STELLENBOSCH

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

CASE NO: **19119/2011**

In the matter between:

JEAN-PHILLIPPE COLMANT	1st Applicant
ANNE GILLIAN STONE	2nd Applicant
LA BOURGOGNE FARM (PTY) LTD	3rd Applicant

And

BRASHVILLE PROPERTIES 51 (PTY) LTD	1st Respondent
THE STELLENBOSCH MUNICIPALITY	2nd Respondent
THE DEPARTMENT OF ENVIRONMENTAL AFFAIRS & DEVELOPMENT PLANNING	3rd Respondent

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JUDGMENT DELIVERED ON 11 OCTOBER 2012

YEKISO, J

[1] The first, second and the third applicant ("applicants") have instituted proceedings out of this court, on notice of motion, in which they seek several forms of relief against the first respondent, second and the third respondent. The first such relief is:

[1.1.] an order declaring that the first respondent has abandoned and/or waived its entitlement to effect building work on portion 1 of the farm 1353, in the municipality of Stellenbosch, division Paarl ("farm 1353") in accordance with plan BP/10/1812 which was approved by the second respondent on 12 January 2010 ("the original plan"). In the paragraphs which follow the approval of the plan on 12 January 2010 shall be referred to as "the first decision";

[1.2.] as an alternative to the relief contemplated in sub-paragraph [1.1], the applicants seek an order declaring that the second respondent rescinded its approval of the original plan when, in conditions imposed by it in terms of section 42 of the Land Use Planning Ordinance, 15 of 1985 on 8 July 2011, it required the first respondent to re-submit plans for reissuing thereof;

[1.3.] as a further alternative to the relief contemplated in sub-paragraphs [1.1] and [1.2] above, an order reviewing and setting aside the first decision and remitting the original plans back to the second respondent for its reconsideration.

[2] The second such relief sought is an order reviewing and setting aside, and remitting to the second respondent for reconsideration, the second respondent's decision on or about June 2011, to instruct the first respondent in writing, in terms of section 40(1)(a)(ii) of the Land Use Planning Ordinance, to apply for a contravention levy in respect of the buildings which had been partially constructed on farm 1353 and which contravened the zoning scheme ("the second decision").

[3] And finally, the third such relief sought being an order reviewing and setting aside, and remitting to the second respondent for reconsideration, the second respondent's decision to approve, alternatively, to reinstate as approved, alternatively, to reapprove, the original building plans on or about 20 July 2011 ("the third decision").

[4] All the decisions referred to in the preceding paragraphs constitute "administrative action" within the meaning of the term as defined in section 1 of the Promotion of Administrative Justice Act, 3 of 2000.

[5] The applicants also seek a costs order, but only in respect of those respondents who oppose the relief sought and, in the event that more than one respondent opposes such relief, jointly and severally between such parties, the one paying the other to be absolved.

THE PARTIES

THE APPLICANTS

[6] The first applicant is Jean-Phillipe Colmant, an adult male person, who is the owner of portion 1 of farm number 1447, situate in the municipality of Stellenbosch, division Paarl ("farm 1447"). The southern border of farm 1447 is contiguous to farm 1353. The common boundary between the farms is marked by a river whose 1:50 year flood is significant to the relief sought in terms of sub-paragraph [1.1] and paragraph [3] above.

[7] The second applicant is Anne Gillian Stone, an adult female farmer and owner of portion 3 (a portion of Portion 2) of farm 1643, situate in the municipality of Stellenbosch, division Paarl ("farm 1643"). Farm 1643 is immediately to the south west of farm 1353 and is separated only by divisional road number 26 which is more commonly referred to as the Verdun Road. The second applicant manages farm 1643, as well as the guest house situate thereon, with her life partner, Daniel McCluskey.

[8] The third applicant is La Bourgogne Farm (Pty) Ltd, a company duly incorporated in accordance with the company laws of the Republic of South Africa (with registration number 1994/005299/07) and carrying on business in farming and wine making on 3 contiguous farms, two of which are owned by it and together known as "La Bourgogne". The two farms are described, respectively, as farm 1106 in the municipality of Stellenbosch, division Paarl and Portion 3 of farm 654 (respectively, "farm 1106" and "farm 1654"). Farm 1106 is immediately to the west of farm 1353 and is separated from it by the Verdun Road. Farm 1654 is situated immediately to the north of farm 1643.

[9] The application is supported by the Franschhoek Valley Conservation Trust, an association of persons formed in and during 1986. Its objectives include preservation and protection of the natural and built environment of Franschhoek and the Franschhoek Valley. It is registered with Heritage Western Cape in terms of section 27 of the National Heritage Resources Act, 25 of 1999 as the conservation body for Franschhoek. The application is also supported by the management committee of the

Franschhoek Ratepayers Association. The original plan, and the building and construction work pursuant thereto, is opposed by the Franschhoek Valley Conservation Trust and the Franschhoek Ratepayers Association on the basis that, so it is alleged in the papers, the construction of the buildings, (and their operation as accommodation for a boutique hotel) on farm 1353, do not respect the sense of place of the Franschhoek Valley; and that the first respondent did not follow due legal process before the commencement of the construction of the building works on farm 1353 as these are unlawful and epitomise the incremental erosion of the rural and agrarian atmosphere of the valley.

THE RESPONDENTS

[10] The first respondent is Brashville Properties 51 (Pty) Ltd, a company duly incorporated in terms of the company laws of the Republic of South Africa ("Brashville"). Brashville is the owner of farm 1353, from which it conducts its principal business of a guest house operator.

[11] The second respondent is the Municipality of Stellenbosch ("the municipality"), a municipality established in terms of section 12 and 14 of the Local Government: Municipal Structures Act, No 117 of 1998. The municipality is the local authority responsible for the areas of Franschhoek, Pniel and Stellenbosch and has its offices at Town Hall, Plein Street, Stellenbosch.

[12] The third respondent is the Minister for the Department of Environmental Affairs and Development Planning in the provincial government of the Western Cape ("the Minister") and has its offices at the Provincial Building, Wale Street, Cape Town. The second and the third respondents abide the decision of this court. The second applicant, over and above a paginated record of its decision filed of record, has filed an explanatory affidavit deposed to by David Peter Daniels, the Municipal Manager.

LOCUS STANDI

[13] All the applicants allege that they have the necessary *locus standi* to institute these proceedings by virtue of their respective farms being in close proximity to the alleged unlawful building operations and other associated building activities conducted on the farm 1353 and are thus adversely affected as a result of the building operations conducted thereon; that they have not been afforded an opportunity to be heard in relation to the second decision despite their demonstrable interest in it, given their geographic situation and their intimate involvement in the events which preceded and gave rise to the decisions; and that they have an intrinsic interest in lawful administrative action and, in particular, a direct and substantial interest in the lawful application of the planning and building laws which govern the area in which they live, conduct business and own property.

FACTUAL BACKGROUND

[14] The farm 1353, as has already been pointed out, is situated in the Stellenbosch Municipality, it being located a distance of approximately 1km south of

Franschhoek town. Access to the farm is off Verdun Road which, in turn, links up with divisional road no 26 at the northwest corner of the property. Farm 1447 is situated on the northern border of farm 1353. As has already been pointed out, the common boundary between these two farms is marked by a river with a 1:50 year flood . La Bourgogne, which consists of farms 1106 and 1654 is situated immediately to the west of farm 1353 and is separated from it by Verdun Road.

[15] The background leading to events which gave rise to each of the three decisions sought to be impugned and the recommencement of Brashville's past building activities is rather extensive. A detailed background leading to each decision sought to be impugned is comprehensively set out in the founding affidavit. A summary of events leading to each decision sought to be impugned is, accordingly, derived from the founding affidavit.

[16] Perhaps a good starting point would be the rezoning of approximately 350m^2 of portion of farm 1353 into a residential zone (guest house) which was approved during July 2006. On that occasion a portion of farm 1353 was rezoned from Agricultural Zone 1 to Residential Zone V by permitting to convert the then existing main dwelling on the property to a ± 350m^2 guest house with 7 suites.

[17] On 13 June 2007 Mr Pieter Mons ("Mons"), a planning and development consultant employed by Brashville's predecessor in title, Trade Quick 109 (Pty) Ltd, applied for the rezoning of another portion of the property in order to expand the area

zoned residential zone V to approximately 1134m^2. The proposed rezoning was to permit the extension of the existing guest house of 350m^2 by 784m^2 to an expanded area of 1134m^2.

[18] The proposed development would comprise a building footprint of approximately 827m^2 and covered walkways of approximately 307m^2. The ownership of the property exchanged hands on 12 March 2007 when Brashville's predecessor in title, Trade Quick 109 (Pty) Ltd, sold farm 1353 to Brashville for a consideration of R8,5m. The property was ultimately transferred to Brashville on 29 October 2007. The property was transferred subject to four conditions. Condition 2 of the deed of transfer states as follows:

"2. Not more than one dwelling house, together with such outbuildings as are ordinarily required to be used in connection therewith, shall be erected on the land except with the approval of the controlling authority as defined in Act 21 of 1940."

[19] During April 2008, the municipality advertised the application and, in terms of section 17 of the Land Use Planning Ordinance, the application was made available for inspection. In terms of the advertisement objections were to be received by no later than 29 April 2008.

[20] Whilst the second and the third applicant objected to the proposed development, the first applicant did not file an objection. The first applicant did not object to the proposed development because, as the first applicant puts it, "it was

tucked away behind the south eastern corner of my farm where the winery and tasting room are situated, and because the proposal did not entail any separate new buildings."

[21] On 28 April 2009 the Minister approved the application for rezoning of portion of farm 1353 ("the record of decision") subject to certain conditions. In terms of the record of decision the relevant portion of farm 1353 was rezoned from agricultural Zone I to residential Zone V. The conditions that are material for the purposes of determination of the issues in these proceedings are those contained in paragraph 2.1 which delineated the extent of the zoning approval granted and a further condition contained in paragraph 2.11 of the record of decision.

[22] The condition contained in paragraph 2.1 of the record of decision reads as follows:

"The approval applies only to the rezoning in question, as indicated on the proposed site development plan attached, and shall not be construed as authority to depart from any other legal prescriptions or requirements."

On the other hand, the further condition of the record of decision contained in paragraph 2.11 reads as follows:

"[that] all final building plans be submitted to the Franschhoek Aesthetics Committee ("FAC") or any similar body nominated by Council, for a recommendation before submission to Council for approval." ("Condition 2.11")

[23] During November 2009 Mons, on behalf of the first respondent, engaged both the provincial and the municipal officials in discussions to ascertain what the proper format of an application would have to be to achieve the amendments to the original site development plan ("original SDP") which was approved in terms of the record of decision of 28 April 2009. On this occasion the first respondent had in mind to construct six free standing and separate buildings comprising 10 separate cottages in lieu of the approved wings to the existing building. For this purpose Mons made a representation to officials of the second respondent during November 2009 showing the Architects' drawings and plans of the proposed new development. A subsequent representation was made to the officials of the third respondent showing the drawings and plans of the proposed new development. The effect of the proposed development would be to substitute the original SDP with a revised SDP.

[24] On 7 December 2009 Mons submitted an application on behalf of the first respondent to the second respondent for the amendment of condition 2.1 of the condition of approval in terms of section 42(3)(a) of the Land Use Planning Ordinance to permit the amendment of the original site development plan and its substitution with a revised site development plan depicting the six free standing and separate buildings comprising 10 separate cottages.

[25] The revised site development plan differed significantly from the original site development plan. In place of the approved wings to the existing building the applicant proposed six free standing and separate buildings comprising ten separate guest units.

There had been objectors to the earlier application which was approved by the Minister on 28 April 2009. None of the objectors to the original application, which included the second applicant, was advised of the proposed amendment of the Minister's conditions of approval or given the opportunity to comment or object thereto. The application was not advertised and none of the applicants was aware of it.

[26] On 8 December 2009 Brashville commenced site works and clearing on farm 1353 preparatory to construction in accordance with the revised site development plan. At that stage Brashville did not have any approved building plans nor had the revised site development plans even been approved by the municipality. On 18 December 2009 the municipality purported, in terms of section 42(3) of the Land Use Planning Ordinance, to amend the conditions of the Minister's record of decision ("the amendment decision"). The effect of the amendment decision was to substitute the original site development plan with the revised site development plan.

[27] Once the site works and clearing on farm 1353 preparatory to construction in accordance with the revised site development plan had commenced, the applicants went to lodge a complaint with the municipality. The applicants had become aware that the clearing of the site work preparatory to the proposed construction had been conducted without approved plans. On 18 December 2009, and in an apparent response to such complaints, one the municipality's building inspectors attended on site and served an "illegal building works/structure" notice (a "cease works order") on Mr Eigelaar ("Eigelaar"), the first respondent's agent and site manager of the project. The

notice instructed Brashville to submit building plans for approval within 30 days and to cease the erection of the buildings immediately. At the stage the cease works order was served on the first respondent, the foundations of the cottages had been laid and the brick work was already starting to come out of the ground.

[28] Brashville did not cease construction work. Building continued with two building teams and work continued upto and including Saturday afternoons despite service on the first respondent of a cease works order.

[29] On 31 December 2009 Werksmans, a firm of attorneys acting for the applicants, addressed a letter to Brashville requiring its undertaking to cease construction work immediately and to furnish an undertaking that no further work would be conducted until approval of building plans. On the same date, 31 December 2009, Werksmans Attorneys addressed a similar letter in similar vain to the municipality. No such undertaking was given. The building works on Brashville's property had continued beyond the commencement of the traditional builder's holiday until 23 December 2009.

[30] On 4 January 2010 Brashville's builders returned to work and continued building without approved plans. By the end of the working day on 4 January 2010, so it is alleged in the papers, Brashville had built without approved plans for a period of 16 working days. On 4 January 2010 at 16h07 after a full days' work, Louis Murray Joseph Robert Myngaard ("Myngaard"), the director of the first respondent, and via the email

address of Eigelaar, wrote to the Director: Planning and Development Services of the municipality to say that he would stop building until construction plans were approved.

[31] Brashville submitted building plans for approval to the municipality on 6 January 2010. The building plans were approved on 12 January 2010. Once the building plans were approved, Werksmans, on 15 January 2010, addressed a further letter to Brashville in which it pointed out that the municipality had acted *ultra vires* its powers in purporting to amend the Minister's approval. The letter stated further that instructions had been received to interdict any unlawful construction work and, accordingly, any further construction work done on site would be at Brashville's risk. Brashville did not respond to this letter and continued building at an expedited pace as soon as its plans had been approved.

[32] During the late afternoon of Friday, 22 January 2010 a Mr Truter ("Truter"), an attorney dealing with the matter at Werksmans, gave an advanced (unissued) copy of an application for an interdict, on notice of motion, enrolled for hearing on Thursday, 28 January 20109 to Brashville's legal representatives. On Sunday, 24 January 2010, Brashville's legal representatives addressed an email to Truter in which email Brashville gave an undertaking to cease with its building operations forthwith. Truter only read this email on Monday, 25 January 2010, by which time the application for an interdict was in the process of being issued. In the notice of motion the municipality was cited as a party to the proceedings and the Minister was similarly served with a copy thereof. On Thursday, 28 January 2010 the matter was settled and the settlement agreement was

made an order of court (per Koen AJ). A copy of the court order is annexed to the founding affidavit as annexure "JP8".

[33] Paragraph 3 of the order referred to in the preceding paragraph reads as follows:

"By 28 April 2010 the First Respondent shall lodge its intended application to the competent authority in the Western Cape Provincial Government ("the competent authority") for the amendment of the conditions imposed by the Minister of Local Government, Environmental Affairs and Development Planning when approving the rezoning of Portion 1 of the farm 1353, Paarl Division, on 28 April 2009, alternatively, for the rezoning of the said property."

[34] During February 2010 Mons, on behalf of Brashville, made an application to the department for "rezoning and amendment of the site development plan to accommodate the extension of the guest house on portion 1 of the farm 1353, Paarl division". On 1 March 2010 the municipality revoked its decision of 18 December 2009 to approve the revised SDP. This was in response to a request by Brashville. On 28 March 2010 the applicants submitted their objections to and comments on the application to rezone or to amend the original SDP, to the Department.

[35] On 25 March 2011 the Chief Land Use Management Regulator of the Department of Environmental Affairs & Development Planning in the Western Cape Provincial Government, Western Cape, addressed a letter to the Director: Planning & Development Services of the municipality advising the municipality that the competent authority had resolved that both Brashville's applications for the rezoning and an

amendment of the original site plan be refused. The last paragraph of the letter by the Department referred to in this paragraph reads as follows:

"Your municipality should instruct the applicant to apply for a contravention levy (as per provincial circular 4/2008) in terms of section 40 of the (LUPO)."

On the same date a similar letter was addressed to Mons.

[36] The contents of the letter to Mons was the same as the letter of the same date addressed to the municipality except for paragraph 3 thereof which reads as follows:

"The municipality will instruct the applicant to apply for a contravention levy."

The applicants only received a copy of a letter by the Department addressed to the municipality on 6 May 2011.

[37] On 13 May 2011 the applicant's attorneys addressed a letter to the municipality and, with reference to the letter by the Department addressed to the municipality dated 25 May 2011, pointed out that the municipality was obliged to consider and rationally choose between the three options provided for in section 40(1)(a) of the Land Use Planning Ordinance. The letter went on to state that the continued construction of the six new buildings on farm 1353 was not in accordance

with the original SDP and the only rational choice which could be made was to instruct the owner of Brashville to rectify its unlawful building works.

[38] On 22 June 2011 there was convened a meeting between the representatives of the municipality and the Franschhoek Valley Conservation Trust ("the trust") and Franschhoek Ratepayers' Association ("FRA"). The purpose of the meeting was to address planning, development and other local issues that were of common concern. At that meeting Basil Davidson, one of the representatives of the municipality, had indicated to Barry Phiilips, one of the representatives of the trust, that the department had "instructed" the municipality to invite the owner of farm 1353 to apply for a contravention levy. There is a dispute as to whether Davidson had agreed to withhold the letter addressed to the owner of farm 1353, which had at that stage already been drafted, at the request of Phillips pending legal advice thereon.

[39] On 24 June 2011 the municipality addressed a letter to Mons instructing Brashville to apply for the determination of a contravention levy in terms of section 40 of the Land Use Planning Ordinance. The opening paragraph of this letter reads as follows:

"The letter of decision dated 25 May 2011 in respect of this proposal from the department ... refers:

1) You are accordingly instructed to apply for the determination of a contravention levy (as per provincial circular 4/2008) in terms of section 40(1)(a)(ii) of the (LUPO) for the actual guest house buildings which were erected without authorisation on farm 1353/1 ... within thirty days from the date of registration of this letter."

[40] On 28 June 2011 Mons addressed a letter to the Director: Planning & Development Services of the municipality acknowledging receipt of its letter of 24 June 2011 simultaneously stating that an application was thereby being made for a determination of a contravention levy in terms of section 40(1)(a)(ii) of the Land Use Planning Ordinance. In this letter Brashville stated that it had determined that the contravention levy would be in an amount of R51,910-08.

[41] On 8 July 2011 the municipality addressed a letter to Mons accepting the application to pay a contravention levy in terms of section 40(1)(a)(ii) of the Land Use Planning Ordinance in an amount of R51,910-08. The approval of an amount to be paid by way of a contravention levy was subject to certain conditions which were annexed to the letter addressed to Mons dated 8 July 2011. The conditions were imposed by the municipality in terms of section 42 of the Land Use Planning Ordinance. Of relevance amongst the conditions imposed are those set out in paragraph (d) and (e) of the annexure to the letter by the municipality dated 8 July 2011.

[42] The conditions which are of relevance for purposes of these proceedings and already referred to in the preceding paragraph read as follows:

"(d) that building plans for the subject guest house building be resubmitted to council for reissuing thereof together with a letter from the owners indemnify (sic) the decision making authority from any flood damages that may occur from the adjacent river stream;

(e) that a landscaping plan be resubmitted for approval to the Director: Planning and Development ... indicating the final proposed landscaping to mitigate the visual impact of the proposed guest house structures from the surrounding properties and roads before further building operations are started."

The indemnity referred to in condition (d) of the conditions imposed by the municipality was given to the municipality by way of a letter from Brashville dated 12 July 2011.

[43] On 14 July 2011 Brashville paid the municipality an amount of R51,910-08 being in respect of a contravention levy. On the same date Brashville submitted a copy of the landscaping plan and principles to the municipality for approval.

[44] On 20 July 2011 Mons addressed an email to the Manager: Building Development Service of the municipality in which letter Mons recorded that he had been informed that the municipality had intended to issue a "letter of re-approval" of the previously approved plans. Mons requested such a letter "to enable them (his client) to proceed with building work after a delay in excess of 14 months". On the same date, namely, 20 July 2011, Crouser addressed a letter to Brashville stating that the building plans were reinstated as approved and that Brashville may continue with the construction of building work.

[45] On 16 August 2011 the municipality addressed a letter to Werksmans attorneys under the heading "Contravention levy: Portion of Portion 1 of farm 1353, Paarl 'De Lavande' ". The letter acknowledged receipt of a letter from Werksmans

attorneys dated 13 May 2011 as well as a letter subsequent thereto dated 5 August 2011. The penultimate paragraph of the letter of 16 August 2011 reads:

"We confirm that Stellenbosch Municipality executed the decision dated 25 March 2011 of the provincial authority. In light thereof you do not have a right of appeal in terms of section 62 of the Municipal Systems Act or in terms of section 44 of the Land Use Planning Ordinance, 15 of 1985."

The letter was authored by a Mr M C Williams, a senior legal advisor within the municipality. On 25 August 2011 Brashville recommenced construction of their buildings.

[46] It is on the basis of the background set out in the preceding paragraphs that the applicants seek to have the approval of Brashville's building plans on 12 January 2011 ("the first decision"; the decision to invite Brashville to apply for payment of a contravention levy during June 2011 ("the second decision"); and the decision to re-approve, re-issue, approve as re-instated of the original plans on 20 July 2011 reviewed and set aside ("the third decision").

THE FIRST DECISION: APPROVAL OF BUILDING PLANS ON 12 JANUARY 2010

[47] The Minister, in approving the rezoning of Portion 1 of the farm 1353 from Agricultural Zone I to Residential Zone V in order to extend the then existing guest house to ±1134m^2 (14 en-suite guest rooms) stipulated certain conditions attached to such rezoning approval. The rezoning application was approved in terms of section 16

of the Land Use Planning Ordinance whilst the conditions attached to such approval were imposed in terms of section 42 of the Land Use Planning Ordinance. The conditions that are of significance for purposes of determination of the issues in these proceedings are those set out in paragraphs 2.1 and 2.11 of the Minister's record of decision of 28 April 2009.

CONDITION 2.11

[48] Condition 2.11 of the Minister's record of decision of 28 April 2009, annexed as annexure "JP5" to the founding affidavit, provides as follows:

"That all final building plans be submitted to the Franschhoek Aesthetics Committee or other similar body nominated by the council for recommendation before submission to council for approval."

[49] Condition 2.11 is a mandatory condition imposed in terms of section 42(3) of the Land Use Planning Ordinance. The municipality thus has no discretion as regards whether to comply with this condition. The municipality was obliged to comply with this condition as the provisions of section 39(1)(c) of the Land Use Planning Ordinance require it to do so.

[50] The Franschhoek Aesthetics Committee ("FAC") disbanded on or about July 2009. The FAC was replaced by the Franschhoek Planning Advisory Committee ("the PAC") which was appointed by the municipality on or about September 2099. The goal of the PAC, amongst other things, is to advise the municipality on various aspects in lieu

of the preservation and furthering the cultural landscape and natural environment of the greater Stellenbosch area. Clause 6(b) of the terms of reference of the PAC provides:

"To advise the municipality on the aesthetic, functional (including water and energy utilisation), architectural, cultural and historical aspects of any new development or contemplated development and with respect to any proposed alteration or additions to existing buildings, structures and elements of the built environment within any and all declared heritage areas or any other development that the Director: Planning & Environment may refer to such a committee."

CONDITION 2.1

[51] On the other hand, condition 2.1 of the Minister's record of decision, as has already been pointed out, reads as follows:

"The approval applies only to the rezoning in question as indicated on the proposed site development plan attached, and shall not be construed as authority to depart from any other legal prescriptions or requirements."

[52] Brashville was very well aware of the conditions imposed in terms of the Minister's record of decision of 28 April 2009. On 7 December 2009 Mons, on behalf of Brashville, applied to the municipality, and not to the relevant provincial department, for the amendment of the Minister's record of decision of 28 April 2009. It would appear that the amendment was sought and applied for in terms of section 42(3)(a) of the Land Use Planning Ordinance. The proposed amendment was for the amendment of condition 2.1 of the Minister's rezoning approval in order to permit the amendment of

the original SDP and its substitution with a revised SDP prepared by Munnik Visser Architects.

[53] The revised SDP differed significantly from the original SDP in that, in place of the approved wings to the existing building, the first respondent proposed six free-stranding and separate buildings comprising 10 separate dwelling units.

[54] On 18 December 2009 the municipality purported, in terms of section 42(3)(a) of the Land Use Planning Ordinance, to amend the conditions attached to the Minister's record of decision. The effect of the amendment, as has already been pointed out in paragraph [51] above, was to substitute the original SDP with a revised SDP. On 6 January 2010, Brashville, ostensibly on the strength of the purported amendment of the Minister's record of decision by the municipality, in terms of which the original SDP was substituted with a revised SDP, submitted plans to the municipality for approval. Such plans were approved on 12 January 2010.

[55] As has already been pointed out in paragraph [52] of this judgment, the revised SDP, which has, since the approval thereof by the municipality, become the basis of the proposed development, differed significantly from the original SDP. None of the owners of the adjoining farms and, in particular, the owners of farms 1447, 1106 and 1643, were notified of the submission of such plans for approval nor were such plans referred to the PAC for the required recommendation.

[56] Section 7(1) of the National Building Regulations & Building Standards Act, 103 of 1977 (the National Building Act) provides for the approval of the building plans if these comply with the requirement of the National Building Act and any other applicable law. The other applicable law, in the instance of this matter, would be the provisions of section 39(1)(a) which enjoins the municipality to comply and enforce compliance with conditions imposed in terms of the Land Use Planning Ordinance as well as those conditions imposed by the Minister in approving the rezoning application. The terms of reference of the PAC, in particular, clause 6(b) thereof, would also constitute another applicable law to the extent that it was appointed by the municipality after the FAC had disbanded.

[57] Furthermore, once the municipality was presented with the revised SDP, which, as has already been pointed out, differed significantly from the original SDP, it ought to have been alerted to the probability of derogation from the natural and built environment of Franschhoek and the Franschhoek Valley. It is for this reason that the plans should have been referred to the PAC for its recommendation as directed by the Minister in his record of decision. For this and other reasons stated elsewhere in this judgment, the owners of the adjoining properties ought to have been alerted of the submission by Brashville of building plans based on the revised SDP.

[58] The municipality, in its explanatory affidavit, accepts that as at the time of the approval of Brashville's revised building plans, its decision of 18 December 2009 to

approve the substitution of the original SDP with the revised SDP was still in force even though the municipality had lacked the authority to effect such an amendment.

[59] Section 7 of the National Buildings Act provides for circumstances under which the local authority shall grant or refuse to grant approval of an application for approval of the building plans. It provides that a local authority, in the instance of this matter the municipality, if, after considering a recommendation by a building control officer, is satisfied that the application in question complies with requirements of the act and any other applicable law, shall grant its approval thereof.

[60] At the time of approval of Brashville's building plans on 12 January 2010, condition 2.1 as well as condition 2.11 of the Minister's conditions attached to the approval of the original SDP, were still in place. In terms of section 39(1)(c) of the Land Use Planning Ordinance the municipality, such as the second respondent in the instance of these proceedings, is obliged to comply and enforce compliance with conditions imposed in terms of Land Use Planning Ordinance.

[61] As has already been pointed out in paragraph [47] of this judgment, one of the conditions attached to the Minister's record of decision of 28 April 2009 is that all final building plans be submitted to the Franschhoek Aesthetic Committee or other similar bodies nominated by the council for recommendation before submission to council for approval. Such plans were neither referred to the PAC as contemplated in condition 2.11 of the Minister's record of decision or any other similar body nominated

by council for that purpose. Such conditions were imposed in terms of section 42 of the Land Use Planning Ordinance. The municipality is, in terms of section 39(1)(c) of the Land Use Planning Ordinance, obliged to comply and enforce conditions imposed in terms of the Land Use Planning Ordinance. Brashville has a similar obligation to comply with conditions imposed in terms of the Land Use Planning Ordinance. (See in the regard *Swartland Municipality v Louw N.O.* 2010 (5) SA 314 (WCC) para [20]). Neither the municipality, nor Brashville for that matter, complied with condition 2.1 and condition 2.11 of the Minister's record of decision. It therefore follows that the decision by the municipality to approve Brashville's building plans on 12 January 2010 is susceptible to review and being set aside.

THE SECOND DECISION: OWNER TO APPLY FOR A CONTRAVENTION LEVY

[62] Building operations on farm 1353 resumed on 4 January 2010 after a short Christmas holiday break. However, building operations ceased after a full working day on 4 January 2010. This ostensibly was to enable Brashville to apply for an amendment of the Minister's record of decision by the substitution of the original SDP with the revised SDP.

[63] Building works did not resume on Monday, 25 January 2010. Such cessation of building operations, ostensibly, was in accordance with an undertaking given by Brashville's legal representatives to the applicant's legal representatives that building works would cease forthwith.

[64] On 24 January 2010 Brashville's attorney of record requested the municipality to revoke its decision of 18 December 2009. On 1 March 2010 the municipality revoked its decision of 18 December 2009. In the meantime, Brashville had instructed Mons to prepare and submit fresh applications for approval to the third respondent for the rezoning of portion of the property to bring it in line with the revised SDP and for the amendment of the relevant condition of approval to achieve the substitution of the original SDP. All the three applicants submitted their objections to and comments on the application to rezone to the third respondent.

[65] On 25 March 2011 the Chief Land Use Management Regulator of the Department of Environmental Affairs & Development Planning in the Western Cape Provincial Government, Western Cape addressed a letter to the Director: Planning & Development Services of the Municipality advising the municipality that the competent authority had resolved that both Brashville's application for the rezoning and an amendment of the original SDP had been be refused. For sake of completeness I once again cite the last paragraph of the letter by the department to the municipality dated 25 March 2010 which reads as follows:

"Your municipality should instruct the applicant to apply for a contravention levy (as per Provincial Circular 4/2008) in terms of section 40 of the (LUPO)."

A letter with similar contents was addressed to Mons. Paragraph 3 of the letter to Mons reads:

"The municipality will instruct the applicant to apply for a contravention levy."

[66] Amongst documents filed in the rule 53 record is an email dated 14 June 2011 by Pedro April of the municipality addressed to Basil Davidson, the Director of

Planning in the municipality. The email sought to elicit clarification from Davidson with regards to what appeared to be an instruction from the provincial authority to the municipality that the municipality should instruct the applicant (Brashville) to apply for a contravention levy. April understood the directive from the provincial authority to be an instruction from the provincial authority to the municipality to instruct the first respondent (Brashville) to apply for a contravention levy. The relevant portion of this email by April to Davidson reads:

"From the provincial response it is clear that we must now instruct the applicant to apply for a contravention levy in line with Circular 4/2008 relating to the determination of a contravention levy (20% of the actual building costs)."

[67] The provincial authority had earlier, on 25 May 2011, through the person of Campbell, and in response to a query from the municipality, wrote to the municipality to say:

"1. Due to the fact that the structures were built illegally, this Department requested your municipality to instruct the applicant to apply for 'rectification of contraventions' in terms of section 40 of [LUPO]."

[68] In an internal memorandum from the Manager: Land Use Management dated 20 June 2011 to the Head: Customer Interface & Planning Support, the Land Use Manager, Ms Zodidi Duze wrote:

"Please note that the afore-mentioned application was refused by the competent authority and in paragraph 3 of the letter dated 25/03/2011, Council was requested to instruct the applicant to apply for the determination of a contravention levy (as per Provincial Circular 4/2008) in terms of Section 40(1)(a)(ii) of the Land Use Planning Ordinance, 1985 (no.15 of 1985).

1. Please inform the applicant to apply in terms of Section 40(1)(a)(ii) of the Land Use Planning Ordinance, 1985 (No.15 of 1985) for the determination of the aforementioned contravention levy for the actual guesthouse buildings which were erected without authorization on Farm No 1353/1, Paarl Division, within 30 days after the registration of the letter of notification."

[69] Arising from the correspondence, e-mails and internal memoranda referred to in the preceding paragraphs, the applicants complain that the letter from the provincial authority dated 25 March 2011 addressed to the municipality constitutes an unlawful dictation by a superior body to a subordinate body as contemplated in section 6(2)(e)(iv) of the Promotion of Administrative Justice Act, 3 of 2000.

UNLAWFUL DICTATION

[70] The powers of the provincial authority to consider an application for rezoning of land is set out in section 16 of the Land Use Planning Ordinance. In granting an application for rezoning of land the provincial authority may attach certain conditions to such approval as provided in section 42 of the Land Use Planning Ordinance.

[71] The power to direct rectification of a contravention of a zoning scheme regulation is vested in a local authority. Once Brashville's application for the rezoning

and an amendment of the original SDP had been refused, all that the provincial authority had to do, under those circumstances, was merely to advise the local authority of the fact that the application for the rezoning and for an amendment of the original SDP had been refused.

[72] In the instance of this matter, the department's function, once the application was lodged with it, together with any objections or comments thereon, was to adjudicate upon Brashville's application for the proposed rezoning in terms of section 16(2) of the Land Use Planning Ordinance. Such power includes the power to grant or refuse an application for rezoning as provided for in section 16(1) of the Land Use Planning Ordinance. The provincial authority can grant such an application without conditions or to waive or amend any conditions pertaining to the granting thereof as contemplated in section 42(3(a) of the Land Use Planning Ordinance.

[73] Arising from the letter of the provincial authority dated 25 March 2011; an email by Campbell of the provincial authority dated 25 May 2011; an email by Pedro to Davidson dated 14 June 2011; and an internal memorandum from the Land Use Manager to Customer Interface & Planning Support, the applicants complain that the last paragraph of the letter of 25 March 2011 addressed to the municipality constitutes an unlawful dictation by a superior body to a subordinate body as contemplated in section 6(2)(e)(iv) of the Promotion of Administrative Justice Act, 3 of 2000. Thus, the applicants complain that the last paragraph of the department's letter dated 25 March 2010 which reads:

"Your municipality should instruct the applicant to apply for a contravention levy (as per provincial circular 4/2008) in terms of section 40 of the (Land Use Planning Ordinance)." constitutes an unauthorised and unwarranted dictation by a superior body to a subordinate body.

[74] Once the provincial authority had refused Brashville's application for rezoning and an amendment of the original SDP, the municipality had three options set out in section 40(1) of the Land Use Planning Ordinance and these are:

[74.1.] to instruct the owner either to rectify such contravention before a date specified in the instruction; or

[74.2.] to apply for the determination of contravention levy; or

[74.3.] to apply for a departure in terms of section 15 of the Land Use Planning Ordinance before a date specified in such an instruction.

[75] The power to deal with rectification of a contravention as provided for in section 40(1) of the Land Use Planning Ordinance is the sole competence of a local authority. Such a power cannot be exercised on instruction by a superior body.

[76] A discretionary power vested in one of official or body may not be used by another, whether the former is subordinate to the latter or not. This constitutes an unlawful dictation and a failure by the person upon whom the power has been conferred

to exercise its own discretion. (See Baxter: *Administrative Law*, p442) [See also *Hofmeyer v Minister of Justice* 1992 (3) SA 108 (C)]

[77] On 24 June 2011 the municipality addressed a letter to Mons on behalf of Brashville instructing Brashville to apply for the determination of a contravention levy in terms of section 40 of the Land Use Planning Ordinance. The letter is headed "Application for Rezoning & Amendment of Conditions; farm 1353/1, Paarl Division (payment of a contravention levy". The opening paragraph of the letter by the municipality to Brashville reads:

"The letter of decision dated 25 March 2011 in respect of this proposal from the Department of Environmental Affairs & Development Planning ... refers. You are accordingly instructed to apply for the determination of a contravention levy (as per Provincial Circular 4/2008) in terms of section 40(1)(a)(ii) of the Land Use Planning Ordinance, 1985 (No 15 of 1985) for the actual guest house buildings which were erected without authorisation on farm 1353/1, Paarl Division, within thirty days from the date of registration of this letter."

[78] As is correctly pointed in the applicants' submissions, the use of the word "accordingly" reflects an objective causal or consequential link between the letter of the department dated 25 March 2011 and the instructions to apply for a determination levy. In the letter referred to in the preceding paragraph, the letter from the department dated 25 March 2011 is given as the source of the authority for the instruction expressed and contained in the first numbered paragraph thereof.

[79] On 16 August 2011 M C Williams, a senior legal advisor within the Stellenbosch municipality and in response to a query from the applicant's attorneys, if the applicants had any right of appeal against a decision by the municipality to instruct Brashville to apply for a contravention levy, responded as follows:

"We confirm that the Stellenbosch Municipality executed the decision dated 25 March 2011 of the provincial authority. In light thereof you do not have a right of appeal in terms of section 62 of the Municipal Systems Act or in terms of section 44 of the Land Use Planning Ordinance, 15 of 1985."

[80] From an analysis of exchange of correspondence between the municipality and the provincial authority, on the other hand, the municipality and the applicant's attorneys as well as an inter-departmental internal memo within the Municipality, on the other hand, it is quite clear, in my view, that the municipality, in instructing Brashville to apply for a contravention levy, was executing an instruction from the provincial authority.

[81] It therefore follow, in my view, that the decision by the municipality to instruct Brashville to apply for a contravention levy is susceptible to being reviewed and set aside on the basis that it was taken on unauthorised or unwarranted dictates of the provincial authority to a local authority in violation of the provisions of section 6(2)(e)(iv) of the Promotion of Administrative Justice Act.

[82] The decision by the municipality to instruct Brashville to apply for a contravention levy is attacked on two other grounds, these being that the action was

materially influenced by an error of law and on a further basis that the decision was not procedurally fair. In the light of the conclusion I have reached in the preceding paragraph it is not, in my view, necessary for me to deal with these further grounds of attack as the conclusion I have reached in paragraph [80] is dispositive of the entire complaint against the decision to instruct Brashville to apply for a contravention levy.

[83] Mr *Van der Westhuizen* SC (with him N van Huysteen) makes a point in his submissions in argument before me was emphatic on the point that in requiring Brashville to apply for a contravention levy, the municipality was simultaneously making a finding that the proposed development was desirable as contemplated in section 36 of the Land Use Planning Ordinance. But, then, what we have here is the application for an amendment of conditions attached to an approved SDP with the substitution thereof with a revised SDP. Section 36 of the Land Use Planning Ordinance applies to applications for rezoning and applications for subdivision. The test in section 36, in my view, does not apply in the determination of any one of those options open to the municipality in terms of section 40(1)(a) of the Land Use Planning Ordinance.

APPLICATION FOR CONDONATION

[84] The administrative decision complained of in these proceedings was taken on 12 January 2010. The proceedings to have that administrative decision reviewed and set aside were instituted on 20 September 2011, somewhat a period of less than a year and two months from the date the administrative decision complained of was taken. As

at 22 January 2010 the applicants knew of some, but not all of the grounds of review in respect of the administrative decision complained of.

[85] Once the building operations were ceased on 23 January 2010, no further building activity occurred. Only on 25 August 2011 did Brashville recommence building operations. It would appear, on the basis of available evidence, that neither Brashville nor the Municipality did, during the period 23 January 2010 and 20 July 2011, when the building plans were reissued, placed any reliance on the original plan approved.

[86] Section 7(1) of the Promotion of Administrative Justice Act provides that proceedings for a review in terms of section 6(1) of the Promotion of Administrative Justice Act must be instituted without unreasonable delay and, in any event, by not later than a period of 180 days of the date of the administrative action complained of was taken. Section 9(2) of the Promotion of Administrative Justice Act provides that the period of 90 days or 180 days referred to in section 9(1) may be extended on an application by an affected party where the interest of justice so require. The most important consideration in the determination of whether the delay should be condoned is the question as to whether a respondent or third parties have placed any reliance on the administrative decision complained of during the period of delay. In *Oudekraal Estates (Pty) Ltd v The City of Cape Town & Others* 2004 (6) SA 222 (SCA) at paragraph [6] Howie P et Nugent JA, writing for the full court, put the position as follows:

"In weighing the question whether the lapse of time should preclude a court from setting aside the invalid administrative act in question an important – perhaps even decisive – consideration is the extent to which the appellant or third parties might have acted in reliance upon it."

[87] In *Oudekraal Estates (Pty) Ltd v The City of Cape Town* 2010 (1) SA 333 (SCA) at 354 paragraph [82] the Supreme Court of Appeal ultimately condoned the delay of a period of 46 years prior to institution of review proceedings. Navsa JA, writing for the full court, said the following in condoning the period of delay:

"In the circumstances of this case, by ensuring that an invalid decision does not stand, the principle of legality and the interest of justice will be advanced. For all the reasons set out above, the conclusion reached by the court below cannot be faulted and accordingly the appeal must fail."

[88] The factors that the applicants seek to be taken into account in determining whether the interest of justice will be best served in extending the period referred to in paragraph 9(2) of the Promotion of Administrative Justice Act are traversed in paragraphs 205 to 217 of the founding affidavit. In those paragraphs the applicants explain why they did not seek to review and set aside the administrative decision taken on 12 January 2010 on an earlier occasion.

[89] In the main, the applicants contend that the period for which condonation is sought is not long. The decision to approve the building plans was made on 12 January 2010. As at 22 January 2010 the applicants knew of some, but not all, of the grounds of review in respect of that decision. During the period 23 January 2010 and 20 July 2011

neither Brashville nor the municipality seemed to place any reliance on the approved building plans. No building activity took place during the period 25 January 2010 and 25 August 2011. As has already been pointed out the proceedings were ultimately instituted on 20 September 2011, that is, a period of less than a year and two months from the date the administrative decision complained of was taken.

[90] A point was made by *Mr Edmund*, for the applicants, during argument that in view of the fact that the decision maker (the municipality in the instance of this matter) does not oppose the application and that the decision maker has not raised any instance or instances of prejudice of any third parties or reliance on the decision by any third parties which would mitigate against such condonation, that this is a classic case for which condonation ought to be granted. Moreover, the first respondent has not provided any reasons of substance as to why it would not be in the interest of justice to condone the delay. Brashville had been aware of the applicants' intentions to institute these proceedings and their caveat that further building operations undertaken on farm 1353 would be at Brashville's risk. In my view, this is a proper case in which the interest of justice would be better served by condoning the delay in the institution of these proceedings.

REFERRAL FOR ORAL EVIDENCE

[91] Prior to the hearing of the review proceedings, and by way of a substantive application, there was launched on behalf of the first respondent an application in terms of rule 6(5)(g) of the Uniform Rules of Court that the review proceedings be referred to

trial or, alternatively, that oral evidence be heard on certain issues specified in the notice of application for referral, these issues being whether the development on farm 1353 is truly adverse to the interest of the applicants as being to their detriment in being out of place with the surrounding area and cultural landscape of Franschhoek; a determination of the motives and the reasons why the provincial authority's initial stance of supporting the amendment of the original SDP in principle but ultimately changing their stance when the application was submitted to the provincial authorities for the required approval; the circumstances surrounding the invitation by the municipality for the first respondent to pay a contravention levy and that certain representatives and/or deponents to some of the affidavits be ordered or subpoenaed to appear and be examined and cross-examined on some of those issues.

[92] After hearing the parties in the application for referral, I dismissed the application. I did not then give reasons for the order I gave nor did I make any order as to costs. Instead I indicated that the reasons for dismissal of the application for referral would be incorporated in my judgment in the main review application. In the paragraphs which follow are reasons for dismissing the application to refer of the review proceedings to trial or directing that oral evidence be heard on those issues specified in the notice of application.

[93] In dismissing the application for referral of the review proceedings to trial or, alternatively, those issues specified in the notice of application for oral evidence I had formed a view that the disputes of fact alleged by the first respondent in its referral

application were not material or *bona fide* disputes as envisaged in such authorities as *Room Hire Company (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (T) at 1163 and *Da Mata v Otto N.O.*1972 (3) SA 858 (A) at 882D-H.

[94] The circumstances under which genuine or bona fide disputes of fact may arise are clearly set out in paragraph 14 of the answering affidavit in the referral application. In that paragraph it is stated that disputes of fact may occur in circumstances where a respondent denies material allegations made on behalf of the applicant and produces positive evidence by deponents to the contrary; or where a respondent admits the applicant's affidavit evidence but alleges other facts which the applicants disputes; or where a respondent concedes that he has no knowledge of the main facts stated by the applicant but denies them, putting the applicant to proof and gives or proposes to give evidence to show that the applicant and his deponents are biased and untruthful or otherwise unreliable and that certain facts upon which the applicant and his deponents rely to prove the main facts are untrue.

[95] In the determination of the fact that the disputes complained of were not material or *bona fide* I was mindful of the fact that the review proceedings concern the legality of three administrative decisions which are being impugned on the basis of specific grounds contained in section 6 of the Promotion of Administrative Justice Act, these being the decision by the second respondent on 12 January 2010 to approve Brashville's building plans (the first decision); the decision by the second respondent to instruct Brashville to apply for the determination of a contravention levy in terms of

section 40(1)(a)(ii) of the Land Use Planning Ordinance (the second decision); and the decision by the second respondent on 20 July 2011 to re-approve Brashville's building plans (the third decision). In my view, these issues were capable of being determined on the basis of the evidence on the papers and, thus, I saw no need to either refer the review proceedings to trial or alternatively that I refer those issues specified in the notice of application for oral evidence. It is thus mainly for reasons set out in this paragraph that I dismissed the referral application.

[96] In paragraph [61] of this judgment I indicated that the decision by the municipality to approve Brashville's building plans falls to be set aside for reasons stated in that paragraph and other preceding paragraphs. Similarly, in paragraph [81] of his judgment I indicated that the decision of the municipality to instruct Brashville to apply for a contravention levy similarly falls to be set aside for reasons set out in paragraph [80] of this judgment and other paragraphs before it. In my view, my decision on the contravention levy issue is dispositive of the other remaining issues so that it is not necessary for me to make any determination with regards the decision by the municipality to approve, alternatively, to reinstate as approved, alternatively, to reapprove the original building plans on 20 July 2011.

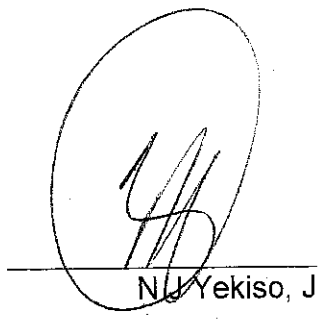
[97] In the result I make the following order:

[97.1.] The decision of the second respondent to approve the first respondent's revised site development plan on 12 January 2011 is hereby set aside;

[97.2.] The decision of the second respondent to instruct the first respondent during June 2011 to apply for a contravention levy is hereby set aside;

[97.3.] The matter of an application for an amendment of the original site development plan, together with any conditions attached thereto, is remitted to the second respondent for reconsideration and to be further dealt with in accordance with the law;

[97.4.] The first respondent is ordered to pay the applicants' costs, inclusive of costs of an application for referral of the review proceedings to trial or, alternatively, for hearing of oral evidence of those issues specified in the notice application, duly taxed or as agreed.



N J Yekiso, J