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

CASE NO: 2973/10

In the matter between:

THE CAMPS BAY RESIDENTS' AND RATEPAYERS' ASSOCIATION	**First Applicant**
HENDRIK STEVEN NEETHLING	**Second Applicant**
TAKU INVESTMENTS SA (PTY) LTD	**Third Applicant**
VERNON LIONEL CHORN	**Fourth Applicant**
and	
DAVID ANTHONY HARTLEY	**First Respondent**
SUSAN DENISE HARTLEY	**Second Respondent**
THE CITY OF CAPE TOWN	**Third Respondent**

JUDGMENT: DATED 2ND SEPTEMBER 2010

GAMBLE, J:

INTRODUCTION

[1] The Atlantic seaboard of the Cape Peninsula is famed for its natural beauty and breathtaking views of mountain and sea. It is also said to host some of the most expensive real estate in the Western Cape. The combination of these factors has lead to many landowners in suburbs

such as Bantry Bay, Clifton and Camps Bay jealously seeking to protect their views and privacy as neighbouring property owners endeavour to push the limits of permissible land use and buildings under the Western Cape's idiosyncratic planning legislation [1] .

[2] Often the simmering tensions between neighbours and civil society groups have spilled over into litigation, many of which have spawned a plethora of decisions of this court relating to reviews, interdicts and declarations of rights. This is yet another such case.

[3] The First Respondent (Mr Hartley) and the Second Respondent (Mrs Hartley), to whom I shall collectively refer as "the Hartleys", jointly own Erf 530 Camps Bay, also known as 21 The Meadway (hereinafter "the property"). The property is located a block or two away from the main beach in Camps Bay and commands views of the western aspect of Table Mountain and the Twelve Apostels. Its sea view is evidently limited at ground level.

[4] Early in 2004 the Hartleys instructed an architect, Mr Thomas Geh, to prepare building plans for the proposed construction of a multi-levelled, double dwelling on the property. The building designed by Mr Geh would be in conflict with the relevant zoning scheme regulations for the City of Cape Town ("the scheme regulations") and certain restrictive

[1] Cf. The Land Use Planning Ordinance, 15 of 1985 ("LUPO") and its attendant zoning scheme regulations.

title deed conditions. Accordingly, a public participation process in respect of the intended use rights of the property was required under various statutory instruments.

[5] The Second Applicant ("Mr Neethling") is the owner of the property on its northern western boundary (i.e. towards the beach). In April 2004 Mr Neethling received a statutory notice prepared by Mr Geh informing him of the proposed construction and inviting his comments thereon.

[6] Mr Neethling filed a letter of objection with the Third Respondent ("the City") on 20 April 2004. In the founding affidavit herein he says that –

> *"I was opposed to the proposed development as it was conveyed to me in Mr Greh's notification because I felt that it would have a deleterious effect on the amenities I enjoy from my property and that it would lead to a derogation both of my enjoyment and of the market value of my property".*

[7] Mr Neethling's wife is an architect and, with her assistance, he compiled a detailed objection document comprising an architect's assessment, drawings and photographs. The principle complaints which Mr Neethling raised regarding the proposed building were overshadowing, overlooking and loss of amenities and a view in respect of his home.

[8] Mr Geh's notification elicited a further sixteen letters of objection, including all of the other neighbours to the property and the First Applicant ("the CBRRA"). The CBRRA is a voluntary association which represents the interests of property owners and residents in the suburbs of Camps Bay, Clifton and Bakhoven. The CBRRA's objections allegedly include the safeguarding of the interests of its more than six hundred members through monitoring the enforcement of, and departures from, zoning scheme and title deed restrictions on properties in those suburbs. It is a proverbial neighbourhood watchdog whose *locus standi* has been recognised by this Court in certain of the cases referred to above. In any event, its standing in this matter is not in issue in the light of certain developments to which I shall refer shortly.

[9] Evidently, the City regarded Mr Geh's April 2004 notification as defective and instructed him to send out fresh notices. Mr Neethling says he received a second notification on 14 December 2004 and thereafter lodged an objection similar to the first. A total of twenty four letters of objection were lodged in respect of the second notification, including from the CBRRA and the other neighbours to the property.

[10] The relevant committee of the City was scheduled to hear objections on 17 August 2005. However, this meeting never took place. Mr Chirs Willemse, the chairman of the CBRRA's planning committee, facilitated a meeting of the interested and affected parties in an attempt

to reach an amicable solution. This endeavour was successful and on 12 August 2005 a written agreement was concluded between the Hartleys, Mr Neethling, the CBRRA and twenty other objecting parties.

[11] For the purposes of this application it is not necessary to recite the terms of the agreement in any great detail. Suffice it to say that it covered a broad range of issues from the dimension of the proposed building to overlooking features, landscaping and hours of construction work. A number of agreed plans were annexed to the agreement and it is the applicant's case that the building was to be conducted strictly in accordance therewith.

[12] The upshot of the agreement was that the twenty one affected parties withdrew their objections to the proposed development which could then progress to the next preliminary stage.

[13] On 16 January 2007 the City granted its consent to a departure from the scheme regulations under Section 15 of LUPO and paved the way (from a land use and planning point of view) for the construction of a double dwelling [2] on the property. This consent incorporated various conditions to which I shall revert hereunder.

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[2] Counsel informed me that the phrase "double dwelling" essentially permits the construction of a building with two kitchens on a property, thereby facilitating the incorporation of a separate self-catering apartment or so-called "granny flat" into the main house.

[14] The offending title deed restrictions on the property (which precluded a double dwelling) were duly removed under the Removal of Restrictions Act, 84 of 1967 and the conditions stipulated in the agreement of 12 August 2005 were incorporated in a new title deed dated 28 February 2008.

[15] The Hartleys were also required to obtain approval of the revised building plans finalised by Mr Geh, but this step was apparently regarded as no more than a formality.

[16] In about April or May 2009 Mr Neethling received a phone call from Mr Paul Righini who told him that he had been appointed as the Hartley's new architect. Mr Neethling declined Mr Righini's request for a meeting to discuss proposed changes to Mr Geh's plans and says that he referred Mr Righini to Mr Willemse because there were a number of other interested parties. It does not seem as if Mr Righini contacted Mr Willemse.

[17] On 20 August 2009 Mr Neethling noticed that demolition of the existing building on the Hartleys' property had commenced. The following day he went to the City's offices to establish whether the building plans had been approved. He says that he ascertained that building plans had been submitted by the Hartleys on 4 June 2009, that these plans had been approved on 12 August 2009 and that in his view

they differed substantially from the agreed plans which were annexed to the agreement of 12 August 2005. ("the old plans")

[18] Mr Neethling says that he was of the view that the Righini plans ("the new plans") were in contravention of:

18.1 the agreement of 12 August 2005 ("the written agreement");

18.2 the amended title deed conditions endorsed pursuant to the written agreement; and

18.3 the conditions imposed by the City when it consented to the construction of a double dwelling on the property.

[19] Mr Neethling then proceeded to engage with the relevant City officials in an endeavour to persuade them that the new plans were indeed in contravention as alleged but he was unable to do so.

[20] Mr Neethling says that during this process of discussion, City officials showed him a copy of the title deeds which had allegedly been submitted together with the new plans. He then formed the view that the City's officials had been mislead regarding the appropriate title deed restrictions/conditions. I will deal in more detail later with some of the alleged contraventions as contended for by the applicants.

[21] During the period 21 August to 30 November 2009, Mr and Mrs Neethling were involved in on-going discussions with City officials regarding their concerns about the Hartleys' proposed development. They also sought legal advice. The City officials, in turn, engaged with Mr Righini.

[22] On 30 November 2009 Mr Neethling went next door and discussed the matter with the building contractor on site. The latter informed him of Mr Righini's instructions to him in respect of certain of the design features and parameters of the proposed dwelling. Mr Neethling requested sight of any updated plans prepared by Mr Righini subsequent to approval of the new plans but these were not forthcoming. Upon enquiry to City officials Mr Neethling established that no such plans (which he termed "rider plans") existed.

[23] On 5 December 2009 there was an informal meeting at the property between Mr Neethling, Mr Righini, Mr Willemse and Mr Theron, the section head of the City's Building Development Management for the area in question. At this meeting Mr Willemse told Mr Righini in no uncertain terms that his view was that the new plans were in breach of the written agreement and the title deed conditions and asked Mr Righini to prepare a full set of plans which were in compliance with the written agreement and the title deeds.

[24] Mr Righini undertook to take instructions from the Hartleys and revert by 15 January 2010. On 12 December 2009 Mr Willemse sent a letter to Mr Righini and the Hartleys confirming the substance of the discussions and recording Mr Righini's undertaking. The Hartleys were advised that the CBRRA would resort to litigation if necessary but that the CBRRA remained available for further discussion if necessary.

[25] Mr Hartley wrote a terse reply on 17 December 2009 denying any non-compliance with the written agreement. He reserved his rights and undertook to revert by mid January 2010.

[26] Building work continued on the property until 21 December 2009 in contravention of the condition in the written agreement that it would not take place during the annual builders' shutdown and only ceased when Mr Neethling threatened to lay criminal charges.

[27] There was no response from the Hartleys as promised in mid January 2010. All the while building work continued apace.

[28] On 15 February 2010 the present urgent application was launched by the CBRRA (as first applicant). Mr Neethling (as second applicant), Taku Investments SA (Pty) Ltd, the owner of the neighbouring property immediately behind the property (as third applicant) and Mr Vernon Chorn, the owner of the neighbouring property to the south east of the

property (as fourth applicant). Mr and Mrs Hartley were cited as the first and second respondents respectively with the City as the third respondent. The City filed a notice to abide the decision of the Court on 23 February 2010.

[29] When the matter first came before Court on 24 February 2010 it was postponed by agreement between the parties by Acting Justice Samela to 20 April 2010 for hearing, with an agreed timetable for the filing of further papers. The Hartleys undertook to cease all building operations pending the hearing on that date.

[30] By 22 April 2010 the Hartleys' answering affidavits had still not been filed and by further agreement between the parties the matter was postponed by the Judge President to 9 June 2010. The Hartleys' undertaking to cease building was extended accordingly.

[31] On Wednesday 9 June 2010 and thereafter, the matter was argued over a period of three days, whereafter judgment was reserved.

[32] The applicants were represented by Mr Irish SC and Mr Baguley while the Hartleys were represented by Mr Dickerson SC and Mr Leslie. The Court is indebted to the legal representatives for the most helpful heads of argument filed and the thorough addresses which have facilitated the preparation of this judgment.

[33] On 14 July 2010 (at a stage when preparation of this judgment had commenced) I was informed by the applicants' attorneys that there has been certain material developments since the conclusion of the hearing and that the applicants sought leave to file a further affidavit. This application was opposed by the Hartleys and the applicants launched a formal application to re-open their case and submit a further affidavit by Mr Neethling.

[34] The parties were informed that my *prima facie* view was that the affidavit was relevant and the parties were offered an opportunity to argue its admissibility. I was then informed that the Hartleys had abandoned their opposition to the admission of the further affidavit and that the parties had agreed on a timetable for the filing of further papers. The Hartleys filed their answering affidavit on 17 August 2010 and the applicants' reply was filed on 27 August 2010.

[35] In the course of the filing of the latest set of affidavits the Hartleys complained that the applicants had not yet applied for an early date in the review application which they had launched on 17 February 2010 and in which the Rule 53 record had been filed by the City on 10 March 2010. The applicants replied that they had not filed a supplementary affidavit under Rule 53(4) and that the Hartleys' answering affidavit was therefore some four months overdue. The Hartleys' response is that once the

applicants have filed the record in terms of Rule 53(3) they will need thirty days to file their affidavits.

[36] At the commencement of the hearing Mr Irish informed me that the applicants envisaged that the review papers could be finalised by August 2010 in anticipation of an early hearing of the matter. It would seem that the delay in the filing of papers both in this application and the main matter has been attributable in part to the peripatetic lifestyle of the Hartleys who spend long periods of time abroad.

ISSUES TO BE DECIDED IN THE REVIEW

[37] The applicants argue that the City passed the approved plans:

37.1 contrary to the terms of the written agreement;

37.2 contrary to the terms of the amended title deed conditions;

37.3 contrary to conditions imposed by the City in terms of Section 42 of LUPO when it granted its consent for the erection of a double dwelling; and

37.4 contrary to the provisions of the scheme regulations.

[38] The applicants go on to argue that, *ex facie*, the opposing papers herein, the Hartleys admit that the approved plans are in contravention of the written agreement, the amended title deed restrictions and the scheme regulations. Their case is therefore that they have established a clear right entitling them to temporary interdictory relief.

[39] Mr Dickerson SC argued that the relief sought in this application had to be carefully considered so as to establish the true extent thereof. He maintained that the relief fell into two distinct categories, each with its own individual characteristics.

[40] In the first place, it was said there was an application to enforce a contractual right. This, it was said, was in the nature of an order for specific performance encompassing permanent prohibitory relief [3] and the order which the Court was being requested to make was final in nature rather than *pendente lite*. As an application for final interdictory relief in motion proceedings this meant that the approach in Plascon Evans [4] was applicable.

[41] Secondly, Mr Dickerson, SC argued that the application for the temporary interdict had to be considered in the light of the fact that the Hartleys had commenced building work in accordance with plans duly approved in terms of Section 7 of the National Building Regulations and Building Standards Act, 103 of 1977 ("the Building Act"). It was contended that any contraventions of the scheme regulations occasioned by the inconsistency of the approved plans therewith was not of such a magnitude that it warranted the setting aside of the plans in their

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[3] Cf. Christie, The Law of Contract in SA, 5th ed p 532; V & A Waterfront Properties (Pty) Ltd v Helicopter and Marine Services (Pty) Ltd and Others 2006 (1) SA 252 (SCA) at p 258, 625.
[4] Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A).

minimis. The point is, however, that the Hartleys implicitly accept that the approved plans do not comply with the necessary statutory requirements.

[42] The panacea to the applicants' problems, it was said, was the submission of so-called "rider plans" to the City which would cure the contraventions. Both Mr Righini and Mr Turner, the Hartleys' town planning consultant, confidently proclaimed in their affidavits in support of their principals that they had little doubt that these plans would be passed by the City.

[43] Neither of the parties' legal representatives were able to refer the Court to any statutory basis for the drawing up and submission of such "rider plans". It seems to me that a "rider plan" is just a convenient phrase employed locally to address any variation to, or non-compliance with an approved plan. This much appears, for instance, from Mr Dickerson's submission that all of the alleged offending zoning scheme contraventions would be rectified by the "rider plan" which the Hartleys had submitted to the City on the advice of Mr Righini.

[44] During the course of argument, the Hartleys' counsel handed up a note dealing with various of the contraventions as alleged by the applicants. This note accepted that there were clear contraventions of the scheme regulations and that the approved plans were not in accordance therewith.

[45] In the latest exchange of affidavits the applicants say that they have been vindicated: they point out that the City has refused to approve the "rider plan". They go on to point out the position is somewhat more sinister than would appear at first blush. The applicants allege that the refusal of the rider plans was something which had already taken place some months ago, was known to at least Mr Righini at the time the matter was being argued in open Court, and was something which the Hartleys' agents withheld from the Court.

[46] Consideration of the latest set of affidavits and in particular the annexures thereto show that –

46.1 the "rider plan" was submitted to the City on 28 May 2010;

46.2 no application has been made to the City by the Hartleys for the removal or amendment of any of the conditions imposed by it under Section 42(1) of LUPO when it approved the old plans;

46.3 the Hartleys were informed telephonically by the City on Friday 11 June 2010 that they should collect a letter from the City (which had been prepared the previous day) in which they were informed of the City's refusal to pass the "rider plan".

46.4 The conditions imposed under Section 42 of LUPO are those set out in the written agreement.

[47] In its letter to the Hartleys of 10 June 2010 the City says the following:

> *"[The "rider plan"] cannot be considered at this stage. The Land Use Management Branch has cancelled the clearance originally granted. The amendments indicated on the aforementioned plan is (sic) must be read in conjunction with building plan 0847/2009 [i.e. the approved plans]. The aforementioned plan contains deviations in contravention of the conditions of approval associated with a land use application (for the removal of Restriction, Consent and Departures) approved in December 2006. Building plan 0847/2009 was approved erroneously by the City of Cape Town as it deviated from the permissible developable (sic) envelope as per the 2006 approval. The building plan now under consideration [i.e. the "rider plan"], perpetuates the aforementioned deviations in the absence of a further land use application to amend conditions of approval.*
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> *In light thereof, this department cannot consider [the "rider plan"] as it must be accompanied by an application for the amendment of conditions of approval associated with the land use application mentioned above."*

[48] This development was not brought to the attention of the Court by the Hartleys on Friday 11 June 2010 (the last day of the hearing) or thereafter. Furthermore, the Hartleys initially resisted it being placed before the Court by way of the application to re-open.

[49] *Prima facie*, the City supports the Applicants' interpretation of the conditional basis upon which the old plans were approved. But, as the letter indicates the City's stance is that the Hartleys do not currently have the requisite approval under LUPO. The effect of this is that *prima facie*

the structure on the property has not been built according to law and is accordingly unlawful.

[50] In an affidavit deposed to in London on 17 August 2010, Mr Hartley bemoans the fact that the City has rejected the "rider plan", points out that this seems to be for inexplicable reasons and notes that he and his wife have lodged an appeal under Section 62 of the Local Government: Municipal System Act, 32 of 2000.

[51] I have little doubt that, given the history of this matter, the latest developments will spawn further litigation. Be that as it may, it is clear that the Hartleys' prospects of completing their summer home soon have been dealt a serious blow.

REQUIREMENT FOR *PENDENTE LITE* RELIEF – BUILDING INTERDICT

[52] The approach to be adopted by a Court in a matter such as this is well-known and the principles were recently re-stated by my colleague Justice Dlodlo in Camps Bay Residents and Ratepayers Association and Others v Augoustides and Others [5]. They are –

52.1 a *prima facie* right;

[5] 2009 (6) SA 190 (WCC) at 195-6 paras 7 and 8

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

52.3 the balance of convenience being in favour of the granting of interim relief; and

52.4 the absence of any other satisfactory remedy.

[53] The purpose of such an interdict is not to mete out punishment for past wrongs but rather to "provide breathing-space to enable solutions to be found". It is said to be aimed at "promoting restorative justice" cf. S v Baloyi (Minister of Justice Intervening) [6].

[54] In this Division, the approach to building interdicts pending review proceedings has been laid down in a series of decisions over more than a decade [7]. That approach is as follows:

54.1 The prospects of success in the pending review proceedings equate to the strength of the right which the applicant must establish *prima facie*.

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[6] 2000 (2) SA 425 (CC) at 436 D517

[7] Cf. Beck and Others v The Premier of the Western Cape (CPD case 12596/06; 11 October 1996); Camps Bay Residents and Ratepayers Association and Another v Avadon 23 (Pty) Ltd (CPD case 17364/05; 18 March 2006); PS Booksellers (Pty) Ltd and Another v Harrison and Others 2008 (3) SA 633 (C); Van der Westhuizen and Others v Butler and Others 2009 (6) SA 174 (C) and Searle v Mossel Bay Municipality and Others (CPD Case 1237/09; 12 February 2009).

54.2 The stronger the prospects of success in the review the lesser prejudice occasioned by the suspension of building operations, i.e. the principle of legality operates decisively in the context.

54.3 It is preferable that building work should be stopped sooner rather later if the application is likely to succeed in the review.

54.4 The building owner should not be permitted to build him/herself into "an impregnable position" by the time the review is heard so as to create a situation of bias towards an unauthorised building – the so-called *fait accompli* approach.

[55] In the instant case it is argued that the Hartley's concession that there is non-compliance with the scheme regulations (albeit allegedly minor) puts the matter beyond the pale: the applicants say that the right is clear and that interim relief should follow accordingly. I believe that the preferable approach is rather to have regard also to the most recent developments (the withdrawal of the land use approvals) and to say that the *prima facie* right originally relied upon by the applicants is now sufficiently persuasive so as to subordinate the prejudice which the Hartleys may suffer.

[56] In light of my findings on the strength of the review right, it is not strictly necessary to go into any detail on the contractual point. Certainly, it would not be necessary nor preferable to consider the question of final relief at this stage since this saga has many instalments

yet to follow. Without wanting to influence the Court ultimately seized with this matter in any way, I would merely wish to say that the applicants have advanced a persuasive argument for the enforcement of their contractual right to demand that the Hartleys adhere to the "spacial parameters" contemplated in the Geh plans and agreed upon in the written agreement. Precisely what the nature and extent of those parameters are is a matter for decision by another Court.

[57] In considering the balance of convenience I have not lost sight of the fact that the Hartleys have been endeavouring to develop their property for the past six years or more. The nature of that development has changed materially since the emergence of the Righini plans and the applicants are fully within their rights to fall back on the time honoured principle of *pacta sunt servanda* - a principle which is as enforceable in a constitutional state as it was under many centuries of common law [8]. It was the Hartleys who decided to change tack without properly consulting their fellow contractants in advance and who casually fobbed them off when concerns were raised about the extent of the construction then taking place.

[58] I agree with Mr Dickerson that the relief now sought by the applicants could be spun out interminably to the detriment of the Hartleys if the applicants were permitted to approach this Court on a piecemeal

[8] Barkhuizen v Napier 2007 (5) SA 323 (CC) at 348 I para 87

basis for final interdictory relief and a demolition order in due course. The order which I intend to make will ensure that the associated issues relating to the development of the property are dealt with in one composite hearing. The contemplated date for that hearing is some ten weeks hence. If the relief contemplated in prayer 2.2 of the notice of motion is initiated speedily (whether by action or application) the parties will have sufficient time to file the necessary pleadings/affidavits to enable issues between them arising from prayers 2.1 and 2.2 to be dealt with in a cost-efficient manner with the least utilization of court time.

[59] During the hearing the Hartleys tendered to demolish whatever part of the building the Court ultimately ordered and undertook not to raise the *fait accompli* argument in response to any attempt by the applicants to secure such relief. Demolition of the building (or part thereof) is still some way down the track and I would prefer not to have to consider that at this stage. Given the latest developments, I am satisfied that the balance of convenience favours the granting of interim relief at this stage.

[60] Finally, I believe that it is indisputable that there is no reasonable alternative remedy available to the applicants at this stage.

ORDER

[61] In the result I make the following order:

A. The First and Second Respondents are interdicted from carrying out (or allowing to be carried out) any construction work on Erf 530 Camps Bay, otherwise known as 21 The Meadway, Camps Bay, pending the final determination of the application for review launched by the applicants in this Court under case no. 3430/10 ("the review matter").

B. In the event that they intend to proceed therewith, the applicants are to commence the proceedings contemplated in prayer 2.2 of the notice of motion herein by 13 September 2010, whereafter the relevant time periods contemplated in the Uniform Rules of Court will apply.

C. The Registrar of this Court is directed to set down the review matter and any proceedings commenced under para B above for hearing before a single judge of this Division on 9 November 2010.

D. The First and Second Respondents are to file their answering affidavits in the review matter by Thursday 23 September 2010.

E. The Applicants are to file their replying affidavits (if any) in the review matter by Friday 15 October 2010.

F. Heads of argument in the review matter are to be filed in accordance with Consolidated Practice Note 50.

G. All costs, which shall include the costs of two counsel, are reserved for determination by the Court hearing the review matter.

H. The parties are at liberty to approach this Court for any adjustment that they may wish to request in respect of the time periods set out above.

P.A.L. GAMBLE