explicated by Forsyth, together with a rejection of the rigid formalism that would subvert all such applications (in effect, along the Coalcor approach), even where the interests of justice compel otherwise, dictates that

there should be a rejection of respondents' argument based on Coalcor, supra. The permission which had been initially granted and which will now be the subject matter of a review application cannot be an irresistible obstacle to the interim relief sought in this case.

DELAY

Respondents have contended, secondly, that the applicants are precluded from obtaining relief on review by reason of the institution of proceedings allegedly outside the 180 day limit prescribed in terms of section 7(1) of the Promotion of Administrative Justice Act 3 of 2000 ('PAJA') and by reason of an alleged failure to exhaust domestic remedies as contemplated in terms of section 7(2) of PAJA.

I turn then to deal with this objection, namely the 180 day rule. 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 sub-section (2)(c) on which any proceedings instituted in terms of internal remedies as contemplated in sub-section (2)

(a) have been concluded; or

(b) where no such remedies exist on which a person concerned who was informed of the administrative act 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."

From the provisions of section 7(1), the relevant 180 day period should commence, not on the date of the approval of the building plans, but from the date the applicants became aware of such approval. Mr Binns-Ward submitted that, on a proper interpretation, particularly having regard to the reference in the section to applicants' knowledge of the reasons for the decision, the 180 day rule would commence from the time the aggrieved party first became aware, or should first reasonably have become aware of the characteristics of the administrative action which it contends are unlawful.

In my view it is correct that persons who are not entitled to notice of building plan applications by their neighbours because the statute entrusts the local authority to act as a guardian to look to the protection of their interests, are not required to check actively for building plans every time any

building work commences on a neighbour's property.

This application is predicated on what applicant considers to be intrusive and objectionable effects of alleged irregularities is the relevant phase. The overall effect was not something that applicants could be reasonably expected to become aware of merely from viewing the foundations of the construction. However, applicant did not stand by and induce, on the part of respondents, a the misapprehension that there was to be no complaint against the intended structure. As I have already set out in the facts, applicants sought to engage with the respondents and negotiate some form of compromise. Indeed, as I shall refer to later, correspondence was exchanged between the parties at a fairly early date, which would have put respondents on their guard. I do not consider, therefore, that, on the basis of the 180 day rule in S 7(1) of PAJA, that it can be said that applicants have not established a *prima facie* right.

That, therefore, leads to the final and third objection raised by respondents, namely the failure to exhaust internal, domestic remedies.

DOMESTIC REMEDIES

Mr Burger submitted that the applicants enjoyed internal

remedies which they had failed to exhaust (see section 7(2)(a) of PAJA). In this connection first and second respondents contended that applicants should have pursued an appeal in terms of section 9 of the Building Act. In particular, Mr Burger contended that applicants should have explored a remedy in terms of section 9 of the National Building Regulations Act, which determines that any person who disputes the interpretation or application by a local authority of any national building regulation or any other building regulation or by-law may appeal within a prescribed period to a review board.

In this respect, Mr Burger submitted that the application for a review was based *inter alia* on the erroneous interpretation or application by third and fourth respondents of the relevant National Building Regulations (insofar as the approval of building plans submitted by first and second respondents are concerned), their interpretation of such building regulations and/or the zoning scheme regulations.

Mr Binns-Ward referred to the express wording of section 9(1)(c) of the Building Act which provides:

> "Any person who disputes the interpretation or application by a local authority of any national building regulation or any other building regulation

or by-law may, within the prescribed period in the manner and upon payment of the fees prescribed by regulation, appeal to a review board."

Mr Binns-Ward contended thus that the applicants case was not about a dispute concerning the interpretation of any national building regulation or by-law. Applicants' case, on review, was premised on the failure by the local authority to comply with section 7 of the Building Act and the illegality of the underpinning decisions to grant departures from the zoning scheme regulations and "relax" applicable title deed restrictions.

These opposing contentions necessitate a brief examination of the grounds of review which have been relied upon in the review application. Briefly they can be stated thus: Applicants contend as follows: the building, as reflected in the approved plans, is not in accordance with applicable law, more particularly they claim it contravenes the applicable provision of the zoning scheme regulations in the following respects:-

1. Section 11, in that it is constructed in part on a sole retaining structure or similar device exceeding 2,1 metres in height above the existing ground level for which the local authorities' consent was not obtained.

2. Section 98, in that by reason of the contravention the façade of the building at a number of points is more than 10 metres above the level of the ground abutting such façade.

3. Section 53, in that the building exceeds three stories in height. Consideration of the building plan shows five stories above the basement storey. Respondent has sought to avoid this conclusion by reliance on section 71 of the zoning scheme's regulations. By contrast, applicants contend that respondents reliance on section 71 of the zoning scheme regulations are misplaced. Section 71 is in chapter viii of the zoning scheme regulations which, save where expressly otherwise provided, is applicable to buildings "other than dwelling houses, double dwelling houses, groups of dwelling houses, and outbuildings thereto."

4. Section 20(3), in that the building is provided with two domestic staff quarters. Respondents have conceded a breach of the zoning scheme in this respect and have indicated that they will be required to submit rider plans changing some of the area currently labelled staff accommodation to bedroom space.

In addition, applicants contend that the building, as reflected in the approved plans, is in contravention of the reciprocal restrictive title deed conditions applicable to applicants' and respondents' properties, in that the contemplated structure infringes:-

1. Title deed condition 6A.1(a), in that more than half of the area of the erf is built upon.

2. Condition 6A.1(d), in that it falls in part to be erected less than 4, 72 metres from the street boundary.

3. Condition 6A.1(f), in that it falls in part to be erected within 1, 57 metres of the lateral boundaries.

Applicants further contend that the purported approval of the building plans by the local authority occurred, pursuant to its unlawful grant of certain departures from the minimum setback provisions in the applicable zoning scheme regulations without advertisement thereof to the applicants as contemplated by section 15 of LUPO.

Further, the failure by the local authority to comply with the provisions of the Building Act, more particularly its purported

approval of the building plans without consideration of a motivated report from the building control officer and without consideration of the disqualifying factors as set out in section 7(1)(b)(ii) of the Act. The purported approval of the building plans applications was undertaken by a functionary not possessed of the requisite delegated authority. Applicants contend that respondents have provided no evidence which they would have been entitled to obtain from the third respondent before the Court to refute this allegation.

Applicants also allege the failure by the local authority to comply with the provisions of the Building Act, more particularly its approval of the building plans, notwithstanding the derogation from the value of the applicants' neighbouring property that will result from the construction of the proposed building.

Applicants further contend that there was an unlawful and unauthorised decision by the provincial authority when it purported to relax applicable title deed restrictions.

The only manner, according to applicants, in which a servitudinal title deed condition could be competently removed, suspended or altered, was consensually or in terms of the Removal of Restrictions Act. See in this regard Beck and

Others v Premier Western Cape and Others, 1998(3) SA 487 (C) at 510. Applicants contend that neither route was followed in making the decision which was relied upon by the City in approving the plans.

Applicants contend further that there was no statutory basis for such informal relaxation.

While certain of the grounds of review could, on an interpretation, fall within section 9(1)(c), that is the question as to whether three or five storeys were to be constructed, the thrust of the application for review, as I have set it out, is based not on an interpretation, but on legality.

In addition, section 9(1)(c) makes it clear that the interpretation concerns a National Building Regulation or other building regulation of by-law. Much of the review turns upon zoning scheme regulations, which are not sourced in a by-law but in LUPO and according must fall outside of the scope of section 9(1)(c), hence section 9.(1)(c) cannot be construed to equate to a complete internal remedy necessary to justify the argument that the applicants are required to exhaust these internal remedies before proceeding with the relief.

In summary thus, the review application is based on an alleged

misinterpretation, non-application of the zoning scheme, not on a by-law or building regulation.

With regard to exhausting domestic remedies, Hoexter, Administrative Law in South Africa, at 480 contends that:

> "Review is prohibited unless any internal remedy provided for in any other Act or any other law has been exhausted. The Court is obliged to turn the applicant away if it is not satisfied that internal remedies have been exhausted and may grant exemption from the duty only in exceptional circumstances where it is in the interests of justice to do so. It may well be asked whether this statutory duty or pass constitutional muster or whether it be regarded as unjustifiable infringing the right of access to a court of law. In this regard, much depends on how the Courts interpret the adjective "internal" and the phrase "any other law". These terms ought to be read restrictively to include only remedies specifically provided for in the legislation with which the case is concerned."

I agree with this contention by the learned author. In this case, were one to give the section the meaning contended for

by respondents, it would be a very wide interpretation of the section to include remedies which do not appear clearly from the wording of the section and thereby would result in the subversion of applicants' right of access to a court as constitutionally enshrined.

This conclusion leads to the question of an apprehension of irredeemable harm.

APPREHENSION OF IRREDEEMABLE HARM

The purpose of the interdict which is being sought is to preserve the *status quo* pending the determination of the review application.

I have already accepted applicants' contention that their prospects of obtaining a demolition of all or part of the offending building may be irredeemably adversely affected if the construction work as proposed is completed by the time they obtain final judgment in the review application. (See P S Booksellers at paras 106 to 109).

BALANCE OF CONVENIENCE

Mr Binns-Ward contended that a prohibition on the continuance of unlawful building work cannot be construed as prejudice to the respondents. On the contrary, he submitted the only

advantages respondents can seek to derive by continuing to build in the face of a possible successful application for review and a subsequent application for demolition is to build themselves into a position where a Court would be more reluctant to exercise its discretion in favour of demolition and in which administrative authorities would be more likely to lean in favour of making decisions that would “regularise” the unlawful structure.

Mr Burger submitted that first and second respondents had built on the basis of permissions which had been sought and granted, had incurred some R13,4 million in construction, and would suffer considerable prejudice if there was a lengthy delay in the completion of the half-completed construction.

I have already indicated my agreement with applicants’ contention of the danger of first and second respondents being able to build themselves into a position from which only a limited relief would be available, even if applicants are successful in the review application.

In addition, from correspondence generated by Mr C N Willemse, the chair of third applicant, first and second respondents have been contacted about potential building problems probably since 2007, and most certainly from January

2008. In short, first and second respondents have continued to build in the face of a looming review application. That in itself should weigh heavily with the Courts in deciding whether to exercise its discretion and grant interim relief as sought.

In my view, applicants have shown, on the evidence and the law as I have set it out, compliance with all the requirements for interim relief, and for these reasons, therefore, the following order may be granted:

1. First and second respondents are interdicted and restrained from proceeding with any further building work or construction on erf 1001, Camps Bay, and from selling, transferring or otherwise alienating and encumbering that property, pending the final determination of:

    1. The review proceedings, as set out in paragraph 4 of the notice of motion of 20 June 2006.

    2. An application for the demolition of any construction on the said property that contravenes the provisions of the restrictive title conditions applicable there, the provisions of the zoning scheme applicable thereto, or any other construction which contravenes applicable law or is not authorised in

terms of a building plan approved under section 7 of the National Building Regulations and Building Standards Act 103 of 1977. Such application be launched within 15 days of final judgment in the review proceedings.

3. Save that first and second respondents are ordered to pay the wasted costs attendant upon the abortive hearing of 7 August 2008, the costs of this application are to stand over until the finalisation of the review application.

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DAVIS, J