Republic of South Africa

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

Case No: 13145/13

Before: The Hon. Mr Justice Binns-Ward

In the matter between:

FRANS HENDRIK BADENHORST First Applicant
RENEE FREYA BADENHORST Second Applicant

and

PAUL JOHANNES DERRICK RETIEF First **Respondent**
THE CITY OF CAPE TOWN Second Respondent

JUDGMENT DELIVERED: 5 December 2013

BINNS-WARD J:

[1] The applicants and the first respondent are the owners of two residential properties in Welgemoed, Bellville, Western Cape. Welgemoed lies within the municipal area of the municipality of the City of Cape Town, which has been cited as the second respondent in the application.

[2] The first respondent is engaged in effecting building extensions to the dwelling house on his property. The first respondent's property lies directly across Hofmeyr Street from the applicants' property. The situation of the dwelling houses on the two properties relative to each other is depicted in a number of photographs that are attached to the papers. A large window to be provided on the upper storey of the building extension on the first respondent's property will provide an outlook in the direction of the applicants' property. The applicants allege that the effect will be to detract from the privacy hitherto enjoyed by their property and consequently derogate from the value of their property.

[3] The second respondent, as the responsible local authority, is charged with the duty to deal with applications in terms of s 4 of the National Building Regulations and Building Standards Act 103 of 1977 ('the Building Act') for authority to build. It approved the building plans for the extensions on the first respondent's property. It had been required to consider and determine the application for building plan approval according to the requirements of s 7 of the Building Act.

[4] Section 7 of the Building Act provides as follows in relevant part:

> **Approval by local authorities in respect of erection of buildings**
>
> (1) If a local authority, having considered a recommendation referred to in section 6(1)(a)-
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> (a) is satisfied that the application in question complies with the requirements of this Act and any other applicable law, it shall grant its approval in respect thereof;
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> (b) (i) is not so satisfied; or
>
> (ii) is satisfied that the building to which the application in question relates-
>
> (aa) is to be erected in such manner or will be of such nature or appearance that-
>
> (aaa) the area in which it is to be erected will probably or in fact be disfigured thereby;
>
> (bbb) it will probably or in fact be unsightly or objectionable;
>
> (ccc) it will probably or in fact derogate from the value of adjoining or neighbouring properties;
>
> (bb) will probably or in fact be dangerous to life or property,
>
> such local authority shall refuse to grant its approval in respect thereof and give written reasons for such refusal..

[5] The applicants contend that the second respondent's approval of the building plan application was in contravention of s 7(1)(b)(ii)(bbb) and (ccc) of the Building Act. They have instituted proceedings for the review and setting aside of the building plan approval. The review application has been set down for hearing at the end of February 2014, in just under three months' time. They sought interim interdictal relief prohibiting the first respondent from carrying on with any building activity on his property pending the determination of the review. The application for interim relief came before Blignault J as the duty judge dealing with urgent applications in the Third Division. The learned judge ordered that a rule *nisi* operating as interim interdict should issue. The proceedings before me at this stage are the extended return day of that rule. The first respondent opposes the confirmation of the rule, and moves for it to be discharged with costs. The applicants seek the confirmation of the rule.

[6] The requirements that an applicant for interim interdictory relief must satisfy are well established. They are (a) the existence of a *prima facie* right, even if it is open to some

doubt; (b) a reasonable apprehension by the applicant of irreparable and imminent harm to the right if an interdict is not granted; (c) the balance of convenience must favour the granting of the interdict and (d) the applicant must have no other effective remedy. See e.g. *National Treasury and Others v Opposition to Urban Tolling Alliance and Others* 2012 (6) SA 223 (CC), at para 41, where Moseneke DCJ restated the requirements with reference to the *locus classicus* decisions on point in *Setlogelo v Setlogelo* 1914 AD 221 and *Webster v Mitchell* 1948 (1) SA 1186 (W). (The latter judgment should, of course, be read with *Gool v Minister of Justice and Another* 1955 (2) SA 682 (C) at 688 - cf. e.g. *Simon NO v Air Operations of Europe AB* 1999 (1) SA 217 (SCA), at 228G-H.)

[7] The existence and relative certainty of the 'right' in issue in a case like this is determined with reference to the prospects of success that the applicant appears to enjoy in the pending review proceedings; cf. *Ladychin Investments (Pty) Ltd v South African National Roads Agency Ltd and Others* 2001 (3) SA 344 (N); *Transnet Bpk h/a Coach Express en 'n Ander v Voorsitter, Nasionale Vervoerkommissie, en Andere* 1995 (3) SA 844 (T) and *Camps Bay Residents and Ratepayers Association and Others v Augoustides and Others* 2009 (6) SA 190 (WCC), at para 10. The court has to assess those prospects, as best it can, on the probabilities as they appear on the papers before it.

[8] In my assessment, the outcome of the review is going to be heavily influenced, if not determined, by the effect of the applicable provisions of s 7 of the Building Act. The proper construction and effect of s 7 of the Building Act has been contentious. It has given rise to conflicting judgments from the Constitutional Court (*Walele v City of Cape Town and Others* 2008 (6) SA 129 (CC) (2008 (11) BCLR 1067) and the Supreme Court of Appeal ('SCA') (*True Motives 84 (Pty) Ltd v Mahdi and Another* 2009 (4) SA 153 (SCA) (2009 (7) BCLR 712). The applicants' position in the pending review application would be stronger if the approach adopted in the majority judgment in *Walele* (especially at para 55) were to be applied. A much less sanguine view of their prospects of success is justified, however, if the SCA's construction of the statutory provisions prevails.

[9] In *Walele* loc cit, the majority in the Constitutional Court held:

> Accordingly the decision-maker must be satisfied of two things before granting approval. The first is that he or she must be satisfied that there is compliance with the necessary legal requirements. Secondly, he or she must also be satisfied that none of the disqualifying factors in s 7(1)(b)(ii) will be triggered by the erection of the building concerned. This is so because any approval of plans facilitating the erection of a building which devalues neighbouring properties, for example, is liable to be set aside on review. An approval can be set aside on this ground irrespective of whether or not the decision-maker was satisfied that none of the disqualifying factors would be triggered. All that is needed for an

applicant to succeed is to prove to the satisfaction of the reviewing that the erection of the building will reduce the value of his or her property. The legislature could not have intended to authorise an invalid exercise of power. In order to avoid this consequence, the decision-maker must at least be satisfied that none of the invalidating factors exist before he or she grants approval. This interpretation is consistent with the obligation to promote the spirit, purport and objects of the Bill of Rights. It demonstrates that it is not only the landowner's right of ownership which must be taken into account, but also the rights of owners of neighbouring properties which may be adversely affected by the erection of a building authorised by the approval of the plans in circumstances where they were not afforded a hearing. The section, if construed in this way, strikes the right balance between the landowner's entitlement to exercise his or her right of ownership over property and the right of owners of neighbouring properties. The interpretation promotes the property rights of the landowner and those of its neighbours.

(footnotes omitted)

[10] In *True Motives* the majority in the SCA held that the aforementioned part of the judgment in *Walele* had not formed part of the *ratio decidendi* of the judgment and accordingly was not binding upon it. It also found that the majority in the Constitutional Court had wrongly construed the provisions of s 7(1)(b)(ii) of the Building Act. The most relevant part of the majority judgment in *True Motives* (per Heher JA) is at para 20-24:

[20] The use of the conjunction 'or' after s 7(1)(b)(i) makes it plain that the enquiry postulated by subparas (aa) and (bb) of s 7(1)(b)(ii) only arises if and when the local authority is satisfied that the application in question complies with the requirements of the Act and any other applicable law. Clearly, the Legislature did not have the factors set out in those subparagraphs in mind when it spoke, in s 7(1)(a), of compliance 'with the requirements of this Act'. In other words, the application may otherwise comply with the requirements of the Act and any applicable law but nevertheless not be susceptible to approval.

[21] The refusal mandated by s 7(1)(b)(ii) follows when the local authority is satisfied that the building will probably or in fact cause one of the undesirable outcomes. Section 7(1)(b)(ii) does not authorise a local authority to refuse to grant its approval upon the strength of a mere possibility that one of those outcomes may eventuate. Such an outcome must at the least be 'probable'. The Act is not to the effect that the local authority may withhold approval because it is not satisfied that the building will not cause one of those outcomes.

[22] The requirements of s 7(1)(b)(ii) are as follows:

(a) If the local authority is satisfied (ie, as with ss 7(1)(a), capable of reaching a positive conclusion) that the building will, for instance, disfigure the area, it must refuse to grant its approval. This involves being satisfied that the outcome is certain.

(b) If the local authority is satisfied that the building will probably havea detrimental effect specified in subparas (aa) or (bb) it must refuse its approval.

(c) If the local authority is not satisfied on either of the aforegoing then the refusal of the building plans is not mandated or indeed allowed by s 7(1)(b)(ii). The decision-

> maker must then act on its positive finding with respect to the requirements of s 7(1)(a).
>
> [23] I agree with the amicus that on the aforegoing analysis a local authority may entertain some level of concern about whether a proposed building will disfigure the neighbourhood or derogate from the value of neighbouring properties (and so on), but that concern may not be at a high enough level for it to be satisfied that the undesirable outcome is probable. If that is the state of its mind (or that of its authorised decision-maker) with respect to these issues, the local authority must approve the plan.
>
> [24] When one has regard to the nature of the circumstances which may compel a refusal of building plans under s 7(1)(b)(ii) one sees that they are very much matters of opinion, matters upon which reasonable persons may disagree. They are not as clear-cut as, for instance, the distance a building is set back from a street. Recognising this, the legislature introduced the concept of a 'probability' that the building would be of a certain type or have a certain effect…..

[11] The applicants' counsel submitted that this court should follow the judgment in *Walele*. He sought support for this argument in the *dicta* of Brand AJ in the more recent unanimous judgment of the Constitutional Court in *Camps Bay Ratepayers' & Residents' Association v Harrison* 2011 (4) SA 42 (CC) (2011 (2) BCLR 121) at para 28-30, where the learned judge rehearsed the doctrine of *stare decisis* and reiterated the importance, by virtue of rule of law considerations, that courts lower in the hierarchy of the judicial system should take care to respect it. What was said in that regard in *Harrison* was uttered in the context of the conflict between the judgments in *Walele* and *True Motive*. It is notable, however, that the Constitutional Court did not go so far as to hold that the SCA had deviated from the doctrine in deciding *True Motives*. On the contrary, *Harrison* was decided on the proper construction of s 7(1)(a) of the Building Act, and the applicant's endeavour in that case to draw s 7(1)(b) into the argument was rejected. *Harrison* thus does not constitute authority for the propositions that the majority judgment in *True Motives* was given in disregard of the *stare decisis* principle or that the SCA's construction of s 7(1)(b) was incorrect. In circumstances I am of the view that the *stare decisis* principle requires this court to follow the majority judgment in *True Motives.*

[12] Reference to *Harrison* is nevertheless useful because at para 34 of the judgment Brand AJ succinctly restated the currently relevant difference between the judgments in *Walele* and *True Motives*:

> Crucial for the evaluation of the applicants' contentions rooted in s 7(1) is the appreciation that the difference between the judgment of this court in *Walele* and the Supreme Court of Appeal in True Motives is strictly confined to the interpretation of s 7(1)(b)(ii). What the difference comes down to is this: according to *Walele* the local authority cannot approve plans unless it positively satisfies itself that the proposed building will not trigger any of the disqualifying factors referred to in s 7(1)(b)(ii). If in

> doubt, the local authority must consequently refuse to approve the plans. According to *True Motives*, on the other hand, a local authority is bound to approve plans, unless it is satisfied that the proposed building will probably, or in fact, trigger one of the disqualifying factors referred to in s 7(1)(b)(ii). If in doubt, the building authority must consequently approve the plans.
>
> (footnotes omitted)

[13] It follows that in order to succeed in the review application the applicants will have to show either that the relevant functionary acting on behalf of the second respondent in approving plans did not apply his mind at all, or that, having applied his mind, his decision was one that no reasonable functionary in his position could have made, having regard to the provisions of s 7(1)(b)(ii)(bbb) and (ccc) of the Building Act. As the SCA has observed, the issues concerned entail subjective judgment and one person's view may legitimately differ from another's. The applicants will have to show on the second of the aforementioned hypotheses that no reasonable person could but have concluded on the facts that there was a high probability that the proposed building extension on the first respondent's property, and in particular its overlooking feature, would derogate from the value of neighbouring properties.

[14] In making the assessment the functionary would have to bear in mind that the meaning of 'value' in the context of s 7 of the Building Act is 'market value'. Market value is something different from price. Market value denotes what the notional reasonable and adequately informed purchaser would be willing to pay for the *res vendita*. As explained in *True Motives* at para 30:

> Market value' is the price that an informed willing buyer would pay to an informed willing seller for the property, having regard to all its potential at the time of sale, both realised and unrealised. One important modifier of such potential, in the present context, derives from the existing controls on the property laid down in the town-planning scheme and the title deed conditions. Informed parties would acquaint themselves with the zoning and the permissible limits of height, coverage, bulk, building lines, etc, all of which influence the utility of the property, and, therefore, its inherent value. Of course, potential for changing any of these aspects may also be apparent in appropriate market conditions. But such conditions may also influence the likelihood that a property will or will not be exploited to the limits of its potential. From all this it is obvious that the hypothetical informed buyer and seller will always be aware of inherent advantages and disadvantages flowing from the lawful exercise of rights and will build them into market price according to how they assess the likelihood that they will occur. The extent of such influence is of course an objective question and the subjective reaction of a particular party is only relevant to the extent that it finds a meaningful echo in the mind of the hypothetical willing buyer or seller. Aesthetics, intrusion, overshadowing and invasion of privacy are all examples of disadvantages which flow to a greater or lesser extent from the lawful development of a property to a potential which exceeds its existing use. In every case involving assessment of value

> under s 7(1)(b) the local authority is entitled and, indeed, obliged to take into account adverse aspects of this nature where the informed willing buyer and seller would factor them into their purchase price. That is done in order to arrive at market value. But derogation from market value only commences when the influence of such aspects exceeds the contemplation of the hypothetical informed parties.

It is thus readily conceivable that a property might realise a price higher than its market value because in reality there are likely to be buyers who will be ready to purchase it having regard to the property's current advantageous characteristics without sufficiently taking into account the potential for them to be adversely affected by surrounding development. The valuations put in by the applicants seemed to me to be directed at the price that could be realised for the property rather than its market value properly considered.

[15] There is no suggestion in the current case that the building extensions on the first respondent's property do not comply with the applicable constraints on development in terms of the building regulations and zoning scheme provisions. The building is across the road from the applicants' property and it is not evident to me that an overlooking window having the effect depicted in the photographic evidence on the papers would be of such an effect that it could not reasonably be expected ever to arise. In the circumstances, applying the construction of s 7(1)(b)(ii) of the Building Act pronounced by the majority of the SCA in *True Motive*, I seriously doubt that the applicants will be able to show that a person in the relevant functionary's position could not reasonably not have had a high enough level of concern about the effect of the proposed extensions on the market value of their property. I also have no doubt at all that the applicants are unlikely to be able to show that the official with delegated authority to approve the building plan application did not apply his mind at all. The evidence shows that the functionary was aware of the applicants' complaint, invited their submissions and engaged with the first applicant directly.

[16] The applicants' counsel sought to counter the effect of the aforegoing line of reasoning by arguing that there was no contradiction of the applicants' averments in the supporting papers that the functionary had not applied his mind and could not reasonably but have been sufficiently certain of the probable derogation from the market value of the applicants' property that would follow upon the erection of a structure in accordance with the first respondent's building plans. He was correct to say that there was no affidavit from the functionary contradicting the averments. This was because the City of Cape Town, understandably, did not involve itself in the purely private question of interim interdictal relief. The City is, however, opposing the review application. But quite aside from those considerations, the court is enjoined in deciding an application like the current one to have

regard to the probabilities as they appear on the papers. The reasoning which the applicants' counsel sought to counter in the manner described is predicated on the outcome of such assessment of the probabilities on the basis of the objective factors mentioned, which are not in dispute. Averments picked out from the supporting affidavit in isolation cannot override the effect of the inherent probabilities ascertainable on the papers read as a whole.

[17] But even were I persuaded to take a less dubious view of the applicants' prospects in the review application, it seems to me that the balance of convenience weighs against the applicants. The only objectionable feature is the overlooking window. If the review succeeds and the building plans are set aside, it seems unlikely that the first respondent would be required to demolish the structure. Amending plans providing for the window feature to be removed and bricked up would suffice to remedy the position. The inconvenience occasioned by preventing the first respondent from completing the building seems to me to outweigh that would be occasioned by requiring the applicants to tolerate the window until the review is decided.

[18] In the result the rule falls to be discharged and the application for interim interdictal relief dismissed with costs. The first respondent's counsel argued that the application had been an abuse of process and in her heads of argument sought a punitive costs order. I have not been persuaded as to the merit of this argument and costs will be allowed on the usual basis as between party and party.

[19] The following order is made:

1. The rule *nisi* issued on 14 August 2013 is discharged.
2. The application for interim interdictal relief is refused.
3. The applicants are ordered to pay the first respondent's costs of suit in the application as between party and party.

A.G. BINNS-WARD

Judge of the High Court

Date of hearing:	**5 December 2013**
Date of judgment:	**5 December 2013**
Before:	**Binns-Ward J**
Applicants' counsel:	**Wesley Vos**
First Respondent's counsel:	**Claire Riley**
Applicants' attorneys:	**AHB Attorneys, Still Bay**
	Walkers Attorneys, Cape Town
First Respondent's attorneys:	**Francois Du Toit Attorney, Bellville**
	A Batchelor & Associates, Cape Town