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

CASE NO: 6444/2007

In the matter between:

PAMELA MEARA Applicant

and

JOHAN VAN DER MERWE N.O. First Respondent
(The Chairman of the Review Board)

THE BITOU MUNICIPALITY Second Respondent

LEXSHELL 507 INVESTMENTS (PTY) LTD Third Respondent

JUDGMENT HANDED DOWN ON 21 JUNE 2010

Introduction

1. The applicant seeks an order reviewing and setting aside the decision of the Review Board constituted in terms of section 9(1) of the National Building Regulations and Building Standards Act, 103 of 1977 (the Building Standards Act) dismissing the applicant's appeal in terms of section 9 of the Building Standards Act against the second respondent's refusal to approve the applicant's application to build,

submitted in terms of section 4(1) of the Building Standards Act,[1] in respect of her dwelling house. Both the first respondent (the chairman) and the third respondent have filed opposing papers. The Bitou Municipality withdrew its opposition to the application on condition that the applicant would seek no cost order against it.

2. In May 2000 the applicant relocated to Plettenberg Bay from Johannesburg and acquired a dwelling situate at No. 3 Tillamook Road, Plettenberg Bay, erf 1581. Mr Gerhard Johannes and his wife René, at the time both attorneys at Werksmans Incorporated in Johannesburg, are the directors of the third respondent, the owner of the adjoining erf 1580, which serves as their holiday home. The applicant and the directors of third respondent accordingly are neighbours. The parents of Mrs Johannes and the applicant have been cordial neighbours since 1971.

3. At the stage that the applicant acquired the house it only had two small spare bedrooms, with a single shower and a bath. Between the applicant's late partner and herself they have five children, all of whom are adults and mostly married. The existing house was inadequate to accommodate the combined families over the holiday period and would have to be enlarged.

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[1] "***4. Approval local authorities of applications in respect of erection buildings.*** – *(1) No person shall without the prior approval in writing of the local authority in question, erect any building in respect of which plans and specifications are to be drawn and submitted in terms of this Act.*"

4. Erf 1581 (as well as erf 1580) is situated in a single residential zone in terms of the Plettenberg Bay Town Planning Scheme.

5. In February 2002 the applicant, after enquiries made at the second respondent, the Bitou Municipality, regarding the requirements for operating a bed and breakfast facility, caused building plans to be drawn up and submitted for the alteration of the house to accommodate the extended family and for use as a bed and breakfast.

6. On completion of the building work and at the applicant's request, the second respondent's building inspector not only approved the alterations, but also confirmed that the house met with the local requirements for a bed and breakfast.

7. The applicant registered her establishment with both the Bitou Municipality and the Plettenberg Bay tourist information centre, prior to her letting out rooms with effect from September 2002. The applicant had in fact moved out of the main part of the house into what had hitherto been quarters intended for a domestic servant, in order to facilitate the letting out of the third bedroom.

8. During 2003 the applicant decided to embark on certain further alterations to the house. To this end building plans were submitted to the Bitou Municipality and its approval in terms of section 7(1) of the

Building Standards Act[2] was obtained in respect of the applicant's application on 23 June 2003. The plans provided for two additional en-suite bedrooms and extensions to the existing kitchen, wooden deck and the main bedroom which the applicant was now to occupy.

9. The alterations served to create a more substantial house. It facilitated the accommodation of the applicant's three grown-up children, as well as her deceased partner's two children and their families, who all tended to visit during the end of year festive season. During family visits, the applicant does not operate the bed and breakfast and the house is used solely for family accommodation.

10. The alterations provoked a response from the Johannessen's who considered that their sea view from their property had been negatively affected by the alterations and that the applicant had not adhered to undertakings given by her. This led to a break down in the harmony which had hitherto been in existence between the neighbours.

11. They brought a review application to set aside the approval of the building plans in the name of the third respondent, together with interdict proceedings. The interdict proceedings sought to preclude the applicant from utilising the house for the purposes of a bed and breakfast. As against the Bitou Municipality an interdict was sought

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[2] "***7. Approval by local authorities in respect of erection of buildings.*** *– (1) If a local authority, having considered a recommendation referred to in section 6 (1)(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 n respect thereof."*

directing it to ensure compliance on the part of the applicant with certain title deed conditions applicable to the property and with the provisions of the relevant zoning scheme regulations. On 8 November 2004, and by agreement between the parties, the interdict proceedings were postponed, subject to the right of the Johannessen's to re-enrol the matter for hearing in due course. This application remains in limbo.

12. The review application was argued before Mr Justice Foxcroft on 31 January 2005. In the final instance only a single ground of review was persisted with, namely the contention that the Bitou Municipality's building control officer was not properly qualified and had not been properly appointed. Mr Justice Foxcroft upheld this ground and the Bitou Municipality's approval of the building plans was set aside. The Bitou Municipality strongly defended its approval of the applicant's building plans before Mr Justice Foxcroft. It asserted that the building was neither unsightly nor objectionable, nor did it derogate from the value of the Johannessen's property, nor was there any other basis for the refusal thereof in terms of section 7(1) of the Building Standards Act.

13. The applicant thereafter during May 2005 caused the identical building plans to be re-submitted to the Bitou Municipality. Despite its earlier and strongly defended approval, the Bitou Municipality performed, what Mr Rosenberg, who with Mr Melunsky, appeared for the

applicant, described as a regrettable about face – it declined to grant approval of the building plans. The Bitou Municipality informed the applicant of its decision by way of a letter dated 13 July 2005. In a subsequent letter the reasons for the decision were given. Five grounds were furnished, four whereof were based upon alleged infringements of the title deed restrictions, while the fifth was based on an alleged infringement of the zoning scheme regulations.[3]

14. The applicant thereafter noted an appeal to the Review Board, in terms of the provisions of section 9(1) of the Building Standards Act,[4] by way of a letter dated 17 August 2005. By way of a letter dated 22 March 2006 the third respondent opposed the appeal. The letter of objection dated 13 March 2005 which had been submitted to the Bitou

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[3] The letter read as follows
"Further to our previous letter regarding the above dated 13 July 2005, it is hereby continued that the decision to refuse approval of the building plans was based on the following considerations:

(i) The proposed "New Whale Suite" and "New Dolphin Suite" as reflected on the building plans submitted were purposefully designed as part of a "Bed and Breakfast" establishment, and not as part of "a house designed for use as a dwelling for a single family". These additions are therefore in conflict with Title Condition D4 (b).

(ii) (ii) The new additions encroach over the I,57m building' line stipulated in Title Condition D(4) (d).

(iii) The new additions in our opinion represent a structure with a flat roof, and is therefore in conflict with Title Condition E2.

(iv) The elevational treatment of the new additions does not comply with Title Condition E4.

(v) *The new additions encroach over the 1.5m building line as stipulated in the Zoning Scheme Regulations."*

[4] *"**9. Appeal against decision of local authority.** – (1) Any person who –*
(a) feels aggrieved by the refusal of a local authority to grant approval referred to in section 7 in respect of the erection of a building;
(b) feels aggrieved by any notice or prohibition referred to in section 10; or
(c) 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 period, in the manner and upon payment of the fees prescribed by regulation, appeal to a review board."

Municipality in opposition to the re-submission of the building plans was an annexure to the letter opposing the appeal.

15. The Review Board appeal hearing took place at Plettenberg Bay on 5 and 6 October 2006. Thereafter, and in a finding dated 19 March 2007, that is five months later, the Review Board dismissed the appeal, the reasons being furnished as follows:

> *"(a) Appellant can succeed in the appeal only if each and every reason raised by Respondent for its refusal to approve is decided in Appellant's favour; Appellant has failed in this regard.*
>
> *(b) Of particular importance is Appellant's intention, frequently admitted, to use the buildings built in terms of the proposed building plans as bed and breakfast facilities.*
>
> *(c) Review Board Members, having inspected same, accept such admission as correct, and reject the belated submission that the design and construction are consistent with an extension to a (domestic) single dwelling.*
>
> *(d) This deviation from the Title Deeds is fatal to the Appeal.*
>
> *(e) Review Board Members unanimously reject the Appeal."*

16. The Review Board's decision to dismiss the appeal was confined to a single issue, namely that the use of the house for the purposes of a bed and breakfast constituted an infringement of the title deed conditions. Since the Review Board was of the view that the applicant

could succeed in the appeal only if each and every reason raised by the Bitou Municipality for its refusal to approve the building plans was decided in her favour, it was not necessary for the Review Board to go any further than it did. Hence the much abbreviated nature of the finding handed down by it.

17. It is this finding which the applicant now seeks to review.

18. Mr Rosenberg submitted that in coming to its conclusion the Review Board heard and/or misdirected itself in the following respects:

(a) Upon a proper construction of the title deed condition in question (condition D.4.(b)), it does not preclude use of portion of the house for a bed and breakfast;

(b) In any event, if the title deed conditions precluded a bed and breakfast use, this does not form a valid or sufficient basis to withhold approval of the building plans; and

(c) the Bitou Municipality have consented to the bed and breakfast use.

19. Mr Rosenberg submitted that the appeal to the Review Board was an appeal in the "wide" sense, as it was a rehearing of the application. The Review Board could call for evidence or conduct an inspection –

as it in fact did.[5] The nature of the proceedings before the Review Board is import by virtue of the decision made by it. Mr Rosenberg was critical of the cursory nature of the decision, pointing out that it dealt with only in a perfunctory manner with only one of the grounds of appeal. The hearing before the Review Board was a hearing *de novo* and the Review Board was not bound by the findings of the Bitou Municipality. Mr Oosthuizen argued that it was not necessary to deal with the other grounds given the decision made by the Bitou Municipality – the Review Board's decision, if I understood him correctly, was to be read as incorporating the findings of the Bitou Municipality in its letter of 22 July 2005. If this is indeed the approach adopted by the Review Board it misconstrued its jurisdiction, and wrongly, by implication, placed an *onus* on the applicant. There is no *onus* in an appeal in the wide sense.[6]

The standard of review

20. In Sidumo and Another v Rustenburg Platinum Mines Ltd and Others 2008 (2) SA 24 (CC) Navsa AJ dealt with standard of review of applicable under the Labour Relations Act, Act 66 of 1995, ("LRA") and whether it is constitutionally compliant. Section 3 of the LRA provides, *inter alia*, that its provisions must be interpreted in

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[5] Tickly and Ohters v Johannes NO and Others 1963 (2) SA 588 (T); Sea Front for All and Another v The MEC: Environmental and Development Planning, Western Cape Provincial Government and Others WCHG case number 15974/07 handed down on 26 March 2010 at para [21] – [24]

[6] Connan v Sekretaris van Binnelandse Inkomste 1973 (4) SA 197 (NC) at 202D; JR de Ville Judicial Review of Administrative Action in South Africa, at 324

compliance with the Constitution. He held that section 145 of the LRA – which provides for a review of arbitration proceedings under auspices of the Commission for Conciliation, Mediation and Arbitration – must be read to ensure that administrative action is lawful, reasonable and procedurally fair.[7] Navsa AJ held that "*(t)he reasonableness standard should now suffuse s 145 of the LRA.*"

21. The reasonableness standard was dealt with in the context of section 6(2)(h)[8] of the Promotion of Administrative Justice Act, Act 3 of 2000 (PAJA) in Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others 2004 (4) SA 490 (CC) where O'Regan J said the following[9]

> *"(A)n administrative decision will be reviewable if, in Lord Cooke's words, it is one that a reasonable decision-maker could not reach."*

22. Navsa AJ continued as follows in Sidumo

> *"[109] Review for reasonableness, as explained by Professor Hoexter, does threaten the distinction between*

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[7] At par [105]
[8] Section 6(2)(h) of PAJA provides as follows
"A Court or tribunal has the power to judicially review an administrative action if
....
(h) the exercise of the power or the performance of the function authorised by the empowering provision, in pursuance of which the administrative actions was purportedly taken, is so unreasonable that no reasonable person could have so exercised the power or performed the function.;"
[9] At para [44]

review and appeal. The Labour Court in reviewing the awards of commissioners inevitably deals with the merits of the matter. This does tend to blur the distinction between appeal and review. She points out that it does so in the limited sense that it necessarily entails scrutiny of the merits of administrative decisions. She states that the danger lies, not in careful scrutiny, but in 'judicial overzealousness in setting aside administrative decisions that do not coincide with the judge's own opinions'.[10] *This court in Bato Star recognised that danger.*[11] *A judge's task is to ensure that the decisions taken by administrative agencies fall within the bounds of reasonableness as required by the Constitution.*

[110] To summarise, Carephone[12] *held that s 145 of the LRA was suffused by the then constitutional standard that the outcome of an administrative decision should be justifiable in relation to the reasons given for it. The better approach is that s 145 is now suffused by the constitutional standard of reasonableness. That standard is the one explained in Bato Star. Is the decision reached by the commissioner one that a reasonable decision-maker could not reach? Applying it will give effect not only to the constitutional right to fair labour practices, but also to the right to me constitutional right to fair labour practices, but also to the right to me constitutional right to fair labour practices, but also to the right to administrative action which is lawful reasonable and procedurally fair."*

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[10] Hoexter, Administrative Law in South Africa Juta, Cape Town 2007, at 318
[11] At paragraph [45]
[12] Carephone (Pty) Ltd v Marcus NO and Others 1999 (3) SA 304 (LAC)

23. Mr Rosenberg, if I understood him correctly, was careful to point out that the review was not a review based on lack of reasonableness.

24. I shall, nonetheless, endeavour to remain mindful of prof Hoexter's warning about overzealousness in setting aside an administrative decision which do not coincide with my own opinion.

25. Mr Rosenberg submitted that the Review Board has misconstrued the title deed conditions and review was, accordingly predicated on a mistake of law, that is the review of an administrative act which was *"materially influenced by an error of law."*[13]

26. As Fourie J pointed out in Seafront for All[14] at paragraph [29]

> *"Judicial review is in essence concerned not with the decision, but with the decision-making process. Review is not directed at correcting a decision on the merits. Upon review the court is in general terms concerned with the legality of the decision, not with its merits. The function of judicial review is to scrutinise the legality of administrative action, not to secure or to substitute a decision by a Judge in the place of the decision of an administrator."*

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[13] see Hira & Another v Booysen & Another 1992 (4) SA69 (A), Hoexter, Administrative Law, at 91; Section 6(2) of PAJA[13]
[14] Footnote 5 above

27. It is against this background that I turn to consider the grounds of review advanced by the applicant. Before doing so it would be appropriate the legislative framework against which the application is to be considered.

The legislative framework

28. The Building Standards Act has as its objective to promote uniformity in the law relating to the erection of buildings within local authorities.[15] It provides for the approval of building plans by local authorities. Section 7 thereof provides that if the local authority, having considered the recommendation of the building control officer *"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"*. Section 7(1)(b) provides that if the local authority *"is not so satisfied ... such local authority shall refuse to grant its approval in respect thereof and give written reasons for such refusal"*.

The first ground - the proper construction of the title deed condition.

29. The building plans in question provided in the main for the addition of two en-suite bedrooms. The contention advanced on behalf of the third respondent was that because the applicant's intention was to use

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[15] The Campsbay Ratepayers' and Residents Assocation v Harrison (560/08) [2010] ZASCA 3 917 February 2010

the two new bedrooms as part of the existing bed and breakfast, the Bitou Municipality was obliged to refuse approval. This contention was accepted as correct by the Review Board.

30. Mr Rosenberg emphasised that throughout the interdict and review papers the Bitou Municipality and the third respondent accepted that prior to the alterations in question, the applicant's house was undeniably a dwelling, despite the fact that she utilised three bedrooms for the bed and breakfast. Following from that it was submitted that the subsequent addition of two en-suite bedrooms did not alter the basic character of the building which remained that of a dwelling.

31. Condition D.4. (b) reads as follows[16]

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[16] The relevant title deed conditions in the applicant's title deed are as follows:

"D. SUBJECT FURTHER to the following conditions contained in the said Deed of Transfer No. 6463 dated 10th May 1963 imposed by the Administrator when approving the establishment of Plettenberg Bay Township Extension No. 5 under the provisions of Ordinance No. 33 of 1934.

No. 1 ...

No. 2 ...

No. 3 ...

No 4. ***This erf shall be subject to the following further conditions****, provided especially that where, in the opinion of the Administrator after consultation with the Townships Board and the Local Authority, it is expedient that the restriction in any such conditions should at any time be suspended or relaxed, he may authorise the necessary suspension or relaxation subject to compliance with such conditions as he may impose:-*

(a) It shall not be subdivided;

(b) It shall be used only for the purpose of erecting thereon one dwelling together with such outbuildings as are ordinarily required to be used therewith;

(c) Not more than half the area thereof shall be built upon;

(d) No building or structure or any portion thereof except boundary walls and fences, shall be erected nearer than 4,72 metres to the street line which forms the boundary of this erf nor within 3,15

"This erf ... shall be used only for the purpose of erecting thereon one dwelling ..."

32. Mr Rosenberg submitted with regard to condition D4(b) that, provided that what has been erected on the property is a dwelling, there is nothing to indicate that, for example, the condition would prevent an architect working from home or a householder letting out any part of the house, be it to a lodger or a bed and breakfast guest.

33. The question then is what is meant by *"dwelling"* and whether Mr Rosenberg is correct in his contention that the condition would not

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metres of the rear or 1,57 metres of the lateral boundary common to any adjoining erf, provided that with the consent of the Local Authority, an outbuilding not exceeding 3,05 metres in height, measured from the floor to the wall space and no portion of which will be used for human habitation, may be erected within the above prescribed rear space. On consolidation of any two or more erven this condition shall apply to the consolidated area as one erf;

(e) In the event of the provisions of a Town Planning Scheme being made applicable to this erf, which provisions are more restrictive than the provisions contained in the above, then the provisions of such a scheme shall apply.

E. SUBJECT FURTHER to the following conditions contained in Deed of Transfer No. 6463 dated 10th May 1963 imposed by Plettenberg Bay Estates Limited for the benefit of itself, its successors in title and assigns as owners of the remainder of Plettenberg Bay Extension No. 5 Township, held by Certificate of Amended Title on Consolidation No. 9101/1956 dated 28th June 1956 reading as follows:-

1. ...

2. The erection of flat, lean-to or monopitch roofs or of flat or corrugated iron or asbestos fencing is prohibited. No wood and/or iron buildings of any description shall be erected on the erf. The main buildings which shall be a complete building and not one partly erected and intended for completion at a later date, shall be erected simultaneously with or before the erection of the outbuildings.

3. ...

4. The elevational treatment of all buildings shall conform to good architecture so as not to interfere with the amenities of the neighbourhood."

(emphasis added)

prevent an architect from working from home, or the operation of a bed and breakfast.

34. In this regard it was pointed out by Mr Rosenberg that it is a well established principle that provisions creating a servitudal right are to be interpreted in a manner least burdensome to the affected property. In other words, a restrictive rather than a wide interpretation is to be applied in construing the possible ambit of the restriction. Thus in Von Wielligh v Mimosa Inn (Pty) Ltd 1982 (1) SA 717 (A) at 724-725 Rabie JA (as he then was), held as follows:[17]

> *"Ten slotte wil ek daarop wys dat dit in hierdie saak om beperkende bepalings gaan – te wete beperkings op die gebruik van grond deur die eienaar daarvan – en dat waar daar in so 'n geval twyfel bestaan oor die vraag of die beperkings die gebruiksreg van die eienaar van die grond beperk, die bepalings 'streng en die mins besparend' vir hom uitgelê moet word, soos dit in hierdie Hof in Pieterse v du Plessis 1972 (2) SA 597 (A) te 599H gestel is. Ek meen, soos hierbo aangedui, dat aan 'hotels' nie die beperkte betekenis van 'private hotels' gegee moet word nie. Sou dit egter nie duidelik wees dat 'hotels' die wyer betekenis het wat ek meen gegee moet word nie, meen ek dat dit ten minste twyfelagtig is of die woord die eng betekenis het wat appellant daaraan gee, en in so 'n geval sou dit die reël waarna in Pieterse v du Plessis (supra) verwys word, geld. By die toepassing van hierdie reël sou dit myns insiens geregverdig wees om aan 'hotels' die wyer betekenis te heg."*

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[17] See also Kruger v Joles Eiendomme (Pty) Ltd and Another 2009 (3) SA 5 (SCA) at par [8] per Cloete JA

35. Further, and with regard to interpretation Feetham JA set out the approach in Cliffside Flats (Pty) Ltd v Bantry Rocks (Pty) Ltd 1944 AD 106 as follows at 111-112

> *"In seeking to interpret the restriction with which we have to deal, I propose in the first instance to confine my attention to the question of the meaning of the words themselves, used in their ordinary sense, and later to consider what assistance, if any, towards their interpretation can be obtained from the context, or from such surrounding circumstances as can properly be taken account off."*

36. Mr Rosenberg submitted that the title deed condition seeks to limit the nature and number of buildings to be erected on the property to a single dwelling. What is precluded is the erection of any building other than one dwelling. Mr Rosenberg distinguished this from Pollard v Friedlander 1959 (4) SA 326 (C) where the condition in terms limited use to residential use.[18] In my respectful view, Beyers JP correctly held that the conducting of a school is a clear breach of the condition. In the instant case, so Mr Rosenberg submitted, the title deed condition does not purport to deal with the extent to which the dwelling can be used for any other purpose.

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[18] The condition there under consideration read: *"That the erf be used for residential purposes only. No shop or hotel, commercial or industrial business of any kind shall be permitted thereon."*

37. Mr Oosthuizen submitted that the contention that a guesthouse can be regarded as a dwelling within the meaning of this condition is misconceived. He relied on Castelijn v Sim & Others 1929 NPD 253 where the Court interpreted a title deed condition reading: *"The erection of only one dwelling with necessary outbuildings will be permitted on this lot ..."* In giving judgment Dove-Wilson JP said the following at 261:

> *"This is a residential quarter, and its continuance as such is sought to be ensured by these conditions, by the prevention of congestion whether of houses or families. 'Dwelling-house' or 'dwelling', in my opinion, must be read in their ordinary meaning of habitation for one family."*

38. In Transvaal Consolidated Land and Exploration Company Limited v Black 1929 AD 454 Wessels JA had to determine the meaning of "*one residence*" in a condition which laid down that the purchaser of a lot "*shall only have the right to erect one residence with the necessary outbuildings and accessories on the said lot.*" Wessels JA equated the words "*one residence*" with "*one dwelling house*" in posing the question

> *"Does the clause mean that there is to be one dwelling house in the ordinary acceptation of this word in which the owner or occupier lives as his home?"*

He went on to say that the words "*one residence*" mean in this country in ordinary parlance –

> *"one house in its narrow and ordinary sense in which the owner or occupier lives with his household."*

And in reference to a dwelling house continued

> *"when we speak of a person's residence we do not conjure up in our minds a huge block of buildings used for residential purposes, but a dwelling house in the ordinary sense of the word.*

39. In Cliffside Flats (Pty) Ltd v Bantry Rocks (Pty) Ltd 1944 AD 106, the following was said by Feetham JA at page 120:

> *"I think we should construe 'dwelling-house' in this condition in the sense impliedly given to that term by Wessels, JA in Transvaal Consolidated Land and Exploration Company Limited v Black 1929 AD 454 at 462-3, as a dwelling house in the ordinary meaning of the word, that is 'one house', in its narrow and ordinary sense in which the owner or occupier lives with his household' – or a building of such character as would make it suitable for use in that way."*
>
> (Emphasis added)
>
> See also R v Jewell and Another 1965 (1) SA 863 (N) at 865D-F; Braham v Wood 1956 (1) SA 654 (N).

40. It is important in my view to have regard to the latter qualification by Feetham JA – if the character of the building is such as to make it suitable for use as a dwelling then, in my view the building complies with the condition imposed. This was the cornerstone of the argument

advanced by Mr Rosenberg, and it is supported, in my respectful view by what Feetham JA had stated in Cliffside Flats.

41. In Abrahamsohn v Voluntary Workers Housing Utility Company 1953 (3) SA 220 (C) Herbstein J, after consideration of the judgments by Wessels JA and Feetham JA concluded as follows:

> *"The condition which calls for construction here differs in no material respect from those with which the Appellate Division had to deal. There does not appear to be any ground which would justify this Court in departing from the narrow and ordinary sense and in giving to the words any wider meaning than that given in the decisions cited above. I come to the conclusion that the respondent cannot on any of the four plots erect anything but a house in the narrow and ordinary sense of that word – namely, a house in which the owner or occupier would live with his family."*

42. What Herbstein J has stated, I respectfully view as confirmation for the conclusion I have drawn in paragraph 40 above.

43. Mr Oosthuizen, in a subsequent note, also placed reliance on Nelson Mandela Bay Metropolitan University v Harlech-Jones N.O. & Others, case No. 2243/08, a judgment by Roberson J in an application for an interdict against the utilisation of a property for a restaurant. There the restrictive title condition[19] was similar to condition D.4.(b) above. Roberson J found that the word *"used"* contained in the restrictive

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[19] B4(b) "*it [this erf] shall be used only for the purpose of erecting thereon one dwelling together with such outbuildings as are ordinarily required to be used therewith;*"

condition related to the purpose for which the property was to be used. In making that he finding he relied on the fact that "*If one looks at examples of restrictive conditions in title deeds, some reference is usually made to the shop purposes, for a garage service site) for industrial purposes, etc. The word 'used' in condition therefore, in my view, leads to an interpretation that the property was to be used for residential condition.*"[20] This led Roberson J to conclude that the property was to be *"used for residential purposes"* and that the operation of a restaurant was therefore in breach of the restrictive condition. I have not had the benefit of comparing examples of restrictive conditions, nor do I agree, with respect, that such comparison would be constitute a permissible aid in interpreting such conditions. The case, therefore, at least on the facts is distinguishable.

44. To the extent that regard may also be had to dictionary definitions of a word or phrase (Association of Amusement and Novelty Machine Operators v Minister of Justice 1980 (2) SA 636 (A) at 660G-661B), Mr Oosthuizen placed reliance on the Collins Concise Dictionary (21st Century edition) which defines a dwelling as a *"place of residence"* and the Concise Oxford English Dictionary (11th edition revised) which defines dwelling as meaning *"a house or other place of residence"*.

45. "*Guesthouse*" is defined in the Concise Oxford English Dictionary, 10th edition, revised, as a *"private house offering accommodation to paying*

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[20] At paragraph [8]

guests". If this definition is applied to the property under discussion, it is clear that what is under consideration is a *"private house offering accommodation to paying guests."*

46. Mr Oosthuizen submitted that an overnight visitor to a guesthouse would hardly refer to the guesthouse as his place of residence. This may be so, but to my mind the question is whether Mrs Meara would refer to it as her residence, and the answer to that must be yes.

47. Mr Oosthuizen submitted with regard to the town planning scheme of the local authority, that it defines the term *"dwelling house"* as meaning a *"building containing only one dwelling unit,"* while a dwelling unit means *"a self-contained interleading group of rooms used only for the living accommodation and housing of a single family".*

48. It will be recalled that the applicant's property is zoned as a "*single residential zone."*

49. It was submitted by the third respondent that a bed and breakfast establishment and/or guest house is an establishment which provides accommodation on a commercial basis to paying guests who are not members of the single family. The building plans clearly show that the dwelling unit does not consist of a self contained inter leading group of rooms.

50. Thus it was contended that a use of the dwelling for purposes of a bed and breakfast establishment and/or guest house constitutes a contravention of the relevant provisions of the Plettenberg Bay Townplanning Scheme, until such time as Erf 1581 has been rezoned appropriately and the restrictive conditions of title have been removed in terms of the appropriate legislation.

51. The response to these contentions by the applicant was as follows:

(a) The suggestion that the house does not fall within the definition of a "*dwelling unit*" as contained in the scheme regulations is without merit.

(b) The Review Board, never addressed the point (and it was not a ground relied upon by the Bitou Municipality for refusing the application). Had the point been considered, the finding would and should have been that there are no rooms in her house which have a separate entrance or kitchen, and that they are all inter-leading within the meaning of that word as contemplated in the relevant definition contained in the scheme regulations.

52. Mr Rosenberg submitted that the applicant's house was at all material times a single dwelling. The additions forming the subject-matter of the June 2003 approval did not change the situation. The house did not become anything else.

53. In addition, the intention of the applicant, when adding the bedrooms and extending the kitchen, was to create a more substantial dwelling for a two-fold purpose. The extended premises could comfortably accommodate the applicant's family during which she does not operate the bed and breakfast. When not required for the applicant's family, the additional rooms are available to be utilised for bed and breakfast purposes.

54. The Bitou Municipality, in the review proceedings, endorsed the aforegoing construction of condition D.4.(b) where Mr L Gericke stated as follows:

> *"First respondent (i.e. the Municipality) points out to the above Honourable Court that only one dwelling has been constructed on erf 1581. Title deed condition D.4.(b) envisages that a single dwelling be erected on the property. The addition of the additional bedrooms to the existing dwelling did not alter its character as a dwelling house."*

55. Mr Rosenberg argued that the intention of the applicant was irrelevant when it came to consider whether the plans submitted complied with the condition. The plans objectively complied and the Building Standards Act was not concerned with the purpose of the building, but was concerned with the structure of the building. In this regard he submitted that Regulation A25, in fact, supported the applicant as it required "*use*" of any building to be in accordance with *"the purpose shown on the approved plans."*

56. In Sandton Town Council v Gourmet Property Investments CC 1994 (4) SA 569 (A) Kumleben JA, writing for the majority (Nicholas AJA did not express a different view in his minority judgment), held with regard to Regulation A25(1) as follows at 576G-H:

> *"The latter applies to a building which has been erected in accordance with the approval given (that is inter alia 'for a purpose . . . shown on the approved plans') and which is subsequently used for a purpose 'other than the purpose shown on the approved plans'. In such a case the proviso may be invoked to establish that the building is suitable for such other unauthorised use."*

57. As will be set out below the class of occupancy "*hospitality*" was not yet in existence at the time that approval was sought, or the appeal was heard, and the plans, as stated above, reflected the nature of the alterations and additions and their purpose, namely extension to the suites and kitchen and two new suites.

58. In my view the plans do reflect the purpose as required by the Building Standards Act, and bearing it mind that the occupancy class H4 – Hospitality – was not yet in existence, the applicant cannot be criticised for not stating that the alterations would be used for the purposes of a bed and breakfast establishment.

59. As stated above, the Bitou Municipality, before the Review Board, reversed its position and there adopted an approach which gave a broad reach to the condition, so as to prohibit the letting out of any

room in a dwelling house by the occupier, whether to a lodger or in the course of a bed and breakfast facility. Mr Rosenberg submitted that this is not what the condition stipulates, nor is there any indication that this was the Administrator's intention. I agree.

60. The question is whether the operation of a guesthouse falls within the definition of the term *"dwelling"*. If dwelling includes the operation of a guesthouse, then there would be no contravention of the township subdivision condition embodied in paragraph B.4(d).

61. I have already herein above set out that it is clear to me that *"dwelling"* includes the use of the property also for the purposes of guests, whether for free or paying and that, accordingly, the applicant did not fall foul of the provisions of the restrictive condition. It seems to me that the condition, in its own terms, expressly restricts the purpose to that of a dwelling.

62. It is also supported, as Mr Melunsky, who addressed me in reply, pointed out, in the new zoning conditions which provide for a new category *"bed and breakfast"*. That category did not exist at the time that the applicant applied for the approval of her building plans.

63. In the premises the use of the property, also for a bed and breakfast business, is not contrary to, or even excluded by the condition D.4.(b). A dwelling is one in which the owner or occupier may receive guests,

whether they are paying or not. In the premises the construction contended for by the applicant is neither strained, nor misconceived.

64. In the premises I am of the respectful view that the Review Board had misdirected itself in coming to the finding that it did.

The Second Ground – *"Approval not to be withheld because of potential unlawful use*.

65. In the alternative Mr Rosenberg submitted that when considering an application to build, the nature or character of the structure in question is the crucial determinant. The Building Standards Act, in essence, purports to regulate what may be built, and to lay down building standards in this regard.

66. He submitted that the future use of the structure to be built is something of a different order. The apprehended, impermissible use might not materialise, or it may be altered in due course. It is a fluid and time related concept. For this reason it was submitted that the possible potential illegal use of a building must be dealt with in terms of the appropriate legislation and legal remedies available to control any such unlawful activity. In this regard he relied upon what Mr Gericke had stated on behalf of the Bitou Municipality (in the original application which served before Mr Justice Foxcroft), namely that *"the use of the additions concerned is irrelevant for the purpose of this matter in view of the relief sought by the Applicants. If use of the*

dwelling as a bed and breakfast establishment is not permitted, this will only imply that the affected en-suite bedrooms may not be used for that purpose, and not that they be demolished".

67. In this context Mr Rosenberg submitted that LUPO and the zoning scheme regulations framed in terms thereof serve to regulate and control land use. In short, building plans cannot be refused on the basis that from time to time future use may be unlawful.

68. Mr Oosthuizen submitted that it is clear that the applicant uses the building as a guesthouse even if she uses the house solely for the family's accommodation during the Christmas festive period.

69. Mr Oosthuizen submitted that the local authority is obliged to refuse a plan approval application submitted to it, if not satisfied that the application in question complies with the requirements of the Building Standards Act and any other applicable law.

70. Mr Oosthuizen relied upon the principle that a duty imposed on a local authority to refuse plan approval as was set out by Heher JA in True Motives 84 (Pty) Ltd v Mahdi & Another 2009 (4) SA 153 (SCA) at paragraph 19:

> *"The refusal of approval under section 7(1)(a) is mandatory and not only when the local authority is satisfied that the plans do not comply with the Act and any other applicable law, but also when the local authority remains in doubt. The plans may not be clear*

enough. For instance, no original ground levels may be shown on the drawings submitted to it for approval, with the result that the local authority is uncertain as to whether a height restriction imposed with respect to original ground levels is exceeded. In those circumstances the local authority (a) would not be satisfied that the plans breached the applicable law, but equally (b) would not be satisfied that the plans are in accordance with the applicable law. The local authority would therefore have to refuse to grant its approval of the plans. Thus, the test imposed by section 7(1)(a) requires the local authority to be positively satisfied that the parameters of the test laid down are met."

71. Mr Oosthuizen submitted that the phrase *"any other law"* has been interpreted as referring to any other statutory enactment, including a by-law of the local authority (R v Kisten 1959 (1) SA 105 (N) at 108G-109D). He is supported in his submission by Muller NO and Others v City of Cape Town 2006 (5) SA 415 (C) where Yekiso J held as follows

> *"[27] The zoning scheme regulations referred to in para [23] and elsewhere in this judgment would obviously be 'any other applicable law' referred to in s 7(1)(a) of the National Buildings Act. The building plans submitted for approval would have to comply with both the provisions of the National Buildings Act and the relevant zoning scheme regulations. Once such building plans are drawn, these will be submitted to the local authority by the building control officer, together with such recommendations the building-control officer may make."*

72. Moreover, Mr Oosthuizen argued that when submitting a plan, it is obligatory, in terms of Regulation A25[21] of the Building Standards Act, to reflect thereon the purpose for which the building is to be used and that a building may not be used for a different purpose – unless the building is suitable for such other purpose. The *"class of occupancy"* is dealt with in Regulation A20 as follows:

> *"(1) The occupancy of any building shall be classified and designated according to the appropriate occupancy class given in column 1 of Table 1 and such classification shall reflect the primary function of such building..."*

73. It follows from this, so it was submitted by Mr Oosthuizen, that applications for plan approval would have to comply with the building standards promulgated under the Building Standards Act – and if they did not, then the local authority would be obliged to refuse such planning approval by virtue of the provisions of section 71(1)(b) of the Building Standards Act.[22]

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[21] "*No person shall use any building or cause or permit any building to be used for a purpose other than the purpose shown on the approved plans of such building, or for a purpose which causes a change in the class of occupancy as contemplated in these regulations, whether such plans were approved in terms of the Act or in terms of any law in force at any time before the date of commencement of the Act, unless such building is suitable, having regard to the requirements of these regulations, for such first-mentioned purpose or for such changed class of occupancy.* "

[22] "***7. Approval by local authorities in respect of erection of buildings*** –
(1) If a local authority, having considered a recommendation referred to in section 6 (1) (a) –
...
(b) (i) is not so satisfied;
...
Such local authority shall refuse to grant its approval in respect thereof and give written reasons for such refusal:"

74. The aforesaid table designates as

(a) H1 – "***Hotel*** . *Occupancy where persons rent furnished rooms, not being dwelling units.*"

(b) H3 "***Domestic residence*** *Occupancy consis1ing of two or more dwelling units on a single site.*"

(c) H4 "***Dwelling house*** *Occupancy consisting of a dwelling unit on its own site, including a garage and other domestic outbuildings, if any.*"

75. I pause to point out that in with effect from 1 October 2008[23] a further category H5 was added to table 1. It provides as follows:

> *"Occupancy where unrelated persons rent furnished rooms on a transient within a dwelling house or domestic residence with sleeping accommodation for not more than 16 persons within a dwelling unit."*

76. The plans, in fact submitted, reflect the extension to be made and the purpose of such extensions, such as bedrooms, kitchen and the like.

77. Logically, it must follow from this that the local authority had to take cognisance of the intended use to which the building is to be put, as reflected on the submitted plans.

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[23] Item H5 added by GN R574 of 30 May 2008

78. Mr Oosthuizen further submitted that if regard is had to the package of planning legislation, which is aimed at harmonising the utilisation of land and the development of erven areas, it would be myopic to interpret section 7 of the Building Standards Act as requiring the local authority to approve a pian, even though the local authority knows that the building work, if approved, will be used in a manner contrary to certain other relevant and applicable planning legislation. He submitted that it would be far more sensible to interpret section 7, and particularly the obligation to consider whether the proposed building contravenes the Act or any other law, as entitling a local authority to give consideration also to the extent to which the proposed building complies or otherwise contravenes legislative measures such as LUPO.

79. Consequently it was submitted that the Bitou Municipality did not err by taking into account the fact that the applicant would be utilising the buildings she intended constructing for the running of a guesthouse.

80. He submitted that a local authority is obliged, in carrying out its duties under sections 7(1)(a) and 7(1)(b) of the Building Standards Act, to have regard to other laws including the provisions of the Townships Ordinance, LUPO and any conditions which, under those legislative enactments, have to be met by the owner of land

81. Mr Rosenberg placed reliance on the unreported judgment in this division by Smit AJ in Kenneth Bruce Sinclair-Smith and Mary-Ann

Davies v The trustees for the time being of the Saphrey Trust and the City of Cape Town case number 9987/09 where, in an interdict application, it was argued that because the intention to use the property at some future date as a guest house, the application to have the plans approved was not *bona fide*. Smit AJ held as follows at paragraph 8.2

> *"I am of the view that it is incumbent on the Municipality to consider whether the plans objectively comply with the zoning and building regulations and that the subjective intention on the part of the person who submits the plans is irrelevant. I accordingly conclude that Applicants have not established a prima facie case that they are likely to succeed on this ground."*

82. In this regard Mr Rosenberg pointed out that when the applicant's family stays with her, then she is not letting out any rooms and there can be no question of a contravention of the title deed condition. If the operation of the bed and breakfast establishment is unlawful, steps must be taken to prevent such unlawful use. It is not the purpose of the National Building Standards Act to also regulate and control the actual use of buildings – this is the provenance of the land use and town planning legislation and title deed restrictions.

83. It seems to me that once it is accepted that the plans as submitted falls within the definition of dwelling, then it must follow that the use reflected thereon, as bedrooms or kitchens, is adequately reflected.

The fact that the dwelling would then be utilised for a bed and breakfast would be irrelevant.

84. I am of the view that the application also has to succeed on this ground.

The Third Ground: The Bitou Municipality's Consent to the Bed and Breakfast Use

85. The factual background against which this ground was advanced is as follows. The consent derived from the Bitou Municipality being advised of the fact that the applicant intended operating a bed and breakfast and advising that the 2002 alterations met with the local requirements for a bed and breakfast and thereafter registering the applicant's establishment as a bed and breakfast, pursuant to which it charged additional rates of the applicant. The Bitou Municipality is the competent authority for the purposes of approving subdivisions in terms of LUPO and therefore had the authority to agree to the relaxation of the title deed condition. Mr Rosenberg submitted that, accordingly, building plan approval should not have been withheld on this ground. He relied upon what Mr Gericke, on behalf of the Bitou Municipality, had stated in the previous review proceedings, namely that *"it has always been my understanding that second respondent (i.e. myself) is entitled to operate a guesthouse and/or bed and breakfast establishment from her property"*. Mr Gericke, in the submissions made on behalf of the Bitou Municipality before the

Review Board, stated that it was the policy of the Bitou Municipality to permit the operation of a three-bedroom bed and breakfast from single residential properties. Mr Rosenberg furthermore pointed out that there are substantially in excess of 100 bed and breakfasts in Plettenberg Bay and that they are a relatively recent phenomenon, as is evidenced by the fact that they were not formerly provided for in the zoning scheme regulations of local authorities in the Western Cape. He submitted that it was never the intention of either the title deed condition in question or the zoning scheme regulations to preclude the letting out of a limited number of rooms in a single dwelling for the purposes of a bed and breakfast. I have already herein above dealt with this contention.

86. In this regard reliance was place on the decision in BEF (Pty) Ltd v Cape Town Municipality and Others 1983 (2) SA 387 (C) where Grosskopf J, as he then was, held as follows at 397 C-E:

> *"I cannot agree with these contentions. It is true that the conditions have the force of law, but rights there under may validly be waived by all persons entitled thereto. See Alexander v Johns (supra)*[24] *and the cases following thereon which are quoted above. In waiving the contravention, the Council did not purport to do more than waive its own private right. I cannot see on what basis I can compel the Council to exercise its rights if it does not want to do so. I can also see no basis upon which the Council could be compelled to*

[24] 1912 AD 431

reject building plans merely because the execution of such plans would infringe the servitutal rights of others. In this regard it must be emphasized that the approval of building plans by the Council does not grant an unqualified right to erect a building pursuant to such approval. The conditions of approval cover a whole page. And include the following:

'(b) Approval of the plans does not absolve the erector or Owner from compliance with any condition in the title deeds of the property upon which the work to which the plans relate is to be executed.'"

87. Mr Oosthuizen contended that it was inconceivable that the applicant would have submitted building plans for the purpose of a bed and breakfast. Such plan approval was unnecessary because of an alleged consent by the local authority. It seems to me that this is not the applicant's stance – she accepts that she had to submit plans, but she suggests that the plans could not be refused on the basis that she could not use the premises as a bed and breakfast as the Bitou Municipality had already consented thereto.

88. Clause 2.7.1 of the Bitou Municipality's own zoning scheme regulations stipulates that the letting of rooms by any occupier of a dwelling house shall not constitute an infringement of the property's single residential zoning status.

89. Section 2.7 of the Scheme Regulations provide as follows:

"*2.7 <u>SAVING FOR SPECIAL PURPOSES</u>*

Without prejudice to any powers of the Council derived from any other law, nothing in this scheme shall be construed as prohibiting or restricting the following or enabling the Council to prohibit or restrict the following:

2. 7.1 The letting, subject to the Council's Regulations relating to lodging and boarding-houses, by any occupier of a dwelling house, of any part of the house otherwise than as a tenement."

90. It is in this context import to bear in mind, as has already been set out above, that the Bitou Municipality had approved the bed and breakfast operation conducted by the applicant. The most recent license was granted on 18 September 2007 to the applicant to carry on business as a bed and breakfast under the name "*Dolphins' Playground B&B*" at 3 Tillamook Avenue, Plettenberg Bay. The only condition attached to this license is that it is not transferable from one premise to another.

91. It was submitted by the applicant that section 2.7.1 intends and permits the use of parts of a house for the business of providing accommodation to outsiders. Whether such accommodation is short term or long term is irrelevant as far as the section is concerned. What is important is that the letting must be by the occupier of the dwelling house. There is no limit on the extent to which an occupier may make available portions of his or her dwelling house for accommodation purposes, save as contained in the municipality's regulations relating to lodging and boarding houses and presumably in any other relevant regulations of the municipality.

92. It was presumably under the aegis of this section that the Bitou Municipality permitted scores of bed and breakfast establishments to operate. The applicant went as far as to state that it was the policy of Bitou Municipality to permit the operation of bed and breakfast establishments (up to three bedrooms) from properties zoned single residential. Mr Rosenberg also stressed that the Bitou Municipality levied rates on the basis that rooms were being let out.

93. The Bitou Municipality could relax the title deed and township approval conditions and, in fact, did do so. It was therefore not open to the Bitou Municipality to now adopt a different position.

94. Accordingly, and on this ground also the review has to succeed.

<u>The other additional grounds upon which the appeal could have been dismissed</u>

95. Both Mr Rosenberg and Mr Oosthuizen addressed me on these additional grounds. It will be recalled that the Review Board dismissed the applicant's appeal on a single ground.

96. Mr Rosenberg submitted that it is no assistance for the chairperson or the Review Board to contend that there were other grounds, not relied upon by the Review Board in its findings, justifying the dismissal of the appeal.

97. It should be noted that the first respondent did not take issue with the allegation that the Review Board's decision to dismiss the appeal was confined to a single issue, namely that the use of the house for the purposes of a bed and breakfast operation constituted an infringement of title deed condition D.4.(b). The alleged contraventions of title deed condition D.4.(c) and conditions E.2 and E.4 were not relied upon before the Review Board at all.

98. Only the alleged encroachment over the building line restriction of 1,57 metres contained in condition D.4.(d) could be of any possible relevance. The chairperson did not regard the encroachment as being so inconsequential as to require the applicant's counsel to deal with them.

99. It seems me that the non-compliance is so insignificant that it amounts to *de minimis non curat lex.*

100. In the premises I am satisfied that the decision by the Review Board was:

(a) materially influenced by an error of law;

(b) failed to take into account relevant considerations and took into account irrelevant considerations;

(c) not rationally connected for the purpose for which it was taken and/or the purpose of the empowering legislation and/or the information before the Review Board;

(d) unlawful.

101. In the premises the review has to succeed.

102. It is, however, not the only basis upon which the applicant is entitled to have the decision set aside.

Bias

103. In her replying affidavit the applicant introduced a further ground upon which to set aside the review. The point arose as follows:

(a) The review application was instituted on 21 May 2007. On 23 August 2007 the chairperson, acting through attorneys Messrs Nongogo Nuku Incorporated, caused the record of the proceedings to be filed. Some eight months after the record had been filed, answering affidavits were filed on behalf of the chairperson and the third respondent on 29 April 2008.

(b) These answering affidavits, together with a further confirmatory affidavit, were presented under cover of a filing notice emanating from Messrs Werksmans, described

as being the attorneys of the first, second and third respondents. It was not apparent why Messrs Werksmans, the third respondent's attorneys, were now also acting on behalf of the chairperson, in the stead of Messrs Nongogo Nuku Incorporated.

104. Mr Rosenberg submitted that the chairperson's affidavit and that of Mr Gerhard Johannes filed on behalf of the third respondent, revealed the following disconcerting features:

(a) Both affidavits appear to have been produced in the office of Mr Johannes. This much is apparent from the computer file reference which appears at the top of each page of both affidavits.

(b) The composition of the two affidavits appears to have taken place on the basis of close co-operation; it is probable that the two affidavits were drafted or settled by the same person as is indicated by the fact that both affidavits at various points make the same error of referring to the record by means of the numbering at the foot of the page, rather than the *"m"* sequence appearing at the top right of each page.

105. Mr Rosenberg further pointed out that the chairperson's affidavit was notable for:

(a) the extent to which it seeks to justify the Review Board's decision on grounds other than those put up in its decision as handed down; and

(b) the fact that the chairperson in effect joins forces with the third respondent in the latter's purported application for a demolition order.

106. I pause to point out that the application for a demolition order was not pursued.

107. Mr Rosenberg pointed out that it would be wholly inappropriate for the chairperson to adopt a stance on an unrelated issue, namely that of a demolition order, and seek to persuade the Court to grant such a claim.

108. At the hearing before the Review Board which spanned two days, the chairperson interrupted Mr Rosenberg to advise him that it was not necessary to deal at all with the question of encroachment. It is therefore surprising and of concern that the chairperson felt motivated to adopt advance encroachment arguments which involve insignificant margins.

109. Mr Rosenberg submitted that the level of co-operation demonstrated between the chairperson and the third respondent was most unusual. Added to this it was singularly inappropriate that the chairperson

should have extended himself to joining the third respondent in seeking demolition of the alterations to the applicant's house. The applicant states that at the time of the appeal she had no reason to suspect that the chairperson might have been biased, but that her position had subsequently altered. She had regard to the lengthy time taken after the conclusion of the hearing to produce the cryptic and unreasoned finding of the Review Board and, taking into account the unusual and inappropriate level of co-operation between the chairperson and the third respondent, she now had an apprehension or suspicion that such inappropriate proximity was not necessarily confined to the period after the handing down of the Review Board's finding.

110. Mr Rosenberg relied upon section 6(2)(a)(iii) of the Promotion of Administrative Justice Act, 32 of 2000, namely that administrative action falls to be reviewed in the event of the administrator being biased or reasonably suspected of bias. The requirements for a reasonable suspicion of bias is as follows:

(a) there must be a suspicion that the administrator might (not *"would"*) be biased;

(b) the suspicion must be that of a reasonable person in the position of the litigant;

(c) the suspicion must be based on reasonable grounds;

(d) the rule against bias applies to all types of decisions.

(See: BTR Industries South Africa (Pty) Ltd v Metal and Allied Workers Union 1992 (3) SA 673 (A); S v Roberts 1999 (4) SA 915 (SCA); and President of the Republic of South Africa v South African Rugby Football Union 1999 (4) SA 147 (CC)).

111. Mr Rosenberg submitted that one would have expected the first and third respondents not only to answer the fresh challenge raised in reply, but also to explain what, on the face of it, amounted to most inappropriate and irregular conduct. Whether an answer or explanation is required depends on the circumstances of each matter. Thus in Tantoush v Refugee Appeal Board & Others 2008 (1) SA 232 (T), Murphy J was of the view that the material in the replying affidavit *"could and should"* have been dealt with (at paragraph [51]). In Pretoria Portland Cement & Another v Competition Commission & Others 2003 (2) SA 385 (SCA) at paragraph [53], Schutz JA stated that he *"would have expected"* any material to be dealt with. In Zuma & Others v National Director of Public Prosecutions & Others 2009 (1) SA (CC) at paragraph [325] Ncobo J, as he then was, felt that it was *"incumbent"* on the party concerned to have dealt with the matter raised in reply.

112. In Cash Paymaster Services (Pty) Ltd v Eastern Cape Province 1999 (1) SA 324 (Ck HC) Pickard JP had occasion to consider allegations

of bias levelled at provincial tender board. He expressed himself as follows at 353F – 354B

> *"The perception of bias may quite possibly be enhanced by another factor which appeared to the Court to be somewhat unusual.*
>
> *Unlike what normally occurs in review matters of this nature, the tribunal (the Board) has in this case offered extremely strenuous opposition to the review proceedings. I have great difficulty in understanding why.*
>
> *It is almost standard practice that an independent tribunal such as the Tender Board would in review proceedings comply with the requirements of rule 53 of the Uniform Rules of Court by making available the record of its proceedings and its reasons and such other documentation as the Court may need to adjudicate upon the matter and, if necessary, to file an affidavit setting out the circumstances under which the decision was arrived at. It seems, however, unusual to me that an independent tribunal such as the Tender Board should file such comprehensive and lengthy papers and offer such stringent opposition by employing senior counsel and the like to argue their case. More often than not independent tribunals, having done their duty in terms of the provisions of rule 53, take the attitude that they abide the decision of the Court and leave the other matters to the interested parties to dispute before the Court...*

Regrettably this attitude of the Board in this case may well be to some extent support for a suggestion that they are not entirely independent and disinterested."

113. In Tantoush v Refugee Appeal Board and Others 2008 (1) SA 232 Murphy J held as follows

[85] The perception of bias is strengthened to some degree by the strenuous opposition put up by the first and second respondents to this application. The RAB[25] is an adjudicative tribunal. All its members are members of the International Association of Refugee Law Judges. They are administrators tasked with quasi-judicial functions.

[86] ....Thirdly, and most importantly for the purposes of the present discussion, the strenuous opposition conducted by the RAB, the adjudicative functionary, on behalf of one of the parties to the appeal before it, the Department of Home Affairs, the successful party, compromises its independence and adds force to the applicant's legitimate or reason or reasonable apprehension of bias."

114. Though the parties were at issue whether there was an invitation extended to the respondents to reply, it seems to me that if any of the facts advanced as set out above were in issue, then the respondents would have replied thereto. Mr Oosthuizen, in the additional note that I

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[25] The Refugee Appeal Board, with whom appeals against decisions of the Refugee Status Determination Officer may be lodged in terms of section 26 of the Refugees Act 130 of 1998.

had invited the parties to submit, pointed out that the only primary facts which the applicant had advanced were the following:

(a) that both affidavits appear to have been produced in the office of Messrs Werksmans;

(b) that the composition of the affidavits *"appears to have taken place on the basis of close co-operation"* given the formatting, the similarities in certain portions of the affidavits and certain erroneous references to the record; and

(c) that the chairperson's affidavit "*in effect joins forces with the third respondent in the latter's purported application for a demolition order*".

(d) The conclusion suggested is that "*such a level of co-operation between the chairperson of an appeal tribunal and a party to the appeal is most unusual*".

115. It seems to me that I can accept the above as facts. Had they been incorrect, no doubt these respondents would have responded thereto and answered them.[26] Given the seriousness of the conclusions the applicant sought to draw from these facts, if they were untrue, or if

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[26] Tantoush v Refugee Appeal Board and Others 2008(1) SA 232 (T) at par [51]; Sigaba v Minister of Defendence and Police and Another 1980 (3) SA 535 (Tk) at 550F.

there was an adequate explanation for them, leave could have been sought – and probably would have been granted – to answer these allegations.[27] The respondents did not seek to do so.

116. It was argued that what the applicant does not show is the link between this unfortunate conduct and the decision made by the Review Board.

117. The starting point is to be found in R v Sussex Justice, ex party McCarthy 1924 1 KB 256, where a clerk to justices went into a room with justices when they considered judgment. The judgment was set aside on this account. In the course of his judgment Lord Hewart CJ said at p 234

> *"There is no doubt, as has been said in a long line of cases, that it is not merely of some importance, but of fundamental importance, that justice should both be done and be manifestly seen to be done. The question is not whether in this case this gentleman, went with the justices, made any observation or offered any criticism which he could not properly make or offer; the question is whether he was so related to the case by reason of the civil action as to be unfit to act for the justices in the criminal proceedings. The answer to that question depends not on what actually was done, but on what might appear to be done. The rule is that nothing is to be done which creates even a suspicion that*

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[27] Thint (Pty) Ltd v National Director of Public Prosecutions and Others; Zuma and Another v National Director of Public Prosecutions and Others 2009 (1) SA 1 (CC) at paragraph [324] per Ngcobo J, as he then was;

there has been an improper interference with the courts of justice."

118. To the same effect was, in our jurisdiction, S v Moodie 1961 (4) SA 752 (A).

119. In Anderton v. Auckland City Council 1978 1 NZLR 657. At p. 686 Mahon J. said:

"Looking then at what I have called 'presumptive bias,' in my opinion the test of real likelihood and reasonable suspicion are distinct, and the invalidation of proceedings on one ground, or the other, or both, will depend upon the evidence. Discovery of documents and the production of the record of the tribunal may disclose such an association between one party and the tribunal that a real likelihood of bias is established, no matter how fairly the proceedings may seem to have been conducted. In such a case it will be the opinion of the Court, and not the objectively assumed response of an observer of those proceedings, which will be the decisive factor. But if there is no evidence of such a connection between one party and the tribunal as to justify real likelihood of bias the manner of conducting the proceedings may in itself create a reasonable suspicion of bias, founded upon nothing but the outward aspect of the determination under review."

Again at p. 688 he said:

"A party may prove 'reasonable suspicion of bias' by relying solely upon the manner in which proceedings were conducted. That is, he may have no evidence at all of

relevant facts or circumstances not referred to or disclosed in the proceedings. The law is now clear, certainly in Australia and in Canada and I think also in New Zealand, that the presence of a 'reasonable suspicion' of bias found by a court to be attributable to an observer unacquainted with the hidden facts, will be sufficient to disqualify the tribunal or to invalidate his decision. Such was the basis of each decision, as I have said already, in re Watson ex p Armstrong (1976) 50 ALJR 778 and in Police v Pereira 1977 1 NZLR 547."

120. I am mindful of the fact that Anderton and the cased cited by Mahon J involved the bias predated the decisions impugned.

121. In In re Pinochet [1999] 1 All ER 577 (HL) the House of Lords had on appeal made an order for the restoration of a warrant for the extradition of Senator Pinochet. Prior to the appeal Amnesty International had been given leave to intervene in the hearing before the House of Lords. Pinochet and his legal team subsequently established that Lord Hoffmann had an interest in Amnesty International. Lord Browne-Wilkinson held as follows with regard to "*apparent bias*"

"The fundamental principle is that a man may not be a judge in his own cause. This principle, as developed by the courts, has two very similar but not identical implications. First it may be applied literally: if a judge is in fact a party to the litigation or has a financial or proprietary interest in its outcome then he is indeed sitting as a judge in his own cause. In that case, the mere fact that he is a party to the

action or has a financial or proprietary interest in its outcome is sufficient to cause his automatic disqualification. The second application of the principle is where a judge is not a party to the suit and does not have a financial interest in its outcome, but in some other way his conduct or behaviour may give rise to a suspicion that he is not impartial, for example because of his friendship with a party. This second type of case is not strictly speaking an application of the principle that a man must not be judge in his own cause, since the judge will not normally be himself benefiting, but providing a benefit for another by failing to be impartial."

122. Lord Browne-Wilkinson, in Pinochet, cited Webb v The Queen (1994) 181 CLR 41 with approval. Deane J there held as follows at 74:

"The area covered by the doctrine of disqualification by reason of the appearance of bias encompasses at least four distinct, though sometimes overlapping, main categories of case. The first is disqualification by interest, that is to say, cases where some direct or indirect interest in the proceedings, whether pecuniary or otherwise, gives rise to a reasonable apprehension of prejudice, partiality or prejudgment. ... The third category is disqualification by association. It will often overlap the first and consists of cases where the apprehension of prejudgment or other bias results from some direct or indirect relationship, experience or contact with a person or persons interested in, or otherwise involved in, the proceedings."

(emphasis by Deane J).

123. There is no doubt in my mind that had the chairman collaborated with the third respondent in the manner set out above prior to the decision made by Review Board, that such decision would be set aside on the basis that the chairman was disqualified to hear the matter.

124. I also have little doubt that if some association was established between the third applicant, its directors and the chairman of the Review Board, then the same result would follow.

125. The question is whether the above subsequent conduct establishes or points to such association. As Lord Browne-Wilkinson had observed in Pinochet

> *"There is no room for fine distinctions if Lord Hewart's famous dictum is to be observed: it is "of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done." (see Rex v. Sussex Justices, Ex parte McCarthy [1924] K.B. 256, 259)"*

126. In President of the Republic of South Africa and Others v South African Rugby Union Football Union 1999 (4) SA 147 (CC) a decision on an application by a party to proceedings before the court for the recusal of certain of its members, including Chaskalson P, on the basis of a '*reasonable apprehension*' that they would be biased against the applicant, the Constitutional Court held in part at page 177, paragraph [48] that:

"[T]he correct approach to this application for the recusal of members of this Court is objective and the onus of establishing it rests upon the applicant. The question is whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the Judge has not or will not bring an impartial mind to bear on the adjudication of the case, that is a mind open to persuasion by the evidence and the submissions of the counsel. The reasonableness of the apprehension must be assessed in the light of the oath of office taken by the Judges to administer justice without fear or favour; and their ability to carry out that oath by reason of their training and experience. It must be assumed that they can disabuse their minds of any irrelevant personal beliefs or predispositions. They must take into account the fact that they have a duty to sit in any case in which they are not obliged to recuse themselves. At the same time, it must never be forgotten that an impartial Judge is a fundamental prerequisite for a fair trial and a judicial officer should not hesitate to recuse herself or himself if there are reasonable grounds on the part of a litigant for apprehending that the judicial officer, for whatever reasons, was not or will not be impartial."

127. The test in our law has more recently been summarised by Mpati AJ, in Islamic Unity Convention v Minister of Telecommunications and Others 2008 (3) SA 383 (CC)

"[40] In considering the constitutional challenge, the High Court[28] reasoned that the test for bias as applied in recusal applications was equally appropriate in the present matter. The test was formulated in BTR Industries South Africa (Pty) Ltd and Others v Metal and Allied Workers' Union and Another[29] as follows:

> *'(T)he existence of a reasonable suspicion of bias satisfies the test; and . . . an apprehension of a real likelihood that the decision maker will be biased is not a pre-requisite for disqualifying bias.'[30]*

The question, as posed in President of the Republic of South Africa and Others v South African Rugby Football Union and Others (SARFU), is

> *'whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the Judge has not or will not bring an impartial mind to bear on the adjudication of the case, that is a mind open to persuasion by the evidence and the submissions of counsel.'[31]*

The test is objective and the onus of establishing it rests on the applicant."

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[28] Islamic Unity Convention v Minister of Telecommunications and Others case No 06/3431, 26 April 2007, unreported, par 26
[29] 1992 (3) SA 673 (A)
[30] Id at 693I-J
[31] Sarfu at para [48]

128. The question is not whether there was indeed bias, the question is whether the applicant has a reasonable suspicion of bias.

129. Both the directors of the third respondent, as well as the chairman of the Review Board are, or were, legal practitioners. It may be said that they ought to have been even more attuned to the perception that would be created by collaboration in opposing the application. Be that as it may, I am of the view that a lay person in the position of the applicant may very well have a reasonable apprehension of bias with regard to the decision handed down by the Review Board in view of the subsequent conduct of the respondents in opposing the review application. It seems me that a Review Board, being taken on review, should remain particularly astute to being objective and impartial.

130. In my respectful view, the applicant has made out a case of bias in respect of the decision made by the Review Board.

131. She is accordingly entitled on that basis alone, to have the decision set aside.

132. Given this finding and where the appeal is to be remitted to the Review Board it should be a Review Board differently constituted, that is, excluding the first respondent. I am of the view that any reasonable litigant in the position of the applicant would have a legitimate reason for concern where it appears that there is co-operation between the

decision-maker and a party who had appeared before the decision-maker in the review process.

133. In the premises I grant an order

(1) Reviewing and setting aside the decision of the Review Board constituted in terms of section 9(1) of the National Building Regulations and Building Standards Act, 103 of 1977 (the Act) dismissing the applicant's appeal in terms of section 9 of the Act against the second respondent's refusal to approve the applicant's application to build submitted in terms of section 4(1) of the Act in respect of the dwelling house situate at No 3 Tillamook Road, Plettenberg Bay.

(2) Directing the first respondent to pay the costs of this application.

S Olivier AJ