THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT)

Cases 22197/12 & 24076/12

In the matter between:

MADELENE DE JONG	1st Applicant
GREGORY NIGEL JOSEPH WHITE	2nd Applicant
MARTHINUS JOHANNES ELS	3rd Applicant
MARGARET JEAN WOUTERS	4th Applicant
JOSHUE SAMUEL JOHNSON SOUTH	5th Applicant
NICOLE GENEVIEVE KYTE	6th Applicant
JACQUES SCHMIDT	7th Applicant
SUZANNE WEHMEYER (SCHMIDT)	8th Applicant
EXCLUSIVE ACCESS TRADING 585	9th Applicant
EMANUEL FEGUERA DE ABREU	10th Applicant
SHIRAAZ JOOSUB	11th Applicant
BARRISTER INVESTMENTS (PTY) LTD	12th Applicant
AMBER VAN DER WALT	13th Applicant
SARAH ELIZABETH HALLAS	14th Applicant
JOAO JOSE RIBEIRO DE CRUZ	15th Applicant
SKYE MIDDELTON	16th Applicant
RICHARD DANIEL KYTE	17th Applicant

And

THE TRUSTEES OF THE SIMCHA TRUST	1st Respondent
THE CITY OF CAPE TOWN	2nd Respondent

Coram: ROGERS J

Heard: **11 NOVEMBER 2013**

Delivered: **22 NOVEMBER 2013**

JUDGMENT

ROGERS J:

Introduction

[1] The applicants are owners of units in the Four Seasons sectional title scheme situated at 43-47 Buitenkant Street Cape Town. The first respondent, the Simcha Trust ('Simcha'), is the owner of an adjoining property, erf 5284 Cape Town situated at 41 Buitenkant Street. The second respondent is the City of Cape Town ('the City'). The proceedings before me are the fall-out from proceedings successfully brought by the applicants for an interim interdict to prevent Simcha from continuing with building work on erf 5284 pending a review and for the reviewing and setting aside of the City's approval of Simcha's building plans. Simcha opposed the application for interim relief; the City did not. The interim interdict was granted with costs to stand over for later determination. The subsequent review was granted without opposition, and the applicants did not seek costs. Simcha contends, as to costs, that the City should pay the costs of the applicants and Simcha in the interdict proceedings, alternatively that the applicants should bear their own costs of the interdict proceedings. Simcha also contends that the City should pay it compensation in terms of s 8(1)(c)(ii)(bb) of the Promotion of Administrative Justice Act 3 of 2000 ('PAJA').

[2] The Four Seasons building was erected over the period 2005 to 2007. During October 2006 Simcha purchased erf 5284 and took transfer in February 2007. There existed on erf 5284 a four-storey face brick building dating back to the 1970s. Simcha had in mind to undertake a substantial redevelopment. In October 2007 Simcha submitted its building plans to the City for pre-scrutiny, with formal submission taking place on 23 January 2008. On 17 October 2008 the City approved Simcha's building plans in terms of s 7(1) of the National Building Regulations and Building Standards Act 103 of 1977 ('the NBA').

[3] On 13 June 2008, about four months prior to the City's approval of Simcha's building plans, the Constitutional Court delivered judgment in *Walele v City of Cape Town & Others* 2008 (6) SA 129 (CC). The majority in *Walele* held that the recommendation of the building control officer ('BCO') contemplated in s 7(1) of the NBA as read with s 6(1)(a) was intended by the statute to be the proper means by which the decision-maker in s 7(1) was to be informed of the factors relevant to the s 7(1) assessment. A mere endorsement and signature by the BCO to the effect that he recommended the plans for approval did not suffice. The BCO had to ensure that adequate information was placed before the decision-maker so that the latter could consider applications for approval of building plans properly and in a balanced way (paras 64-72).

[4] Despite this judgment (in litigation to which the City was a party), the City continued for more than six months to approve building plans in accordance with the procedure which *Walele* had found to be inadequate. Between 19 000 and 20 000 building plans were approved during that period. Among these were Simcha's building plans. The City explained in affidavits in the present proceedings that the import of the *Walele* judgment and the manner in which it should be implemented were matters debated internally within the City and on which counsel's advice was subsequently taken. It was only in January 2009 that the City finalised and issued guidelines for BCOs to follow when making recommendations.

[5] Simcha undertook certain demolition and preliminary construction works in 2008 but decided towards the end of 2008 to cease work in view of the global financial crisis. Work resumed more than three years later on 14 May 2012. The

trustees of the body corporate of the neighbouring Four Seasons building obtained a copy of Simcha's building plans on 24 May 2012. A number of unit owners were concerned that Simcha's proposed building, particularly at its 7th and 8th levels, was to be built on the common boundary in such a way that the structure would loom up against the windows of the Four Seasons building on that side and thus be offensive and block out light. The trustees obtained a report from a town planner on 28 June 2012. The body corporate decided on 3 October 2012 that further expenditure in opposing the adjacent development could not be justified but that individual owners were free to pursue objections. The next day the first applicant consulted with attorneys and began the process of assembling the individual owners who were to join her in opposing Simcha's development. Her initial attorneys withdrew due to a conflict of interest and other attorneys were engaged. Unsuccessful attempts at settlement between the applicants and Simcha took place in November 2012.

[6] On 21 November 2012 the applicants launched their application for an interdict pending review proceedings. There were two main grounds for the proposed review. The first ground concerned the location of the dividing line on erf 5284 between that property's C4 and C5 split-zoning. On the applicants' view, Simcha and the City had located the dividing line in the wrong place, thus allowing a greater part of the building to benefit from the more generous C5 height restriction. The second ground was that Simcha's building would probably derogate from the value of the units in the Four Seasons building and that the BCO and decision-maker could not properly have reached a contrary view. The founding papers in the interdict proceedings did not allege that the BCO had failed to present to the decision-maker a reasoned recommendation as contemplated in *Walele* though the issue was flagged in paragraphs 75 and 76 where deponent said that the BCO was obliged to provide a fully motivated reason for concluding that Simcha's building would probably not derogate from the value of the applicants' properties; that it was inconceivable in the light of the evidence that such a conclusion could have been reached in a manner that would not be open to serious attack; and that the applicants were not in possession of the BCO's report but fully expected that the report would reveal that the BCO did not properly apply his mind to the matter.

[7] Simcha filed opposing papers on 1 December 2012. Simcha complained that the applicants had unreasonably delayed in launching the proceedings. On the merits, Simcha denied the applicants' contentions regarding the split-zoning issue and the derogation point. Simcha's deponent said that paragraphs 75 and 76 of the founding affidavit would be dealt with in an accompanying affidavit of Mr CJ Moir ('Moir'), who had been the City's BCO when Simcha's plans were approved in 2008. In his accompanying affidavit Moir said that he had properly applied his mind to the factors mentioned in s 7(1) when making his recommendation. He did not say that he had prepared a reasoned report for the benefit of the decision-maker (who, it later transpired, was a Mr J Theron ('Theron'), the City's Section Head: Building Development Management). On 3 December 2013 the applicants' attorney telephoned Moir to enquire whether he had prepared a report for the benefit of the decision-maker. Moir said that he had not, and that Simcha's plans had been approved prior to the implementation of the new procedures adopted by the City following the *Walele* judgment. Based on this information, the applicants in the replying papers in the interdict stated that they intended to rely on non-compliance with *Walele* as a further ground of review.

[8] The interdict application was argued before Dolamo AJ (as he then was) on 7 December 2012. On 12 December 2012 Dolamo J granted the interim interdict. In his judgment he set out the contentions of the parties on the various points. He rejected the delay complaint. On the merits of the matter (ie in regard to the applicants' alleged *prima facie* right), he based his decision on the *Walele* point, expressing no opinion on the two original grounds of review.

[9] The applicants launched the review application on 19 December 2012. The review grounds were the derogation-from-value issue, the split-zoning issue and the absence of a recommendation complying with *Walele*. Simcha filed a notice of opposition on 5 January 2013. Very belatedly the City filed its record in terms of rule 53 on 12 April 2013. On 25 April 2013 the City filed a notice to abide together with an explanatory affidavit by Theron. In his affidavit Theron explained why in his view the City had correctly determined the dividing line relevant to the split-zoning issue. In regard to the *Walele* point, Theron said that Simcha's plans had been approved shortly after the handing down of the *Walele* judgment. He said that the City had

needed guidance and direction in relation to the implications and implementation of the judgment. In particular the City had to [a] obtain legal advice on the impact of *Walele*, 'particularly in relation to the onus as to what additional factors had to be taken into account by the decision-maker in considering whether or not to approve building plans'; [b] create new precedent documents for use in the City; and [c] formulate new policy concerning the processing and approval of building plans, in order to comply with the requirements of the judgment. All of this had taken more than four months.

[10] Thereafter an arrangement was reached between the applicants and Simcha that the applicants would not supplement their founding papers in the review with reference to the City's record until Simcha had decided whether or not to persist with its opposition to the review. Simcha in due course concluded that it could not successfully oppose the review on its merits but contended that the City should pay the costs of Simcha and the applicants relating to the interdict proceedings and that the City should refund to Simcha the scrutiny fee of R82 327,60 which the latter had paid in 2008 in order to have its plans assessed. The City rejected these claims in correspondence.

[11] On 7 August 2013 and by agreement an order was granted in the review setting aside the City's approval of Simcha's building plans. The order did not in express terms state that Simcha's application for approval of its building plans was remitted to the City for reconsideration. The following issues relating to costs were to stand over for later determination, namely: [a] the liability of the City for Simcha's review costs; and [b] the liability of Simcha and the City for the applicants' costs in the interdict proceedings. It appears that, due to an oversight by the parties, the order failed to mention that Simcha also wished to reserve its alleged right to claim compensation from the City in terms of s 8(1)(c)(ii)(bb). In argument before me counsel were in agreement that the form of the order granted in the review did not preclude a consideration of the compensation claim.

[12] On 19 August 2013 Simcha filed affidavits in the review proceedings relating to costs and compensation. Simcha's attitude in these papers was that the only review ground with merit was the *Walele* point, and that in the absence of evidence

that Moir had provided Theron with a reasoned recommendation Simcha had felt bound to concede the review. Simcha alleged that prior to the launching of the interdict proceedings, or at least on receipt of the interdict application, the City ought frankly to have disclosed to Simcha that its plans had been approved in violation of the *Walele* judgment. Had the City done so, Simcha would probably not have opposed the interdict. For this reason the City should be ordered to pay the costs of the applicants and Simcha in the interdict proceedings. Simcha also alleged that the City's disregard of *Walele* when approving Simcha's plans in October 2008 had been so reckless or grossly negligent that this was an 'exceptional case' in which it would be appropriate, in terms of s 8(1)(c)(ii)(bb) of PAJA, to order the City to make compensation by refunding the scrutiny fee of R82 327,60 and by paying the out-of-pocket expenses incurred by Simcha in ceasing work following the granting of the interdict in December 2008.

[13] The City responded to these contentions in papers filed on 16 October 2013. The City's deponent, Ms CD Walters ('Walters'), elaborated upon the explanation given by Theron regarding the delay in the City's implementation of *Walele*. She also said that Simcha had consulted with Moir when preparing its answering papers in the interdict proceedings and knew that he had not prepared a reasoned recommendation. Simcha's opposition to the interdict proceedings was thus not due to a misapprehension that a reasoned recommendation existed. Certain procedural objections were also taken (that Simcha, as a respondent, could not seek relief against a co-respondent; and that the review court was *functus officio* except in regard to the reserved costs and that compensation could thus not be ordered) but these were not pressed in argument.

[14] The parties were in agreement that, if the compensation claim succeeded in principle, its quantification would need to be referred to oral evidence.

Compensation

[15] Simcha has based its claim for compensation exclusively on s 8(1)(c)(ii)(bb) of PAJA; there is no claim in delict nor for constitutional damages directly in terms of s 38 of the Constitution. The starting point must thus be the proper interpretation of

the relevant provisions of PAJA. Section 8(1) of PAJA reads thus (I underline certain words relevant to the arguments):

'(1) The court or tribunal, in proceedings for judicial review in terms of section 6(1), may grant any order that is just and equitable, including orders –

(a) directing the administrator –

(i) to give reasons; or

(ii) to act in the manner the court or tribunal requires;

(b) prohibiting the administrator from acting in a particular manner;

(c) setting aside the administrative action and –

(i) remitting the matter for reconsideration by the administrator, with or without directions; or

(ii) in exceptional cases –

(aa) substituting or varying the administrative action or correcting a defect resulting from the administrative action; or

(bb) directing the administrator or any other party to the proceedings to pay compensation;

(d) declaring the rights of the parties in respect of any matter to which the administrative action relates;

(e) granting a temporary interdict or other temporary relief; or

(f) as to costs.

[16] Mr Hodes SC, who appeared for Simcha together with Mr de Waal, submitted that the City's disregard for *Walele* in 2008 when approving Simcha's plans was so reckless or grossly negligent as to render the present matter an 'exceptional case' justifying the granting of compensation to Simcha in terms of s 8(1)(c)(ii)(bb).

[17] Mr Rosenberg SC, who appeared for the City together with Ms van Huyssteen, resisted the claim for compensation on the basis of the three inter-related contentions regarding the interpretation and scope of s 8(1)(c)(ii)(bb):

[a] Firstly, he submitted that compensation cannot be granted where the court has set aside the administrative action and remitted the matter for reconsideration by the decision-maker. He said that in the present case the legal effect of the order granted by agreement on 7 August 2013 was to remit to the City for reconsideration Simcha's application for approval of its building plans, even though the order did not say so in terms. Mr Rosenberg argued that, this being the case, the alternative remedies set out in sub-paragraph (ii) were not available.

[b] Second, Mr Rosenberg argued that the circumstances which render a case 'exceptional' within the meaning of s 8(1)(c)(ii) are concerned not (as Mr Hodes' argument assumed) with the egregiousness of the impugned conduct of the administrator but with the appropriateness of departing from the usual remedy of remittal.

[c] Third, Mr Rosenberg argued that s 8(1)(c)(ii)(bb) can be invoked only by the aggrieved applicant, not by a respondent.

[18] In addition to these three contentions, Mr Rosenberg contended, as a fall-back position, that the City's conduct in approving Simcha's plans was not so unreasonable or egregious as to elevate its conduct to an 'exceptional case'. In this latter context, he urged me to interpret the phrase 'in exceptional cases' in a manner consistent with the jurisprudence of our highest courts in relation to the delictual liability of public bodies for the improper performance of their duties.

[19] Mr Rosenberg's argument on the three legal points I have foreshadowed was the following. The usual review remedy is the setting aside of the unlawful action and remittal of the matter to the decision-maker for reconsideration. This primary remedy is contained in s 8(1)(c)(i). In certain circumstances, which the lawmaker required to be 'exceptional', a remittal of the matter for reconsideration by the administrator would not be practical or achieve justice. In those exceptional cases only, the court may grant one or other of the alternative remedies specified in s 8(1)(c)(ii). Those alternative remedies, confined to 'exceptional cases', provide a substitute for the usual remedy, the substitute being either [a] a decision by the court itself on the relevant administrative application or [b] compensation in lieu of a

decision on the administrative application. Although Mr Rosenberg did not quite put it this way, the two alternative substitute remedies would be reserved for the exceptional cases where [a] it is appropriate for there to be a decision on the administrative application but where it would be unjust or inequitable to remit this to the original decision-maker or [b] it is inappropriate for any further decision to be taken on the administrative application but nevertheless just and equitable that the aggrieved applicant should be compensated for the original decision-maker's unlawful conduct.

[20] I accept the first two legs of Mr Rosenberg's argument as summarised earlier but prefer to leave the third leg open. The first two legs of the argument accord, in my view, with the structure of s 8(1)(c). The use of the word 'and' at the end of the introductory part of paragraph (c) followed by the separation of sub-paragraphs (i) and (ii) with the word 'or' is a strong syntactical pointer in favour of the view that the remedies in sub-paragraphs (i) and (ii) are true (ie mutually exclusive) alternatives. Sub-paragraph (ii) is qualified by the phrase 'in exceptional cases', indicating that the remedies in sub-paragraph (ii) apply in circumstances different to those in sub-paragraph (i). It is clear, furthermore, that at least in the case of item (aa) of sub-paragraph (ii) the remedy can only ever be a true alternative to the remedy in sub-paragraph (i) – a court could not remit a matter for reconsideration by the administrator and also substitute or vary the administrative action.

[21] On this view, which I regard as correct, a court cannot grant either of the remedies in sub-paragraph (ii) if it has granted the usual remedy contemplated in sub-paragraph (i). A further implication of this interpretation of s 8(1)(c) is that the phrase 'in exceptional cases' in sub-paragraph (ii) is not concerned with whether the administrator's decision was a conspicuously bad one but with whether there are unusual circumstances which make it appropriate to grant the exceptional remedy in item (aa) or (bb) rather than the usual remedy of remittal (cf *Gauteng Gambling Board v Silver Star Development Ltd & Others* 2005 (4) SA 67 (SCA) para 28). Of course, the manner in which the decision-maker went about his business may bear on the question whether, exceptionally, the matter should be decided by the court rather than be remitted to the decision-maker but exceptionality is concerned with the choice of remedy, not the quality of the administrator's decision in the abstract.

In many cases involving very poor decisions a setting aside and remittal will remain appropriate.

[22] If the phrase ‘in exceptional cases’ is intended to qualify the circumstances in which a court may grant one or other of the substitute remedies in sub-paragraph (ii) in lieu of the usual remedy in para (i), it seems to me that the remedy of compensation must have been intended by the lawmaker as a remedy for the benefit of an aggrieved party in the review proceedings, granted because such party will enjoy neither a reconsideration of his administrative application by the original administrator nor obtain the benefit of a substituted administrative decision by the court. I do not say that an aggrieved party in review proceedings is entitled to compensation merely because there has been neither a remittal nor a substitute decision by the court but I do hold that compensation is not available as a remedy if the usual remedy of remittal has been granted or if exceptionally the court has substituted its own decision for that of the administrator.

[23] It does not necessarily follow from an acceptance of these two legs of the argument that compensation can only be awarded to the applicant for review and not to a respondent. As this case shows, there may be persons other than the applicant for review who have suffered harm in consequence of unlawful administrative action and who would thus be aggrieved. Once the court has determined that the administrative action was irregular and should be set aside, all the persons interested in the matter and cited as parties are arguably entitled to be heard as to the appropriate relief to be granted. Often the party most keenly interested in receiving a favourable decision on an administrative application will (as here) be a respondent, not an applicant. If an earlier favourable administrative decision is set aside on review, such a respondent should not be precluded from contending, for example, that the matter should be determined by the court in terms of s 8(1)(c)(ii)(aa) rather than being remitted. If that is so, and if it should emerge that neither a remittal nor a substituted decision is feasible, why should such a respondent not be entitled to the further alternative remedy of compensation? Item (bb) of the sub-paragraph does not in terms limit the range of persons to whom the administrator can be ordered to pay compensation. It is however unnecessary for

me in this case to express a final opinion on whether the compensation remedy is available to a respondent.

[24] In summary, I consider, firstly, that on a proper interpretation of s 8(1)(c) the remedies of remittal (sub-paragraph (i)) and of a substituted decision or compensation (sub-paragraph (ii)(aa) and (bb)) are mutually exclusive so that if the usual remedy of remittal is granted compensation may not be awarded; and second, that exceptionality in sub-paragraph (ii) has to do with the circumstances which exceptionally justify the granting of one or other of the unusual remedies in sub-paragraph (ii) in lieu of the usual remedy of remittal in sub-paragraph (i) rather than with circumstances which render the administrative decision exceptionally bad.

[25] It is true that on this interpretation affected parties will often be precluded from obtaining compensation under PAJA in respect of loss suffered as a result of very bad administrative decisions, because often in such cases the remedy of remittal will remain appropriate or there may be scope for a substituted administrative decision by the court. I do not regard this as a justification for departing from what seems to me to be the clear meaning of s 8(1)(c). It must be remembered that the law of delict and perhaps s 38 of the Constitution remain to provide redress in the form of damages in cases not covered by s 8(1)(c)(ii)(bb). I am aware that our courts have been cautious in imposing liability on public bodies for the negligent exercise of their powers. This caution reflects what is regarded as a proper balancing of the policy considerations relevant to a determination as to whether a public body has acted wrongfully (in the delictual sense) when performing an administrative function. In *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 (3) SA 121 (CC) Moseneke DCJ, writing for the majority, reviewed the leading cases (paras 38-56) and concluded that a successful tenderer did not have a claim for out-of-pocket expenses in circumstances where the tender was later set aside at the instance of an unsuccessful tenderer. He considered that there was nothing in the governing legislation which explicitly or by implication contemplated that an improper but honest exercise of the discretion of the tender board might attract a delictual right of action in favour of a disappointed tenderer (para 47). He proceeded to consider a submission by the successful tenderer that there were no alternative remedies. Moseneke DCJ pointed out that in circumstances such as

those in *Steenkamp* there was in principle the alternative remedy of a renewed opportunity to tender pursuant to the setting aside of the invalid decision (paras 49-51). In *South African Post Office v De Lacy & Another* 2009 (5) SA 255 (SCA) the Supreme Court of Appeal said, with reference to *Steenkamp* and other cases, that [a] irregularities falling short of dishonesty, [b] incompetence on the part of those who evaluated the tender; and [c] even conduct that amounts to negligence, will not found a claim for damages at the hands of an unsuccessful tenderer – a claim will lie only if it is established that the award of the contract to the rival was brought about by dishonest or fraudulent conduct (para 14). I express no view as to whether Simcha could successfully sue the City in delict; there might be grounds on which Simcha could distinguish its position from those of the claimants in leading reported judgments. However, and if it be assumed that a delictual action would fail, that is not a reason to extend the scope of s 8(1)(c)(ii)(bb) beyond what I regard as its proper boundaries, namely an exceptional grant of compensation in review proceedings where an applicant (or perhaps a respondent) is unable to obtain a reconsideration of his administrative application or a substituted decision by the court. If anything, to interpret s 8(1)(c)(ii)(bb) in the way for which Simcha argues, ie as a remedy available to an aggrieved party even where the invalid decision has been set aside and can be reconsidered by the administrator, would run contrary to one of the important policy considerations which has impelled our courts to refrain from imposing delictual liability.

[26] The only case to which I was referred dealing specifically with a claim for compensation in terms of s 8(1)(c)(ii)(bb) of PAJA is the judgment of Selekowitz J in *Darson Construction (Pty) Ltd v City of Cape Town & Another* 2007 (4) SA 488 (C). In that case the applicant for review was an unsuccessful tenderer for a civil engineering contract. The court found that the decision to award the tender to the second respondent was invalid because it had been taken by the wrong official. The learned judge said that s 8(1)(c) reflected ‘the common-law’s position where the preferred order is one of setting aside the invalid decision and sending the matter back to the relevant administrator rather than the Court substituting its own decision’ (at 501H-I). He said that on the facts of the case before him there was no question of remitting the decision to the proper authority for reconsideration, particularly because the period of the civil engineering contract which had been put out to

tender had already run its course (502F-G). He also found that there was no basis for the court to substitute its own decision for that of the relevant administrator (502J-503F). It was against that background that Selekowitz J proceeded to consider the claim for compensation. After referring to various leading cases on constitutional and delictual damages for malperformance of statutory functions (504F-509E), he concluded that it would not be just and equitable to award the applicant its alleged loss of profit (509E-510D) but that the applicant was entitled to some compensation for the manner in which the City had breached the applicant's right to administrative justice, such compensation to be computed with reference to the applicant's out-of-pocket expenses in connection with the unsuccessful tender (510E-G). Selekowitz J did not analyse the structure of s 8(1)(c) and make the specific legal findings I have made regarding its scope. As a fact, though, the party to whom compensation was awarded in that case was the aggrieved applicant, and compensation was awarded because neither the remedy of remittal nor a substituted decision was feasible or appropriate.

[27] Another case to which I should refer is *Minister of Defence & Others v Dunn* 2007 (6) SA 52 (SCA), which received a passing reference in a footnote to Simcha's heads of argument. The court *a quo* found that the Department's decision to promote another official rather than Dunn was reviewable but that it would not be in the interests of justice to order the appointment of the rival candidate to be set aside. Instead, and as compensation in terms of s 8(1)(c)(ii)(bb), the Department was directed to ensure that Dunn received the same benefits as if he had been promoted. The Supreme Court of Appeal found that the Department's promotion decision was not vitiated by any irregularities. Lewis AJA said that it was nevertheless appropriate to consider whether, on the finding made by the court *a quo* on the merits, compensation in terms of PAJA should have been awarded. She emphasised that the supposed irregularities in the appointment decision were errors in process, and that it could not be said that Dunn would necessarily have obtained the promotion if a proper process had been followed. Dunn had thus not proved any loss for which compensation could be awarded.

[28] The court *a quo* and the Supreme Court of Appeal in *Dunn* did not consider the precise arguments addressed to me regarding the construction and scope of

s 8(1)(c) of PAJA. However, the question of compensation arose in circumstances where neither a remittal nor a substituted decision by the court were considered feasible. I do not find anything in the judgment of the Supreme Court of Appeal which is inconsistent with the view I take of the matter.

[29] Simcha's claim for compensation thus cannot succeed. Although the order of 7 August 2013 did not expressly provide for a remittal to the City of Simcha's application for the approval of its building plans, that was in my view its legal effect. The review court did not find, and was not asked to find, that Simcha's application for building plan approval in 2008 was a defective or invalid application. Since the order on review was granted by agreement, no reasons for the order were given, but it is perfectly clear from the history of the matter that nobody understood the order as finally determining that the building plans submitted by Simcha in 2008 were not able to be approved. All that was set aside was the approval of the application. The review court did not substitute for that approval a refusal of the building plan application. The legal position, upon the granting of the review order, was that the 2008 application for building plan approval remained before the City and Simcha was entitled to a decision on that application. That being the obvious purport of the order, it is not open to the review court to grant either of the exceptional alternative remedies in para (ii) of sub-section 8(c). (The fact that Simcha is or was entitled to a decision on its application for building plan approval would naturally not preclude the City, in the process of reconsideration, from following pre-approval procedures which it did not follow before, including a process of public participation.)

[30] In any event, and given my interpretation of s 8(1)(c), the present case is not an 'exceptional' one within the meaning of sub-section (ii). For my part, I think the City's approval of Simcha's building plans and those of thousands of other applicants during the second half of 2008 in violation of the *Walele* judgment was a serious dereliction of duty. The City should, in my view, either have placed a moratorium on the approval of building plans or at least put in place a provisional procedure for complying with *Walele* until final guidelines could be formulated. The one thing the City must have known would not pass muster was the perpetuation of the procedure which was found in *Walele* to be unlawful. In abstract, therefore, I agree with Mr Hodes that the City's decision to approve Simcha's building plans was

a conspicuously bad one. However, and as I have said, exceptionality in the context of s 8(1)(c)(ii) is concerned with circumstances justifying a departure from the usual remedy of setting aside the administrative action and remitting the matter for reconsideration. The review application in the current matter did not present any exceptional circumstances justifying a departure from the usual remedy of remittal (even if that remedy was not expressly sought). Since January 2009 the City has had in place appropriate procedures for complying with *Walele*. Nobody claims that the City's officials are incapable of competently reconsidering Simcha's building plans or that there is any other reason why the application for building plan approval should not be reconsidered. (As a fact, the City is currently considering Simcha's building plans. I do not know whether those building plans are the same, or substantially the same, as those submitted for consideration in 2007/2008. Although the City is following a fresh process in considering these plans, it is not altogether clear whether Simcha has made a new application for plan approval. Mr Rosenberg for the City informed me from the bar that the City would not levy a new scrutiny fee if the plans were the same as those previously considered by the City.)

[31] If these difficulties had not stood in Simcha's way, a further question would have arisen – as it did in *Dunn* – as to whether the losses which Simcha claims to have suffered were caused by the City's defective approval of Simcha's building plans. As to the scrutiny fee, it seems to me that if Simcha now merely requires the City properly to consider and adjudicate upon the application for the approval of the building plans submitted in 2007/2008, no further scrutiny fee should be payable. The payment of the original scrutiny fee in 2008 would thus not have been a wasted expense. As to the costs which Simcha occurred in late 2012 in shutting down the building operations which it had resumed in May 2012, the question may arise whether these costs would not in any event have been incurred. This would require an assessment as to what would have happened if Moir in 2008 had prepared a recommendation in accordance with *Walele* (this being the only respect in which Simcha alleges the City to have acted in a conspicuously bad way). Given the evidence of Moir and Theron as to the consideration they gave to the relevant issues in approving the plans in 2008, one might infer that the preparation of a reasoned report in accordance with *Walele* would not have led to a different result, ie the plans would still have been approved. Events would then have unfolded as

they did, and the applicants would have issued the same interdict proceedings, based on the two original review grounds mentioned in the founding papers. If the court hearing the interdict proceedings had granted an interim interdict based on one or other of those grounds, Simcha would have incurred the same shut-down costs as it now claims from the City. Simcha's contention in the proceedings before me was that those other two grounds were wholly without merit, and that the interdict was granted and the review conceded only because of the *Walele* point. In view of the conclusion I have reached on other issues, I fortunately do not need to go into the question as to whether Simcha has shown that an interim interdict would probably not have been granted on either the split-zoning issue or on the derogation-from-value issue.

Costs of the review

[32] Mr Hodes accepted that the costs in the review application turned on the outcome of the compensation claim. Because the compensation claim fails, Simcha must pay the City's costs in the review application. I should emphasise that the costs in question are those arising out of the affidavits filed in connection with compensation together with the appearance on 11 November 2013 to the extent that such appearance related to the claim for compensation. No costs are payable by any of the parties in connection with the review relief granted by agreement on 7 August 2013, because the applicants did not seek costs and because Simcha did not, apart from its claim for compensation, incur any costs in relation to the review application for which the City could notionally be held liable.

Costs in the interdict

[33] The applicants were represented at the hearing before me by Mr Dickerson SC leading Mr Baguley. Their only concern at the hearing related to the costs of the interdict application. In the interdict application the applicants sought costs against Simcha only. Mr Dickerson submitted that Simcha should indeed pay the costs though he added that it would be a matter of indifference to the applicants whether their costs in the interdict were paid by Simcha or by the City. In other words, I understood him to say that if I were persuaded by Simcha that the City should pay

the applicants' interdict costs, the applicants would not object to that outcome but it was not open to them specifically to seek or support such an order.

[34] The court has a wide discretion in regard to costs. The nub of the matter here is whether Simcha's initial or continued opposition to the interdict application was caused by a reprehensible failure on the part of the City to disclose to Simcha that the City's failure to comply with *Walele* in the approval of Simcha's building plans would give the applicants an unbeatable case. I do not think there is a sufficient basis for such a finding. Simcha, for perhaps understandable commercial reasons, was reluctant to stop the building work which it had resumed in May 2012. By way of letters dated 23 October 2012 both Simcha and the City were informed of the essential basis of the review proceedings which the applicants intended to launch. The fact that building plan approval needed to be informed by a report from the BCO was highlighted in these letters in the context of a contention by the applicants that the City could not properly have applied its mind to the criteria stipulated in s 7(1) of the NBA. From that point onwards, Simcha was in a position to investigate the merits of the proposed review, including the cogency and rationality of any report which the BCO had prepared in compliance with *Walele*. There is no allegation by Simcha that the City was not willing to provide information to Simcha upon enquiry.

[35] After the interdict application was launched, Simcha's legal representatives consulted with Moir (who by that stage was no longer employed by the City). The affidavit which was prepared for his signature was conspicuous in not addressing the question whether he had prepared a reasoned report for Theron in compliance with *Walele*. It is true that the *Walele* point was not taken in the founding papers but that was because the applicants themselves did not know whether a reasoned report had been prepared; they had been told by the City on 13 November 2012 that they could only have access to the Simcha documentation pursuant to a request in terms of the Promotion of Access to Information Act 2 of 2000. However, paragraphs 75 and 76 of their founding papers were a clear warning signal that the *Walele* point might come into play, because there the applicants pointed out that building plans could only be approved after the preparation of a fully motivated report by the BCO and they expressed the view that the BCO's report in the present case would inevitably reflect that he had not applied his mind properly to the matter.

I find it inconceivable that Simcha's legal representatives would not have asked Moir whether he had prepared a fully motivated report. Although he said in his affidavit of 1 December 2012 that he had not had time to analyse the documentation regarding his recommendation to Theron, he was able to confirm to the applicants' attorney on 3 December 2012 that his recommendation had been made by ticking a box (as in *Walele*) and not by way of a reasoned written report.

[36] Simcha also filed in the interdict proceedings an affidavit by Mr DR Saunders, a town planning expert. He made this affidavit on 30 November 2012. He said that he had inspected the approved plans 'and all supporting documentation with regard to Erf 5284..'. He expressed the view that the City had followed due legal process in scrutinising and approving the plans and that there was no evidence that the City had overlooked any prescribed procedural action or not taken into account any applicable law. The level of detail in this affidavit makes it likely that Saunders began his research into the City's files on Erf 5284 and on the Four Seasons building before the interdict application was launched on 21 November 2012. It appears probable that such research began around the time of Simcha's attorneys' letter to the applicants' attorneys dated 30 October 2012 (see in particular para 23 thereof). In their letter of 13 November 2012 Simcha's attorneys referred to opinions on the split-zoning issue from three senior counsel and from three town planners which were on the City's file relating to the Four Seasons building; these same opinions were mentioned by Saunders in his affidavit, and it seems probable that Saunders' inspection of the files was the source of the information in the letter of 13 November 2012. It thus appears that by the time the interdict application was launched Simcha knew that the City's files did not include a reasoned BCO report complying with *Walele*. (It is common cause that when the City eventually produced its record in terms of rule 53 no such report was included.)

[37] Even after the filing of the replying papers (which disclosed the content of the discussion between the applicants' attorney and Moir on 3 December 2012), Simcha continued with its opposition. Simcha contended at the interdict hearing on 7 December 2012 that it was not permissible for the applicants to take the *Walele* point in reply and that the applicants should in any event be non-suited by reason of delay. In the circumstances, I cannot find that Simcha would have conceded the

interdict if the City had disclosed to Simcha, shortly before the launching of the interdict, that the BCO had not furnished a reasoned report in accordance with *Walele*. Indeed, I think it likely, for the reasons I have given, that Simcha knew prior to the institution of proceedings that no such report existed.

[38] Mr de Waal's alternative contention was that the applicants should bear their own costs in the interdict. This argument was based on the alleged delay on the part of the applicants between May and November 2012. I do not think that this is a proper basis to deny the applicants their costs. The alleged unreasonable delay was a matter which could have been raised, and was raised, in opposition to the interdict. Dolamo AJ rejected the delay defence (see paras 23 and 24 of his judgment). That being so, I do not think it can be resurrected simply for the purposes of punishing the applicants on costs.

[39] I therefore consider that the interdict costs should follow the result, ie that Simcha should pay the applicants' interdict costs and that the City should not be ordered to pay the costs of either Simcha or the applicants.

Conclusion

[40] I make the following order:

[a] The first respondent's claim against the second respondent for compensation in terms of s 8(1)(c)(ii)(bb) of the Promotion of Administrative Justice Act 3 of 2000 is dismissed.

[b] The first respondent is directed to pay the second respondent's costs in relation to the said claim for compensation, including the costs of two counsel.

[c] In regard to the costs in case 22197/12 reserved by this court's judgment of 12 December 2012, the first respondent is directed to pay the applicants' costs, including the costs of two counsel.

ROGERS J

APPEARANCES

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