**IN THE HIGH COURT OF SOUTH AFRICA**

**(WESTERN CAPE HIGH COURT, CAPE TOWN)**

**Case Number: 11933/10**

In the matter between:

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| **CT Marina Property (Pty) Ltd** | **First Applicant** |
| **John Mountain Property CC** | **Second Applicant** |
| **136 Kloof Road Investments (Pty) Ltd** | **Third Applicant** |
| and | |
| **Barmaran View CC** | **First Respondent** |
| **Vector Construction CC** | **Second Respondent** |
| **The City of Cape Town** | **Third Respondent** |

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**REASONS DELIVERED ON 10 SEPTEMBER 2010**

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[1] On 21 July 2010, I granted the relief set out below and indicated that my reasons would follow. These are my reasons.

**THE RELIEF GRANTED**

[2] The order provided as follows:

(a) That pending the determination of proceedings to review and set aside the third respondent's purported approval of building plans in respect of the Erf 901, Bantry Bay at Cape Town, the first and second respondents are interdicted and constrained from proceeding with any further building work or construction on the property.

(b) That the applicants must launch the further proceedings referred to in 2(a) above within 30 days calculated from the date of granting the order proposed in prayer 1, failing which this order shall *ipso facto* lapse.

**BACKGROUND**

[3] On 19 November 2008, the City of Cape Town (**the third respondent**) approved building plans for the construction of a 3- storey double dwelling with a top storey mezzanine level on the property situated at Erf 901 Bantry Bay, also known as 138 Kloof Road, Bantry Bay in Cape Town (**the property**). The property is a consolidation of Erf 451 and a portion of Erf 55. The first respondent is the owner of the property and it contracted the second respondent to build the dwelling.

[4] The second respondent had begun construction and when these proceedings commenced was about to cast the final slab that would form the mezzanine level.

[5] The property is situated on the seaward side of Erf 884, the property of the first applicant, and Erf 891, the property of the second applicant. The property adjoins Erf 449, the property of the third applicant.

**The applicants' version**

[6] John Mountain (**Mountain**), first applicant's director, attested to the founding papers and said that in 2007, he had instructed architects to investigate the impact of the proposed development on the property. In the course of the investigation, the architect prepared a photomontage of the area depicting the proposed new building. He concluded that the impact of the new building on the view from first applicant's dwelling would be unreasonably affected by the construction.

[7] On 3 December 2007, Tommy Brümmer (**Brümmer**), a town planner and regional planner, lodged an objection to the proposed plans with the third respondent on behalf of the applicants. On 20 March 2008, the third respondent informed Brümmer that the application for subdivision and departures in respect of the property had been withdrawn.

[8] However, soon afterwards, the original dwelling on the property was demolished. Mountain again contracted Brümmer to investigate whether the third respondent had approved any plans and to comment on them. Mountain said that:

*"Brümmer was able to view the approved plans. Although he was unable to obtain a copy thereof but was able to trace the plans."*

[9] According to Mountain, the approved plan traced by Brümmer depicted the new building superimposed upon the original dwelling. This allowed the applicants to understand the height of the new dwelling in relation to that of the original dwelling. He said that the original dwelling was depicted on the approved plan as a dotted line and that the highest point of the original dwelling was the ridge of the roof that appeared to be the same height as the proposed level of the mezzanine storey of the new dwelling.

[10] The building consisted of a ground storey below the level of Kloof Road, a first storey at the level of Kloof Road and 2 double garage front doors, and a second storey with a mezzanine level.

[11] Influenced by the dotted line, Brümmer was satisfied that the proposed building was no higher than that of the original dwelling excepting the mezzanine level. He was further satisfied that the new plans resolved the difficulties he had in respect of the 2007 plans.

[12] In June 2010, Mountain saw that the construction of the new dwelling protruded above Kloof Road, Bantry Bay. He noticed that the height of the 'column boxes' on the first floor/garage storey were higher than he had expected. Mountain realised that the completed structure would be significantly higher than originally anticipated.

[13] This sparked a new investigation. Brümmer learned that the dotted line had not been drawn to scale and that the structure being erected was 2.55 metres higher than originally anticipated. Mountain said that the dotted line had misled the applicants and, possibly also, the third respondent.

[14] The applicants therefore intended to launch an application for the review of the approval granted to the first respondent. The applicants sought the relief referred to above pending the finalisation of the intended review proceedings.

[15] The applicants alleged that they would suffer irreparable harm if the first and second respondents were allowed to complete the building works. I deal in more detail with that allegation below.

**The first respondent's version**

[16] The second and third respondents have not opposed the application; they abide by the court's decision.

[17] Harry Singer (**Singer**) attested to the first respondent's answering affidavit and said that the first respondent was in the process of

constructing a dwelling in accordance with plans approved by the third respondent.

[18] Singer said that the 2007 plans included a building with an average mean sea level height of 75 metres. The first applicant abandoned those plans after receipt of objections and in June 2008 submitted new plans to the third respondent in respect of the current project. In October 2008, Brümmer, representing the applicants, objected to the new plans. Singer deduced from the objection that Brümmer had intimate knowledge of the planned structure and the proposed height.

[19] The third respondent nevertheless approved the plans on 19 November 2008 and construction began on 28 October 2009. On 18 June 2010, Brümmer complained on behalf of the applicants that the various levels had not been built in accordance with the mean height above sea level set out in the plans. He was wrong.

[20] Once Brümmer realised his error, he alleged that he had been misled as to the height of the building by the dotted line. Singer denied that the new building would in any way impact on the sea view from Erf 449, owned by the third applicant.

[21] About the dotted line Singer said the following:

*"The dotted line outline was placed on the plan merely to indicate the previous and general position of the original dwelling. It was in no way meant to be a reflection of the relative heights of the old and new dwellings. This is borne out by the fact that no heights have been provided for the old dwelling."*

[22] Singer said that the applicants have remained "supine" for a period of more than 8 months. That is from November 2009 when Brümmer viewed and traced the building plans until construction work was at a point in June 2010 when the second respondent "was making ready to cast the final concrete slab which would form the base of the approved mezzanine level".

[23] Singer further alleged that even had Brümmer been misled, the construction complied with the relevant zoning regulation and therefore no objection would succeed. The first respondent was entitled to build to a height of approximately 15 metres above Kloof Road. In an exercise of caution, it had lowered the various slabs on the plan by approximately half a metre.

[24] Singer also said the second respondent had employed approximately 50 labourers who would be adversely affected should the project not continue. In addition, the first respondent had to pre-order the concrete required for laying the mezzanine slab. It was of a specific nature designed to prevent "entirely the ingress of water and is necessary in order for the creation of the swimming pool." Singer said that any delay in that process would "cause huge amount of loss..." Singer suggested that the applicants could claim damages as an alternative to the relief sought.

[25] Cornelis Johannes Moir (**Moir**), was employed by the third respondent as a building control officer when the first respondent submitted its plans. He has since retired. Moir attested to an affidavit in these proceedings and said that he was directly involved in the approval of the building plans that are the subject of this application. The plans were submitted in June 2008 and he inspected them. The third respondent identified the second and third applicants as interested parties and in correspondence invited them to make representations on the proposed plans. Brümmer responded as indicated above. Moir said that he had not been misled by the dotted line and that he was "not satisfied that ...the building... would disfigure the ...area...".

**Response to Moir**

[26] Mr Kantor, who appeared for the applicants, submitted that Moir's affidavit had provided the applicants with more grounds for the

review. He submitted that Moir had been required to prepare a recommendation for consideration by the decision maker, who was another official. The details of that official do not appear from these papers. It appeared from Moir's affidavit, so the argument went, that Moir had not applied his mind to the subjective facts and circumstances relevant in terms of section 7(1)(b)(ii)(bbb) and/or (ccc) of the National Building Regulations and Building Standards Act 103 of 1977 when he made his recommendation.

[27] That report does not form part of these papers. On these papers, the applicants have not made out a case for alleging failure on the part of either Moir or the decision maker. Mr Kantor submitted that the applicants only realised their further review grounds on receipt of Moir's affidavit.

**DISCUSSION**

[28] I accepted that the relief granted would have financial implications for the workers as well as the first and the second respondents. I further accepted, as alleged by Mountain, that the project was approximately 12 months from completion. The building work in process at the property is in accordance with plans that the third respondent had approved.

[29] Counsel for the first respondent argued that the applicants could claim damages and a demolition order should they succeed in the intended review proceedings. It is so that if the building works were to continue, the applicants would then have to convince a court to order the demolition of a completed building. Griesel J, in the matter of ***Camps Bay Ratepayers Association vs Minister of Planning, Western Cape*** 2001(4) SA 294(C) said the following at 328 para c–d:

*"...Moreover, if an interdict were not granted at this stage, the result would be that the developer would be entitled to continue*

*construction of the flats. Should the applicants later decide to bring an application for a demolition order, they would obviously have a much more difficult task in eventually persuading the Court to make such an order in respect of a fully built block of flats."*

[30] I was further of the view that the balance of convenience favoured the applicants in the circumstances of this matter. In this regard, Nicholson J in the matter of ***Ladychin Investments v South African National Roads Agency*** 2001(3) SA 344 (N) at 353 paras F- I said the following:

*"Where the applicant cannot show a clear right then he has to show a right which, though prima facie established, is open to some doubt. In that event, the applicant will have to show that the balance of convenience favours him. The test for the grant of relief involves a consideration of the prospects of success and the balance of convenience – the stronger the prospects of success, the less the need for such balance to favour the applicant; the weaker the prospects of success the greater the need for the balance of convenience to favour him. By balance of convenience is meant the prejudice to the applicant if the interdict be refused, weighed against the prejudice to respondent if it be granted.(my underlining)*

*Even if there are material conflicts of fact, the Courts will still grant interim relief. The proper approach is to take the facts as set out by the applicant, together with any facts set out by the respondent, which the applicant cannot dispute and to consider whether, having regard to the inherent probabilities the applicant should on those facts obtain final relief at a trial."*

[31] Nicholson J went on to say at 353 paras I-J to 354 A that:

*"... The facts set up in contradiction by the respondent should then be considered. If serious doubt is thrown on the case of the applicant he*

*should not succeed in obtaining temporary relief, for his right, prima facie established, may only be open to 'some doubt'.*

*If there is mere contradiction, or unconvincing explanation, the matter should be left to trial and the right be protected in the mean time, subject of course to the respective prejudice in the grant or refusal of the relief."*

[32] It is common cause that the respondents are currently performing the building operations in terms of an approved administrative act. I considered an interim interdict pending the review of an administrative action should not be lightly granted even if all the requirements for the granting of interim relief had been complied with.

**Condonation before review**

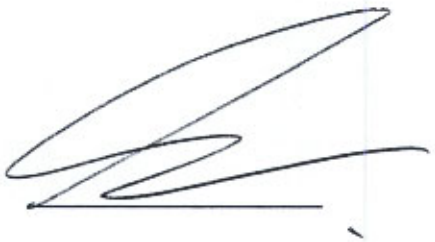
[33] The respondent's counsel argued that the applicants were obliged, in terms of s7(1) of the Promotion of Administrative Justice Act 3 of 2000, to have brought their review application within a period of 180 days and/or 90 days as provided for in s9 of the Act. Counsel submitted that the intended review application would be brought outside of the periods provided for in the Act.

[34] He further submitted that it was incumbent on the applicants to show that they enjoyed prospects of success in the review being entertained. They failed to set out the factual basis upon which they would assert that it would be in the interest of justice to extend the time limit prescribed by s7 of the Promotion of Access Act.

[35] I disagree. Mountain said that it was only in June 2010 that the applicants realised that the building would be "an imposing and dominating structure quite out of keeping with the area". He said that Brümmer thought the dotted line represented the original house, which meant that only the mezzanine level was added to the height of the original dwelling. As indicated above, the dotted line was not drawn to scale.

**CONCLUSION**

[36] I decided to exercise my discretion in favour of the applicants because in my view, the balance of convenience favoured them. I was persuaded that to the extent that they would need condonation to bring the review application they have explained their delay. I was satisfied that an application for interdictory relief instead of an application for demolition and damages was more appropriate.



**BAARTMAN, J**