Republic of South Africa

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

CASE NO 1237/09

In the matter between:

SHIRLEY SEARLE	**Applicant**
and	
MOSSEL BAY MUNICIPALITY	**First Respondent**
JAKOBUS PETRUS VAN DER MERWE	**Second Respondent**
JOHANNA THERESA VAN DER MERWE	**Third Respondent**

JUDGMENT
delivered on 12 February 2009

BINNS-WARD AJ:

[1] The applicant has applied, as a matter of urgency, for the issue of a rule *nisi* operating as an interim interdict prohibiting the second and third respondents from continuing with any building

work on erf 196 Tergniet, Mossel Bay, pending (1) the furnishing of a reply to the applicant's request for reasons directed to the first respondent municipality in terms of s 5 of the Promotion of Administrative Justice Act 3 of 2000 ('PAJA') in connection with the municipality's approval of building plans submitted in respect of the construction, currently at an advanced stage, on the aforementioned erf and (2) the determination of any review application that the applicant might be advised to bring after receipt of the aforementioned reasons.

[2] The first respondent has indicated its intention to abide the judgment of the court. The second and third respondents, to whom I shall, save in the body of the order to be made, hereinafter refer simply as 'the respondents', have opposed the application and delivered what has been labelled as a provisional ('*voorlopige*') answering affidavit. They point out, with some measure of justification, that the application is voluminous and that in the time afforded they were unable to answer the founding papers comprehensively.

[3] The points taken by the respondents in their provisional answering affidavit are the following:

3.1 Absence of urgency

3.2 The failure by the applicant to demonstrate *prima facie*, in the sense required for interim relief, an infringement of any cognisable right. In this respect the respondents appear to have understood that the alleged right that the applicant was seeking to protect was the right to an unobstructed sea view from their property over erf 196. But, as will appear from what is set out hereafter, the application was in fact far more broadly based.

3.3 That in any event the applicant's allegations suggesting the possible existence of grounds to impugn the legality of the municipality's approval of the building plans were based on 'pure speculation' and should not be permitted to stand in the way of the respondents right to proceed in accordance with the permission granted in terms of the National Building Regulations and Building Standards Act 103 of 1977 ('the Building Act').

3.4 That the balance of convenience weighs against the applicant.

The Respondents ask for the application to be dismissed with costs.

[4] I am persuaded that the application satisfies the requirements of urgency so as to entitle the applicant to a hearing out of the ordinary course. It is obvious that if the application for interim relief were to be heard in the ordinary course any order granted in terms of the notice of motion would by that stage be of no practical value. The evidence is that the respondents, as they are entitled to do, are proceeding apace with construction work, ostensibly (although this is in dispute) in accordance with the building plan approval that they have obtained. Such delay as there was in launching the application is explained on the basis of the intervention of the builders' holidays and the endeavours of the applicant to persuade the local authority to intervene, thereby avoiding the necessity for litigation.

[5] If the court were to adopt the approach taken by Farlam AJ (as he then was) in *Coalcor (Cape) (Pty) Ltd and Others, the Boiler Efficiency Services CC and Others,* 1990(4) SA 349 (C), the application could not succeed because until and unless the building plan approval was set aside the conduct of the respondents could not be characterised as unlawful, and building

in accordance with the tenor of the approval could not be prohibited. In my respectful view, however, the approach adopted in *Coalcor* was predicated on the now outdated characterisation of impugned administrative decisions as, respectively, void or voidable. This was an approach that has subsequently been authoritatively discredited by the Supreme Court of Appeal in *Oudekraal Estates (Pty) Ltd v City of Cape Town* 2004(6) SA 222 (SCA).

[6] If the approval of the building plans is regarded for present purposes as no more than a relevant fact pointing in favour of the respondents' right to continue with their building work, which seems to me the correct approach in assessing an application for interim prohibitory interdictal relief pending a judicial review application, then the approach taken in *Ladychin Investments (Pty) Ltd v South African National Roads Agency Ltd and Others*, 2001(3) SA 344 (N) and *Transnet Bpk h/a Coach Express en 'n Ander v Voorsitter, Nasionale Vervoerkommissie en Andere* 1995 (3) SA 844 (T) commends itself as the correct one. That means the prospects of success in the contemplated review proceedings - as far as it is possible at this stage to assess them - represent the

measure of the strength or otherwise of the alleged right that the applicant must establish *prima facie* in order to obtain interim relief.

[7] In view of the granting of many interim interdicts in this Division over the intervening years in conflict with the approach in *Coalcor*, it is surprising that Farlam AJ's judgment was – as far as I am aware - first expressly disapproved in the relevant respect in this court in Davis J's judgment in *Van der Westhuizen and Others v Butler and Others* [2008] ZAWCHC 59 (CPD case no. 9871/2008; judgment dated 1 September 2008).[1]

[8] Despite its acknowledged importance to the result of the application for interim interdictal relief I do not consider it necessary, or indeed appropriate, in these proceedings to deal at any length with my assessment of the applicant's prospects of success in the contemplated review application save on one issue.

[9] Suffice it however to say that I would not be disposed, in the absence of very weighty and convincing indications of the

[1] In *van der Westhuizen*, interim relief was granted because the unlawfulness of the building plan approval was clearly established and the structure in question was also demonstrated to contravene certain title deed restrictions of a servitutal character in favour of the applicant's property. Similarly, 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), referred to in *van der Westhuizen* as an example of a case where building work was stopped pending the determination of contemplated review proceedings notwithstanding the advanced stage of construction, the court was of the view that a relevant contravention of the zoning scheme had been clearly demonstrated which would vitiate the approval of the building plans in question.

unlawfulness of the impugned decision, alternatively of the irremediable prejudice likely to be suffered by the applicant if interim relief were to be refused, to grant interim prohibitory relief merely because the applicant had directed a request for, and was awaiting, reasons in terms of s 5 of PAJA.

[10] The issue of the obstruction of the applicant's sea view also does not weigh heavily with me at this stage. Photographic evidence shows that the structure has already reached roof height, apart from the laying of the roof tiles. Accordingly any harm that the applicant might apprehend in this regard has already been done and will not be effectively addressed without at least a partial demolition of the building. The argument addressed on behalf of the applicant in this regard was that if the building work were to be completed the prospects of obtaining a demolition order, even of a legally non-compliant structure, would be so much more difficult. I do not attach too much credence to this argument. Local authorities have a statutory duty to enforce compliance with zoning schemes - including compliance with matters such as maximum permissible building heights; and in terms of the Building Act they have the power to apply for the demolition of non-compliant buildings, which would include buildings for which there are no

approved building plans. If the building plans for the building in issue are set aside on review, and the resultant position cannot be lawfully remedied, the local authority will be forced to consider obtaining some form of demolition order – cf. *High Dune House (Pty) Ltd v Ndlambe Municipality and Others* [2007] ZAECHC 153; (ECD case no. 181/2006; judgment dated 29 June 2007) and *Van Rensburg NNO v Nelson Mandela Metropolitan Municipality* 2008 (2) SA 8 (SE). To the extent that it unreasonably fails to do so, its failure or refusal to make an indicated decision in the circumstances will itself be reviewable at the applicant's instance in terms of s 6(3) read with s 8 of PAJA. At the end of the day the question of demolition, if it arises for determination, cannot be decided whimsically or capriciously, whether by the relevant functionaries or, indeed, a court. The primacy in our constitutional order of the principle of legality makes it unlikely that the building owner's convenience will prevail if the structure is in fact irremediably unlawful. Pre-constitutional judgments such as *De Villiers v Kalson* 1928 EDL 217 at 231 must, insofar as their references to the court's discretion where the demolition of buildings is in issue, be construed and applied in the light of modern constitutional principle.

[11] In my view the potential prejudice that parties in the position of the applicant are exposed to if the allegedly unlawful structure is permitted to be completed lies more in the incentive the completed state of the building might afford for functionaries to go out of their way to determine regularisation applications favourably and thereby permit a result that would not have been permitted if the factor of a *fait accompli* had not been present. This potential could in a given case necessitate the applicant's involvement in a succession of further review applications in order to obtain effective redress. The history described in the judgment in *High Dune*, cited above, bears testimony to a practical example of such an outcome.

[12] Any argument that the obstruction of the unobstructed sea view previously enjoyed from the applicant's property results, by itself, in a derogation from the value of the latter property is also not persuasive. It is so that the local authority is not permitted in terms of s 7(1)(b)(ii)(aa)(ccc) of the Building Act to approve a plan for a proposed building that, if constructed, would occasion a derogation from the value of neighbouring properties. This incident of the Building Act does not, however, give rise to any right to a view that would not, other than by way of the benefit of a

servitude of *prospectus* or *altius non tollendi*, have been enjoyed at common law.

[13] The value of a property for the purpose of the relevant provision of s 7 of the Building Act is its 'market value'. See *Paola v Jeeva NO and Others* 2004 (1) SA 396 (SCA). The market value of property is determined on an assumption that the notional seller and purchaser are equally informed as to the advantages and disadvantages of the *res vendita*, and of its positive and negative potentialities; cf e.g. *Minister of Water Affairs v Mostert and Others* 1966 (4) SA 690 (A) at 722 C-D and *Bestuursraad van Sebokeng v M & K Trust & Finansiële Maatskappy (Edms) Bpk* 1973 (3) SA 376 (A) at 384 F-H. Accordingly, any notional purchaser of a site enjoying a sea view would, in determining the market value thereof, take into account the potential for such view to be obstructed by subsequent development in a reasonable manner[2] of any land between such site and the sea.

---

[2] The second phase enquiry that a local authority is required to undertake in terms of s 7(1)(b)(ii)(aa) of the Building Act, after it is satisfied that the building plans submitted comply with the requirements of the Act and any other applicable law, is in the nature of a sensitivity assessment to ensure that the erection of the contemplated building will not be an unreasonable use of the property in question having regard to the rights of the neighbours. Reasonableness in this context would equate to the connotation of the word in neighbour law. Insofar as it was contended, with reference to the minority judgment written by O'Regan J in *Walele v City of Cape Town and Others* 2008 (6) SA 129 (CC) at para 130 – 132, that any building development within the parameters permitted in terms of the applicable zoning scheme could not result in a derogation from value within the meaning of the Building Act, I cannot agree. To uphold that argument would be to conflate the two phase enquiry posited

[14] The judgment in *Paola v Jeeva* has in my experience been widely misunderstood as ascribing to s 7 of the Building Act the character of a provision prohibiting the approval of building plans if the resultant structure might obstruct the existing view enjoyed from a neighbouring property. The judgment, however, affords no support whatsoever to that interpretation.[3] What is often overlooked is that it was common cause in *Paola* that the structure in question derogated from the market value of the neighbour's property. On the basis of the parties' agreement to this effect (which may or may not have been well-advised) the court in that matter did not have to determine whether an actual derogation from value was involved.

---

by s 7. The first phase enquiry is into statutory compliance, which would include compliance with the requirements of the zoning scheme. The second phase - which I call a 'sensitivity assessment' - is quite discrete from, and additional to, the legal compliance enquiry. It is quite conceivable that a building might be technically compliant with the zoning scheme, and yet still constitute, by reason of its peculiar characteristics or placement on the erf in question, an unreasonable user vis-à vis the neighbours. In my view this much is implicitly recognised in the majority judgment's characterisation of the role of the local authority as the guardian of the neighbours' interests. See *Walele* at para. [55] – [56].

[3] In my respectful opinion the judgment of van der Westhuizen AJ in *Clark v Faraday and Another* 2004 (4) SA 564 (C) (which was relied upon by Mr *Berthold* for the respondents) exemplifies, insofar as it deals with the SCA judgment in *Paola*, the wide misunderstanding of the narrow point that was actually determined in *Paola*; viz. that the word 'value' in s 7(1)(b)(ii)(aa)(ccc) of the Building Act means 'market value'; and that it does not, as was contended on behalf of the local authority in that case, have some special meaning peculiar to the supposed purposes of the Act. I also respectfully disagree with the characterisation by van der Westhuizen AJ of the currently relevant part of the SCA's judgment in *Paola* as obiter. The SCA dealt with the issue at the request of the parties who undertook to be bound by its findings in that regard in order to avoid an unnecessary further round of litigation on an issue which it was unnecessary for the SCA to resolve if it were to determine, as it did, the requirement of a duly appointed building control officer's recommendation to be essential for valid plan approval under the Act. It is clear from the judgment that the SCA would not have acceded to the request if it was not certain that the effect of its judgment in this respect would be binding, not just advisory.

[15] The only consideration advanced by the applicant in respect of her prospects of success on review that requires more careful consideration is the issue of safety.

[16] Section 7(1)(b)(ii)(bb) of the Building Act provides that a local authority may not approve a building plan application where it 'is satisfied that the building to which the application in question relates will probably or in fact be dangerous to life or property.

[17] The local authority has in the past expressly acknowledged that building on the steep dune face on which the construction by the respondents is being undertaken can be problematic. A letter was produced by the acting municipal manger to an owner of property in Muller Street in May 2006 in which it was stated, inter alia:

> 'Die grootste problem wat die Munisipaliteit ondervind met die goedkeuring van bouplanne in hierdie area, is die kwessie van veiligheid. Daar is sonder enige twyfel nou vasgestel dat die stabiliteit van hierdie duin van so 'n aard is dat daar uiters streng vereistes opgelê sal moet word alvorens 'n Bouplan goedgekeur kan word. Dit wil baie duidelik blyk dat hierdie erwe so onstabiel is dat slegs 'n klein gedeelte van die erwe aangewend kan word vir die aanbou van 'n eiendom.'

Both the applicant's and the respondents' properties are situate along Muller Street.

[18] Indeed as a consequence of the factors mentioned in the aforementioned extract from the acting municipal manager's letter, the local authority has adopted guidelines in respect of the development that will be permitted on the dune and the information that must be submitted in support of any building plan applications thereanent. These guidelines do not appear to have any legislative force. Their existence does however *prima facie* support the applicant's concern about the safety considerations of any development of the dune in the close vicinity to her property. The considerations that moved the local authority to draw up strict guidelines with regard to the control of development on the dune is borne out in a detailed and closely reasoned report by Dr Theo van Rooyen, a soil scientist, which was attached to the founding papers. In Dr van Rooyen's opinion any building is undesirable on a slope as 'extremely steep' as that which makes up the respondent's property. Destabilisation of the dune face could readily affect the physical integrity of the applicant's own property which is situate atop, or higher up the dune behind that of the respondents. My understanding of Dr van Rooyen's report is that he raises concerns especially for what he refers to as the long term ('oor die lang termyn') consequences of development of the dune slope.

[19] It is therefore understandable that development of the respondents' property was preceded by a geotechnical investigation and slope stability study by Siyakhula Lab CC (Geotechnical and Geological Services). My impression is that its content in general confirms the observations and concerns in Dr van Rooyen's report. Siyakhula's report highlights what is described therein as 'a few important issues on the stability of the slope':

- *The stability of the slope is critical for the safety of the proposed structures, existing structures below the slope, environmental and third party liability.*
- *Apart from some localised historical slips in the loose upper sands, the dune has been macro-stable.*
- *Since the dune slope is steeper than Ø, the loose upper horizon is considered unstable at all times and is only enjoying marginal stability due to the anchoring effect of the dense vegetation cover.*
- *The slope is considered to being "on the point of failure" (i.e. unsafe) when cleared of vegetation during construction.*
- *The macro slope is considered "marginally safe" when a suitably designed structure is in place (ie: after construction*

is complete). This is due to the lateral buttressing effect of foundation columns at the recommended founding depth.

- *The future stability of the slope is very dependent on storm water management and general erosion control.*
- *The study is based on the existing geometry of the slope. Any changes to this geometry during construction will have an effect on the stability.*
- *Any present or future excavations at the toe of the slope could have a serious negative effect on the stability of the slope.* (underlining supplied)

[20] The applicant has commissioned an assessment by a civil engineer of the safety considerations pertaining to the structure being erected by the respondents. Mr Jéan du Plessis has a special interest in geotechnical engineering and is an external examiner for geotechnical engineering in the University of Stellenbosch department of civil engineering. Mr du Plessis did not visit the site for the purpose of preparing his affidavit in this application, but he had inspected the respondents' property in connection with an earlier application in proceedings between the parties in case no. 12557/08.

[21] Mr du Plessis set out to deal with three principal subjects. Firstly he deals with the degree of correspondence between the building plans approved for the respondents' property in May 2008 and the geotechnical report of Siyakhula Lab CC, dated March 2008. I should mention that building work commenced pursuant to the approval of these building plans, but this work was suspended pursuant to an order taken by agreement in case no. 12557/08. What I shall call 'the May plans' were later withdrawn and a new set of plans submitted by the respondents was approved by the local authority in November 2008 ('the November plans'). The approval of the November plans is the administrative decision which it is intended by the applicant to impugn in the contemplated review proceedings, in relation to which interim relief is sought *pendente lite* in the current proceedings. Secondly, du Plessis addresses the question of whether the November plans provide for the stabilisation conceived in terms of the Siyakhula geotechnical design proposals. Thirdly, du Plessis deals with whether the geotechnically significant building work actually undertaken on the respondents' property, ostensibly in accordance with the May plans, is consistent with the content of the November plans. In the latter regard Mr du Plessis was reliant on photographs of the building site and not on personal onsite inspection. It seems to me

that only the second of the principal issues addressed by Mr du Plessis is centrally relevant in the context of the relief sought in terms of the notice of motion. The first issue has been superseded by the replacement of the May plan approval, which was the subject matter of an earlier attack by the applicant, by the November plans; and the third issue, assuming that the November plans were validly approved, is more a question of compliance enforcement than anything bearing on the validity of the building plan approval. I have nevertheless decided to take into account what Mr du Plessis has to say on the third question because the failure of the local authority to attach conditions to its November approval requiring the existing partly completed structure erected ostensibly in accordance with the May plans to be altered to coincide with the November plans could arguably afford a basis to criticise the validity of the approval of the November plans. A suggestion to that effect is in fact strongly implicit in Mr du Plessis's evidence.

[22] Mr du Plessis describes internal inconsistencies between the lower ground floor layout design that formed part of the application for building plan approval approved in November 2008 (annexure JP 3.1 to his affidavit), and the accompanying 'Detail Section A'

drawing (annexure JP 3.2 to his affidavit) which depicts how the proposed building is to be anchored into the dune and stabilised. (I refer to paragraphs 7.1 and 7.2 of Du Plessis's affidavit.) He also points out that what has been built corresponds with neither set of plans. In this respect I consider it significant that at the time of the approval of the November plans the local authority was aware that construction had already commenced, ostensibly in accordance with the May plans. It is implicit in Mr du Plessis's evidence (I refer especially to paragraph 12.1 of his affidavit) that any proper consideration and approval of the November plans had to take into consideration what had already been built if, as appears to have been the case, the second set of plans was directed at regularising the construction of a building already under construction and in a state of partial completion. Mr Du Plessis also points to inconsistencies between what is depicted on the aforementioned drawings and the descriptions given in a motivation report submitted to the local authority by Mr Rynard Pienaar of the Vox Group as part of the November building plan submission, which report was described itself as 'a construction explanation'. An important point made by Mr du Plessis in this connection is that the drawings considered in connection with the building plan application do not on their face contain the degree of

particularity which could satisfy the local authority that a safe and stable structure would result from construction in accordance with their tenor.

[23] Mr du Plessis goes on to advance the opinion that the plans do not satisfy safety requirements and do not comply with the requirements of the Building Act. I do not think however that it is appropriate for me to go into that at this stage of the matter before the respondents have had an opportunity to deal fully with the founding papers.

[24] The reports of the building control officers of the local authority would on their face indicate that careful consideration was given by them to the building plan application before the November plans were approved. There is, however, nothing to indicate that the functionaries were astute to the apparent internal inconsistencies identified by Mr du Plessis, or to the alleged inconsistencies between the plans and the recommendations made in Siyakhula Lab's report of March 2008; most importantly, it would appear on Mr du Plessis's assessment, in respect of the depth to which the supporting timber poles fall to be sunk into the ground and in the absence of any provision in the plans for reinforced concrete piles (*Afr.* 'heipale') on the northern and

southern boundaries. The conditions of approval endorsed on drawing M000 of the approved November plans (at page 268 of the papers) do not appear to address these issues. Indeed the insertion of a condition of approval that 'Aanhangsel A (aangeheg) moet streng nagekom word' is somewhat anomalous. The 'Aanhangsel A' referred to appears to be the local authorities guidelines mentioned in paragraph [18], above. Compliance with those guidelines would, it appears to me, *prima facie* have required that the building plan submission should deal fully the details of, amongst other matters, the foundations. This follows from a reading of Paragraphs A and C of the guidelines. Mr du Plessis's analysis, considered together with the fact that *ex facie* the conditions of approval plans of all reinforced concrete work were not available or considered when the building plan application was approved, suggests that the local authority in determining to approve the application subject to strict compliance with the guidelines overlooked that it was itself not complying with the guidelines.

[25] The aforegoing considerations suggest to me quite strongly that, on an assessment of the papers as they currently stand, the applicant would appear to enjoy reasonable prospects of success

on review. This impression might, of course, be altered once the court has the benefit of insight into a full and properly considered answer from the respondent.

[26] When it comes to the balance of convenience I consider that in a situation in which the applicant has on the current status of the papers established her alleged *prima facie* right quite strongly the prejudice to the respondents that will be occasioned by a cessation of the building work must be subordinate to the applicant's entitlement to the enforcement of the principle of legality. The safety considerations that are potentially in issue clearly afford the applicant sufficient interest to have standing in the intended review application and therefore also in this application for interim relief. I shall endeavour to acknowledge the respondents' personal and economic interest in being able to complete the building if the building plan approval should be sustained by giving directions that will hopefully assist in expediting the final determination of this application. In that connection I consider that this is a matter that should be heard with higher priority than that afforded in terms of what I understand to be the earliest date currently available on the semi-urgent roll (*circa* October 2009).

[27] The following order is made:

1. An order is granted permitting the disposal of this application as a matter of urgency, and dispensing, insofar as may be necessary, in terms of uniform rule 6(12) with the ordinarily applicable forms and rules.

2. A rule *nisi* is issued calling upon the respondents to show cause, if any, on Friday, 6 March 2009 why –

    2.1 second and third respondents should not be interdicted from carrying out any building work on erf 196, Tergniet, Mossel Bay, pending the final determination of judicial review proceedings to be instituted by the applicant within the time period afforded in terms of s 7 of the Promotion of Administrative Justice Act 3 of 2000 for the setting aside of the approval of the building plans pertaining to the development; and

2.2 why an order should not be made directing that the costs of this application should not be costs in the intended judicial review application, subject to the qualification that the second and third respondents costs shall be paid by the applicant in the event that the review application is not launched, or having been launched, is not diligently prosecuted to a hearing.

3. In the event of the respondents desiring to oppose the confirmation of the rule on the abovementioned return date, they shall deliver their amplified answering papers, if any, by Thursday, 26 February 2009.

4. The applicant is afforded until Thursday, 5 March 2009 to deliver her reply, if any, to any answering papers delivered by the respondents.

5. The applicant's attorneys of record are directed to ensure, through the Registrar, that the judge

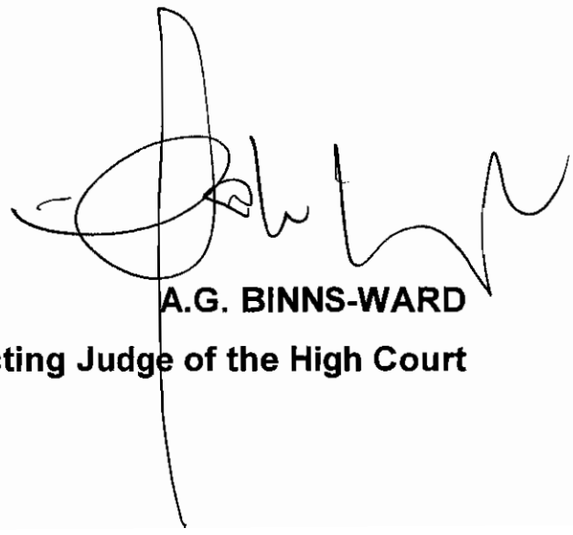
presiding in the fast track of the Third Division on 6 March 2009 is provided with the papers in the application by no later than 09h30 on Monday, 2 March 2009, without any assurance however that the matter will be disposed of in that court as an opposed application on the return date.

6. In the event that the matter cannot be disposed of in the Third Division on 6 March 2009, the parties are given leave, insofar as such might be required, to apply to the Judge President in chambers for an early allocation date of greater priority than that afforded on the semi-urgent roll.

7. The rule *nisi* shall operate as interim interdict pending the return date or any later date to which the application for interim relief might then be postponed for hearing.

8. The effect of the operation of the interim interdict shall not prohibit the execution of any

work especially certified by a professionally certified civil engineer to be strictly necessary to preserve the stability of the partially completed structure on erf 196 or the dune slope.



A.G. BINNS-WARD

Acting Judge of the High Court