THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

In the matter between Case No: 2954/2014

ANDREAS G de M DU TOIT **APPLICANT**

and

KNYSNA MUNICIPALITY **FIRST RESPONDENT**

BERKEL AFRICA (PTY) LTD **SECOND RESPONDENT**

Coram: ROGERS J

Heard: **9 JUNE 2015**

Delivered: **26 JUNE 2015**

JUDGMENT

ROGERS J:

Introduction

[1] This is an application launched in February 2014 to set aside the approval of building plans in February 2009 for a building completed (at the latest) in December 2006. Unsurprisingly the first point, and main point, taken in opposition to the application is delay. That the approval of the building plans was irregular is clear though the precise extent of the irregularities is open to debate.

[2] The building plans relate to a house erected at No 9 Eagles Way in Knysna. The second respondent ('Berkel') owns No 9 and an adjacent property No 7.[1] Berkel is controlled by Mr and Mrs Palmer. They lived in the United Kingdom until relocating to South Africa in November 2010. The first respondent is the Knysna Municipality which approved the building plans ('the Municipality'). The applicant ('Du Toit') owns No 8 Eagles Way. A Mr de Swardt owns No 10. Nos 7 and 9 lie on a slope below Eagles Way and look out towards the Knysna lagoon. Nos 8 and 10 are situated above Eagles Way.

[3] Mr E Bruwer appeared for Du Toit and Mr DL van der Merwe for Berkel. The Municipality abides the court's decision but filed brief explanatory affidavits.

The facts

[4] When Berkel bought Nos 7 and 9 (this appears to have been in the late 1990s or early 2000s) there already existed a double storey house on No 7. In October 2003 Berkel obtained building plan approval for a double storey house on No 9 ('the 2003 plans'). I was told by Mr van der Merwe from the bar that the idea was for the Palmers to live in one of the houses and Mr Palmer's parents in the other.

[5] During 2004 Nos 7 and 9 were consolidated into a single erf. This had the unintended consequence that the proposed dwelling at No 9 would be in conflict

[1] No 7 was initially Erf 7436 and No 9 Erf 7435. Upon consolidation in 2004 they became Erf 13913. A subdivision application lodged in 2007 would have resulted in No 7 becoming Erf 16319, a reference sometimes used in the papers. In terms of a later approved subdivision, No 7 became Erf 18265 and No 9 became Remainder Erf 13913.

with the Zoning Scheme, which allowed only one dwelling per erf in respect of properties zoned Single Residential.

[6] In September 2004, prior to beginning construction, Berkel submitted plans for a three-storey dwelling on No 9 ('the 2004 plans'). Although this application was described as being in respect of an 'addition' to the dwelling approved on 16 October 2003, the 2004 plans were not truly an addition; they were in substitution of those previously approved.

[7] The Zoning Scheme imposes the following height restriction in respect of properties zoned Single Residential:

'at most 8m above the natural ground level directly below a given point or portion of the building with a maximum of 2 storeys;

provided that a departure from the 2 storey limit may be considered due to the slope of the site;

provided further that the 8m restriction is maintained and that the additional storey is added to the building on the lower side of the slope.'

[8] A 'storey' is defined as meaning

'a single level of a building, including a basement, which does not exceed a height of 4m, measured from finished floor level to finished floor level or to the ceiling in the case of the top storey'.

[9] A 'basement' is defined as meaning

'that portion of a building, the finished floor level of which is at least 2m below a level halfway between the highest and lowest natural ground levels immediately contiguous to the building; provided that only one basement per structure will be permitted and in any case such basement shall comply with the definition of a storey'.

[10] The expression 'natural ground level' is defined as meaning

'the natural ground height as depicted on an approved contour map, ie prior to any earthworks or landscaping'.

[11] Due to inefficiency or lack of capacity within the Municipality, no decision on the 2004 plans was made until February 2009. In the meanwhile, apparently during 2005, Berkel began construction. Although Du Toit alleged and Berkel admitted that the house was completed by December 2006, it appears from documents in the record that the building must have been finished by December 2005. In particular, on 9 December 2005 De Swardt wrote to the Municipality complaining about the 'new house… recently completed' at No 9.[2] Furthermore an occupation certificate in respect of No 9 was issued on 7 December 2005 (though it incorrectly stated that the constructed house was in accordance with the 2003 plans).[3]

[12] Du Toit, who had knowledge of the 2003 plans but not the 2004 plans, says that when building began on No 9 he assumed it was the approved two-storey house which was under construction. He then noticed that a third storey was being added (he says this was in 2006 but it must have been in 2005). He alleges that over the period 2006 to 2010 he spoke with a municipal building inspector, a Mr Kakora ('Kakora'), who assured him that a third storey had not yet been approved and that he would have an opportunity to object.

[13] Mr Maughan-Brown, who made an explanatory affidavit on behalf of the Municipality, was appointed as the Municipality's Director of Planning & Development during 2008 (he was previously its Manager of Town Planning and Building Control). He says that after his appointment the Municipality made a concerted drive to deal with the backlog in the approval of building plans. Berkel's application of September 2004 was one of the long outstanding applications dealt with. They were approved on 20 February 2009, purportedly in terms of s 7(1) of the National Building Regulations and Building Standards Act 103 of 1977 ('the NBR Act'). At that time the Municipality's Building Control Officer ('BCO') was a Ms Fick. Whether she was involved at all in the process of approving Berkel's plans is in doubt. if she was, it is clear that she did not produce a recommendation complying with *Walele v City of Cape Town* 2008 (6) SA 129 (CC), a judgment delivered by the Constitutional Court on 3 June 2008. The official who finally approved the plans was Ms Kruger, the Acting Manager: Town Planning & Building Control.

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[2] Record 202-203.
[3] Record 444.

[14] In approving the 2004 plans, the Municipality stamped on each page the following caveats: 'Building height may not exceed height indicated on plan. Registered surveyor to certify height on completion'; and: 'This approval does not absolve the applicant from compliance with any applicable title deed restriction, zoning scheme restriction or any similar restriction which may be applicable to the property.'[4]

[15] It is the approval of 20 February 2009 that Du Toit wants to have reviewed and set aside. He says he only learnt of the approval in late January 2012. The grounds of review can be summarised thus: (i) Ms Kruger did not have delegated authority to approve the plans. (ii) Ms Fick, the BCO, did not make a recommendation at all, alternatively not in accordance with *Walele*. (iii) Because Nos 7 and 9 were a consolidated erf, a second dwelling was in violation of the Zoning Scheme. (iv) The Municipality did not follow the prescribed process for granting a departure from the two-storey limit in the Zoning Scheme, such process being the one laid down in s 15(2) of the Land Use Planning Ordinance 15 of 1985 ('LUPO'). (v) In any event, the departure could not lawfully have been granted because the 8m height restriction was not maintained and because the additional storey was added on the higher side rather than the lower side of the slope, and no departure had been sought in respect thereof in terms of s 15 of LUPO. (vi) The Municipality failed to take into account the factors mentioned in s 7(1) of the NBR Act, in particular the adverse effect of the three storey building on Du Toit's lagoon view.

[16] During 2010 Berkel did certain work on the house at No 7, including the erecting of a covered pergola above the second storey and the replacement of an existing balustrade. In October 2010 the Municipality instructed Berkel to cease work, to submit as-built plans for the alterations and to apply for the necessary departures.

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[4] These caveats are not legible in the copy of the 2004 plans attached to the founding papers but can be seen on the original plans forming part of the record furnished by the Municipality (rule 53 record pp 592-600).

[17] During March 2011 Marike Vreken Town Planners CC ('MVTP') submitted an application for various approvals in respect of Nos 7 and 9 ('the relaxation application'). At this stage Nos 7 and 9 were still consolidated but MVTP seems to have been under the misapprehension that they had been subdivided. MVTP referred to No 7 and No 9 as Erf 16319 and Erf 13913 respectively.[5] The approvals sought were: (i) the removal of No 9's title deed restriction requiring a building set-back of 1,52m in respect of lateral boundaries, and a departure from the Zoning Scheme's lateral building line of 2m, so as to permit the construction of a covered walkway linking No 7 and No 9; (ii) a departure from the 8m height restriction imposed by the Zoning Scheme in respect of No 7 so as to permit the pergola and balustrade; (iii) permission for an encroachment onto the municipal road reserve in respect of a linking balustrade from Eagles Way to the garage on No 9.

[18] In regard to the first of these approvals, Berkel had already constructed a garden wall stretching from the one house to the other, so as to create privacy and security in respect of the parts of the adjoining properties below the wall. Berkel wanted to convert this into a covered walkway.

[19] In regard to the second of these approvals, Berkel was seeking a departure in respect of that which had already unlawfully been built. In the application MVTP said that the houses on Nos 7 and 9 both exceeded two storeys but that the dwelling at No 9 complied with the 8m restriction whereas the house at No 7, with the addition of the pergola and balustrade, did not. Although the approvals identified in para 2 of the application did not include a height departure in respect of No 9, the text in para 9.2 of the application said that a departure for the third storey was required.

[20] The Municipality gave notice of the relaxation application. Both Du Toit and De Swardt lodged objections. In his objection, dated 7 April 2011, Du Toit expressed doubt about the claim that the house on No 9 did not exceed the 8m restriction. He said that the house at No 11 was built on a higher natural elevation and only marginally met the restriction, yet was significantly lower than the house at No 9. He said that an independent surveyor should be commissioned to check this. In regard

[5] See footnote 1 above.

to the third storey on No 9, he said that the existing buildings in the area with three storeys (to which MVTP had made reference in motivating the departure) were built some years ago before the two-storey limit was introduced. Du Toit submitted inter alia that the application was flawed because the houses were located on a consolidated erf. He objected to all the requested approvals but said that his main concern was the contravention of height restrictions, which applied both to No 7 and No 9.

[21] Du Toit, it should be recalled, says that at this stage (April 2011) he did not know about the approval of the 2004 plans in February 2009. In his objection he bemoaned the culture of non-compliance with building regulations in Knysna, culminating (in Berkel's case) in the illegal addition of a third storey to the building on No 9, 'apparently without the submission of plans for approval by the Municipality.'

[22] On 30 November 2011 the Municipality's council made the following decisions on the relaxation application: The council (i) refused to relax the lateral building line imposed by the Zoning Scheme and noted that relaxation of the lateral building line imposed by the title deed could not be considered until No 7 and No 9 were subdivided; (ii) refused to relax the 8m height restriction in respect of No 7; (iii) directed that No 9's encroachment on the road reserve be negotiated between Berkel and the Directorate: Corporate Services; (iv) instructed Berkel 'to rectify the illegal structures to comply with the [Zoning Scheme] as per approved building plans' within 21 days of receipt of the notification letter, failing which the council might do so at the owner's cost.

[23] On 10 January 2012 the Municipality notified Du Toit of the decision. Berkel lodged an administrative appeal, a development which came to Du Toit's notice on 14 February 2012. According to Berkel, its administrative appeal was confined to the refusal to relax the height restriction in respect of No 7.

[24] Du Toit says that he telephoned the Municipality in January 2012 and spoke with an official who told him that building plans for the three-storey house on No 9 had been approved several years previously. Du Toit engaged an attorney, Mr Ross

('Ross') of ED Ras Attorneys, who wrote to the Municipality on 31 January 2012, seeking clarity about the 'illegal structures' which Berkel had to remove and stating that these should include the entire third storey added to the house on No 9, this being of a 'much more serious and invasive nature' than the illegal structures on No 7 with 'a far greater adverse impact on [Du Toit's] view and on the value of his property'. Ross recorded that according to Du Toit's investigations the approval for the additional storey had been improperly given by an official whose services were subsequently terminated,

'and that our client was furthermore deliberately misinformed as to the true nature of such approval for a period of more than 2 years, thereby preventing him from exercising his rights to object thereto.'

[25] On 14 February 2012 the Municipality's Municipal Manager responded, stating that the illegal structures to be removed were those which did not appear on approved building plans. The Municipality denied that the 2004 plans had been improperly approved. The Municipal Manager said that, following thorough investigation, it appeared that the approval of the plans had been 'unusual' in that they were submitted in 2004 but only approved in 2009. The reason for the delay was said to be certain errors which had to be corrected before the plans could be approved. Although one section of the house had three storeys, this was legitimately accepted by the official who approved the plans as being in accordance with the Zoning Scheme:

'The finished floor levels are shown on the second set of plans and they indicate that the level of the lowest floor was marginally lowered[6] and the heights of the internal rooms were adjusted during construction[7] so that the house would fit within the 8 metre height restriction line.'

[26] Ross wrote again to the Municipality on 15 May 2012. By this stage he and/or Du Toit had examined the 2004 plans. He stated that they related to a 'completely different building' to the one approved in 2003. He questioned whether the 2004

[6] It seems from the handwritten alterations on the plans that the finished ground floor level was changed from 95,5m to 95,3m above mean sea levels (see record 72, 73, 74 and 78).

[7] The handwritten alternations on the elevations and cross-sections at record 72-74 show that the heights of the ground and first storeys were changed from 3,4m and 3,2m to 3m each.

plans had in fact been approved in 2009, stating that they bore no approval stamp. He said that apart from the 8m height restriction, compliance with which was not conceded (visual evidence, he said, indicated an encroachment), the third storey had been constructed on the highest side of the slope, not the lower side as required by the Zoning Scheme. Ross complained that, despite the supposed 2009 approval, the Municipality's building department had continued to inform Du Toit throughout 2009 and 2010 that the third storey had not yet been approved and that he would be given an opportunity to object. On his client's behalf he continued to assert that the most serious illegality was non-compliance with the height restriction on No 9. Ross concluded by stating that Du Toit reserved all his rights and that he would consider his position further once the outcome of the administrative appeal was known.

[27] On 28 May 2012 the Municipality's Municipal Manager replied, stating that Ross must have looked at the wrong set of plans because the 2004 plans definitely bore the Municipality's approval stamp. She said that the approved plans clearly showed that there were only two storeys on the higher part of the slope.

[28] In a letter dated 5 July 2012 Ross acknowledged that upon further inspection it appeared that the 2004 plans did bear an approval stamp though it was very faint. He again reserved Du Toit's rights 'at least until such time as the outcome of the present appeal is known'.

[29] During October 2012 the MEC dismissed Berkel's appeal. The effect of the dismissal was that Berkel would have to remove the balustrade and pergola added to No 7. The Municipality informed Berkel of the decision on 7 November 2012 and instructed it to rectify the illegal structures within 21 days. (Whether Berkel complied does not appear from the papers and is not an issue in this case.)

[30] Ross wrote to the Municipality on 28 October 2012, 4 December 2012, 8 March 2013 and 7 February 2013, asking to be informed of progress in the appeal. The Municipality had addressed a notification letter to Ross on 14 November 2012 but unfortunately it was sent to the incorrect postal address (PO Box 1254 instead of

PO Box 1253). The result was that Ross and Du Toit only learnt of the decision by way of a further letter from the Municipality dated 11 February 2013.

[31] Ross wrote to the Municipality on 14 February 2013 recording that although Du Toit was happy at the outcome, the concerns raised in his letter of 15 May 2012 had still not been properly addressed. Ross noted that Du Toit's right to deal with these aspects further, once the outcome of the appeal was known, had been reserved. He recorded that Du Toit 'now intends doing exactly this, and you will hear from us further shortly in this regard'.

[32] At some stage, apparently during 2012, the consolidated Erf 13913 was subdivided so that the houses on No 7 and No 9 now stood on separate erven.

[33] On 8 April 2013 Ross wrote to the Municipality setting out the history of the matter. He contended that Berkel could not lawfully have been permitted to construct a third storey on No 9 without a departure duly granted in terms of s 15(2) of LUPO. Since the Municipality had not followed the s 15(2) procedure, the approval of the 2004 plans stood to be set aside. The Municipality, in its correspondence with Ross, had wrongly insisted, despite the concession in MVTP's relaxation application, that no departure had been needed. Ross invited the Municipality's 'comments and positive reaction' on what it was going to do 'to rectify the situation'. He stated that if the Municipality did not revert by 30 April 2013 his instructions were to proceed with a review application.

[34] Ross send a copy of this letter to Berkel by registered mail. (As far as I can see, this is the only relevant communication which Du Toit or Ross had with Berkel over the period 2005-2014.)

[35] The Municipality, through its Manager: Legal Services, replied on 17 April 2013, stating that it was in the Municipality's best interests to obtain an external legal opinion. Ross was requested to grant the Municipality an indulgence until the opinion was received. Ross responded by granting an extension to 20 May 2013. There having been no developments by that date, Ross contacted the Municipality but was told that the opinion was still awaited. There was a suggestion that Ross

meet with the Municipality's external attorney, Mr Andre Swart ('Swart'). A meeting took place and there were various discussions off the record. There was some uncertainty as to precisely what plans had been approved. Swart promised to obtain the approved plans and show them to Ross. In a letter to Swart dated 3 September 2013 Ross complained that five months had passed since his letter of 8 April 2013. He had still not received the approved building plans. In any event, the building plans were not the only issue. The matter could not be allowed to drag on indefinitely. In the absence of a positive response within 14 days, Ross' instructions were to proceed. On 13 September 2013 Swart delivered the approved plans to Ross; they turned out to be the same as those which Du Toit and Ross had all along had.

[36] On 9 October 2013 Swart emailed Ross to say that he had consulted with the relevant municipal officials. His instructions were that the Municipality viewed the 2004 plans as duly approved.

[37] Du Toit says that he decided at this stage to approach a land surveyor to determine whether the house on No 9 complied with the 8m height restriction. He engaged a Mr David Friedman ('Friedman') but the latter was not able to deal with the assignment immediately. Friedman submitted his report on 31 January 2014, concluding that it could be stated with certainty that parts of the house on No 9 exceeded the 8m height restriction. In the meanwhile, Ross wrote to the Municipality on 22 November 2013, disputing that the 2004 plans had been validly approved and recording his instructions to proceed with litigation. On 27 January 2014 Ross wrote a final pre-litigation letter to the Municipality, complaining that the Municipality had failed to respond meaningfully to the issues raised in the letter of 8 April 2013. Ross called upon the Municipality to respond fully by 12 February 2014, failing which the review application would be issued. The Municipality's legal department replied on 10 February 2014, stating that the Municipality had instructed external attorneys and that Ross' letter had been forwarded to them.

[38] The review application was issued on 20 February 2014.

Delay – the legal position

[39] The approval of the 2004 plans constituted 'administrative action' within the meaning of the Promotion of Administrative Justice Act 3 of 2000 ('PAJA') (see *JDJ Properties CC & Another v Umngeni Local Municipality & Another* 2013 (2) SA 395 (SCA) paras 11-22).

[40] Proceedings for judicial review in terms of s 6(1) of PAJA must, in terms of s 7(1), be instituted without unreasonable delay and not later than 180 days after the applicant has exhausted any applicable internal remedies or, in the absence of such remedies, not later than 180 days after the applicant became aware of the action and the reasons for it or might reasonably have been expected to have become aware of the action and the reasons for it.

[41] Section 9(1) of PAJA provides that the said period of 180 days may be extended for a fixed period by agreement between the parties or, failing such agreement, by the court on application. The court has jurisdiction to grant such an application 'where the interests of justice so require' (s 9(2)).

[42] In *PricewaterhouseCoopers Inc & Others v Van Vollenhoven NO & Another* [2010] 2 All SA 256 (SCA) it was said, with reference inter alia to *Van Wyk v Unitas Hospital (Open Democratic Advice Centre as Amicus Curiae)* 2008 (2) SA 472 (CC), that in assessing the interests of justice a court should have regard to the extent and cause of the delay, the effect of the delay on the administration of justice and other litigants, the reasonableness of the explanation for the delay (which must cover the full period thereof), the importance of the issues raised in the review and the applicant's prospects of success (paras 6-7). See also *Camps Bay Ratepayers and Residents Association & Another v Harrison & Another* 2010 (2) SA 519 (SCA) para 54.

[43] In *Gqwetha v Transkei Development Corporation Limited & Others* 2006 (2) SA 603 (SCA), which was a pre-PAJA case, Nugent JA (who delivered the majority judgment) explained, with reference to authority, that the rule that review proceedings must be brought within a reasonable period of time rested on two main

considerations: (i) Firstly, the failure to bring review proceedings within a reasonable time may cause prejudice to the respondent. (ii) Second, and more importantly in the view of the learned judge of appeal, 'there is a public interest element in the finality of administrative decisions and the exercise of administrative functions', this being embodied in the maxim *interest rei publicae ut sit finis litium*. For this latter reason, proof of actual prejudice to the respondent is not a precondition for refusing to entertain review proceedings by reason of undue delay although the extent to which prejudice has been shown is a relevant consideration that might even be decisive where the delay has been 'relatively slight' (paras 22-23).

[44] In *Opposition to Urban Tolling Alliance & Others v The South African National Roads Agency Limited & Others* [2013] 4 All SA 639 (SCA) Brand JA in para 25 regarded the above purposes as being equally applicable to s 7(1) of PAJA. Regarding the approach to applications for extension in terms of s 9, he said the following (para 26):

'At common law application of the undue delay rule required a two stage enquiry. First, whether there was an unreasonable delay and, second, if so, whether the delay should in all the circumstances be condoned (see eg *Associated Institutions Pension Fund and others v Van Zyl and others* 2005 (2) SA 302 (SCA) para 47). Up to a point, I think, s 7(1) of PAJA requires the same two stage approach. The difference lies, as I see it, in the legislature's determination of a delay exceeding 180 days as *per se* unreasonable. Before the effluxion of 180 days, the first enquiry in applying s 7(1) is still whether the delay (if any) was unreasonable. But after the 180 day period the issue of unreasonableness is pre-determined by the legislature; it is unreasonable *per se*. It follows that the court is only empowered to entertain the review application if the interest of justice dictates an extension in terms of s 9. Absent such extension the court has no authority to entertain the review application at all. Whether or not the decision was unlawful no longer matters. The decision has been 'validated' by the delay (see eg *Associated Institutions Pension Fund* para 46). That of course does not mean that, after the 180 day period, an enquiry into the reasonableness of the applicant's conduct becomes entirely irrelevant. Whether or not the delay was unreasonable and, if so, the extent of that unreasonableness is still a factor to be taken into account in determining whether an extension should be granted or not (see eg *Camps Bay Ratepayers' and Residents' Association v Harrison* [2010] 2 All SA 519 (SCA) para 54).'

[45] Applicants for review are expected to be vigilant in protecting their rights. They may not be supine in the face of decisions adversely affecting them but must investigate the reviewability thereof as soon as they are aware of the decision (*Associated Institutions Pension Fund & Others v Van Zyl & Others* 2005 (2) SA 302 (SCA) paras 50-51).

The 180-day period here

[46] The impugned decision in the present case was taken on 20 February 2009. On Du Toit's own version he was told by the Municipality in late January 2012 that as-built plans for the house on No 9 had been approved. It is clear from Ross' letter of 31 January 2012 that the official told Du Toit that the plans had been approved several years previously, because Ross recorded his client's complaint that municipal officials had been misinforming him for more than two years. Du Toit and/or Ross obtained copies of the 2004 plans shortly after learning of the approval. By 5 July 2012 Du Toit and Ross had satisfied themselves that the said plans in fact bore the Municipality's approval stamp. Any attempt to place the date of Du Toit's actual knowledge of the approval later than 5 July 2012 is contrived.

[47] Du Toit at no stage formally sought reasons for the Municipality's decision to approve the 2004 plans. His attorney did, however, write letters alleging various deficiencies in the Municipality's decision. In my view, the Municipality's replies of 14 February 2012 and 28 May 2012 constituted a sufficient statement of the Municipality's reasons for approving the plans. Du Toit evidently thinks (and still thinks) that the reasons are bad. However, the question is not whether the reasons were good or would withstand attack on review. The question is whether they were sufficient to allow Du Toit to formulate a review application. In my view they were. Indeed, in regard to the grounds of review which have always represented Du Toit's core complaint, namely the approval of a third storey and of a structure allegedly violating the 8m height restriction, Du Toit did not require reasons in order to make the case that these restrictions had been violated and that the procedure laid down in s 15(2) of LUPO had not been observed.

[48] It follows that by early January 2013 at the latest the 180 days prescribed in s 7(1) lapsed. The review application was launched more than a year later in February 2014. As Brand JA said in the *Urban Tolling* case, the delay was 'unreasonable per se'.

[49] The above conclusion represents, in my view, a best-case scenario for Du Toit, since it is based on actual knowledge. In truth, I think that Du Toit could reasonably have been expected to have become aware of the decision and the reasons for it well before 5 July 2012. This will be apparent from my discussion under the next heading.

Extension of time in the interests of justice?

[50] I shall discuss whether an extension of time is in the interests of justice under subheadings derived from the factors listed in the *PricewaterhouseCoopers* case supra.

Extent of delay and explanation for delay

[51] Du Toit's attempt to explain the delay focuses on the period after 20 February 2009 and can be summarised thus: (i) As a fact, he did not know of the approval of the 2004 plans until late January 2012. (ii) Although he knew, well before that time, that the house at No 9 incorporated what he regarded as an illegal third storey and violated by his assessment the 8m height restriction, he duly objected to the relaxation application of March 2011. (iii) When Berkel appealed against the council's decision of 30 November 2011, he reasonably awaited the outcome of the appeal before taking further action. He was only notified of the appeal decision on 14 February 2013. (iv) Thereafter his attorney wrote to the Municipality on 8 April 2013. At the Municipality's request, he held his hand to afford the Municipality a chance to obtain an external legal opinion. (v) The Municipality's final position was only conveyed to Ross on 9 October 2013. (vi) Du Toit thereafter needed to verify that the 8m height restriction was in fact contravened, for which purpose he engaged a land surveyor. Friedman was only able to furnish Du Toit with his report at the end of January 2014. (vii) In the meanwhile, and because the Municipality had

never responded meaningfully to Ross's letter of 8 April 2013, Du Toit through his attorney on 27 January 2014 reasonably gave the Municipality one final chance to give a substantive reply.

[52] In assessing the explanation offered for the delay after 20 February 2009, I do not think it is right, in the particular circumstances of this case, to ignore what happened prior to the approval of the plans. Du Toit's review application is not concerned with the abstract question whether the plans were lawfully passed. Du Toit's ultimate aim is to have part of the house on No 9 demolished so that it will be a two-storey house complying with the 8m height restriction. This is foreshadowed in para 1.7 of the notice of motion, in which Du Toit asks to be given leave to approach the court, on supplemented papers, for consequential relief for demolition in the event of his being successful in the review relief. In the absence of approved plans, the doctrine of legality would require demolition (*Lester v Ndlambe Municipality & Another* [2014] 1 All SA 402 (SCA).

[53] Du Toit saw the house No 9 being built during 2005/2006. On his version the three-storey structure was complete by December 2006 though the true date seems to be December 2005. Du Toit was aware that plans for a two-storey house had been approved and knew nothing of an approved three-storey house. Despite this, he did not seek an interdict during 2005/2006 to prohibit the completion of the third storey. He did not write to the Municipality to insist that it enforce the NBR Act and the Zoning Scheme or ask on what basis it was allowing a three-storey house to be erected. He did not do what the neighbours in *Lester* did, which was to apply for an interdict as soon as they realised that the house which Mr Lester was constructing did not accord with the approved plans.

[54] Du Toit claims to have been told by municipal officials over the period 2006 to 2010 that the third storey had not yet been approved and that he would be given a chance to object to it. His allegations in that regard are vague. In the founding affidavit he said he was told this by 'officials' from the Municipality's building department 'from about 2006 to 2010'.[8] In the replying affidavit he says the

[8] Para 47 record 31.

assurance came from 'the building inspector' (ie Kakora) 'from about the time that the third storey went up' and that this was repeated to him 'on several occasions up to and including 2010'.[9] He did not write a single letter to the Municipality during that period. It would be unfair to expect the Municipality, in response to a review application launched in February 2014, to be able to respond meaningfully to the evidence of informal communications between Du Toit and one or more of its officials a number of years earlier. From the Municipality's letter of 14 February 2012 it appears that Kakora had by that date left the Municipality's employ. It was not reasonable for Du Toit to sit back and do nothing over the period 2005-2010. On the facts as he knew them, there was a patent illegality, one which he says has had a materially adverse impact on his property. If one or more municipal officials fobbed him off by saying that he would have a chance to object in due course, he should have known that their attitude was completely unacceptable and that action on his part would be fully justified. Yet the earliest document from Du Toit in any way relating to the houses on No 7 and No 9 is his objection of 7 April 2011 in response to the relaxation application. By that time the three-storey house on No 9 had been standing for more than for five years.

[55] In part, Du Toit's inactivity over the period 2005-2010 is relevant to another question (ie apart from delay) which arises in review applications, namely the discretionary nature of review relief. As I have said, Du Toit's ultimate aim is the partial demolition of the house on No 9. An application for an interdict to prevent the completion of the construction or for its partial demolition could have been brought at any time during the period 2005 until February 2009. Indeed, on the facts as Du Toit then understood them, this remained the position until January 2012, when he learnt of the approval of the 2004 plans. His review of the belated approval of the 2004 plans is simply additional preparatory relief which he has to seek to clear the way for his ultimate object. Given Du Toit's failure to take any steps to protect his rights over the period 2005-2010, it is doubtful whether a court in the exercise of its discretion would grant review relief on an application issued as late as February 2014.

[9] Para 6.1.2 record 294.

[56] But apart from the effect of this delay on the aspect of discretion, it has implications in assessing the reasonableness of the delay after 20 February 2009. The court would be more reluctant to condone an unreasonable delay in launching review proceedings if the review was a precursor to an even more unreasonably delayed application for demolition.

[57] Du Toit should have been agitating with the Municipality on a regular basis. If he had done so, matters would have been brought to a head long before February 2009. At any rate, regular correspondence with the Municipality would have ensured that not long after 20 February 2009 he would have been told of the approval of the 2004 plans. It was not a matter for informal communication with lesser officials. A single letter to the Municipality in the first half of 2009 would almost certainly have sufficed to elicit a response that the plans had recently been approved. The longer matters dragged on, the more insistent he should have become.

[58] It is also necessary to make the point that the question of delay is not only relevant as between Du Toit and the Municipality. Berkel had a vital interest in any attack on its construction activities. There is no evidence that Du Toit at any stage over the period 2005-2010 communicated with Berkel. Indeed, even when Ross began corresponding on Du Toit's behalf in late January 2012, his communications were, apart from the letter of 8 April 2013, solely with the Municipality.

[59] Turning to the period after the approval of the 2004 plans, the first written communication by Du Toit objecting to the construction work on No 7 and No 9 was in April 2011 in response to the relaxation application. However, the said application did not seek a relaxation of the 8m height restriction in respect of the house on No 9. Although the text of the MVTP suggested that a relaxation was required for the third storey on No 9, this was not identified in para 2 as one of the relaxations/departures sought. I do not think it was reasonable for Du Toit to assume that his height objections relating to No 9 would be dealt with in the relaxation application. He was thus not justified in remaining passive during the period April 2011 to January 2012 when he was informed of the council's decision on the relaxation application.

[60] At any rate, by the time he received the council's decision on 10 January 2012, it must have been obvious to him that his height objections in relation to No 9 had not been dealt with as part of the relaxation application. Du Toit must have been aware that Berkel's appeal to the MEC related to the refusal of the requested height relaxation in respect of No 7. The MEC was not being asked to decide, and could not properly have decided, whether a departure was needed or should be granted in respect of No 9. January 2012 was a critical milestone for another reason: it was in that month that Du Toit learnt that plans for the three-storey house had been approved several years previously. Given the limited scope of the relaxation application and the council's decision thereon, and the limited scope of Berkel's administrative appeal, it was not reasonable for Du Toit to sit back until 11 February 2013 (when the outcome of the administrative appeal was communicated to him). There was no point in reserving his rights pending the outcome of the administrative appeal, since the appeal could not have yielded a favourable outcome for him in respect of No 9.

[61] Du Toit's failure to have taken any action in the period 2005-2010, coupled with his discovery in late January 2012 that building plans for the three-storey house had been approved several years previously, made it imperative for him to act swiftly in January 2012. Although Ross wrote a letter on 31 January 2012 which threatened legal action, he and Du Toit only examined the 2004 plans in the first half of May 2012 (see Ross' letter of 15 May 2012). This inspection, with a view to potential legal action, should have been undertaken in February 2012.

[62] Following Ross's letter of 15 May 2012 (which expressed uncertainty as to whether the 2004 plans had in fact been approved) and the Municipality's reply of 28 May 2012 (confirming that the plans had definitely been approved), more than a month was allowed to go by before Ross confirmed on 5 July 2012 that the 2004 plans indeed bore the Municipality's approval stamp. Had Du Toit acted with reasonable vigilance after January 2012, this stage could have been reached by mid-March 2012 at the latest. (I should add that on the original plans forming part of

the record supplied by the Municipality the approval stamps are clearly visible, albeit somewhat faint.[10])

[63] After 5 July 2012 Du Toit allowed matters to drift until the outcome of the administrative appeal was notified to Ross on 14 February 2013. I have already said that this inaction on his part was not justified.

[64] By 14 February 2013 four years had passed since the approval of the plans and one year had passed since Du Toit learnt of such approval. Even if the delay up to this point was not unreasonable, urgent action was now clearly required. In Ross' letter of 14 February 2013 he said his client intended taking further action and that the Municipality would hear shortly from him in that regard. The next development came nearly two months later, by way of Ross' letter of 8 April 2013. That letter set out the history of the matter and concluded with an invitation to the Municipality to say how it was going to rectify the situation in relation to No 9. A deadline of 30 April 2013 was set, failing which a review application was to be instituted. It is not apparent to me how the Municipality could have remedied the situation. It could not, without Berkel's consent, rescind the approval of the building plans, since it was functus officio.

[65] Du Toit justifies the delay from April to October 2013 on the basis that the Municipality asked for an indulgence to obtain an external legal opinion. This is where Berkel's interests again come to the fore. If the review were simply a matter between Du Toit and the Municipality, the fact that Du Toit held back at the Municipality's instance would naturally be very material. But as I have said, Berkel had an obvious interest in the matter. Particularly in the light of the history of the case, Du Toit could not reasonably refrain from prompt action just because the Municipality was seeking legal advice. The extent of the indulgence in any event went beyond what was reasonable. Du Toit's evidence is vague regarding precisely what was done in the period between the extended deadline of 20 May 2013 and Swart's letter of 9 October 2013.

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[10] Rule 53 record pp 592-600).

[66] Even after the letter of 9 October 2013, there was an absence of swift action from Du Toit's side. The review application was issued more than four months later. Du Toit's explanation for this further delay is in part that he needed to obtain a surveyor's report. If he considered that a surveyor's report was necessary for purposes of a proposed review, he should in the light of the history of the case have obtained this at a much earlier date.

[67] Ross' letter of 27 January 2014 seems to me to have been unnecessary in the light of the long history. The Municipality had already clearly conveyed that it regarded the approval of the 2004 plans as valid.

[68] To sum up, the extent of the delay in this case was very substantial and the explanation unsatisfactory and unconvincing.

Effect of delay on administration of justice

[69] The effect of delay on the administration of justice is concerned, as I understand it, with the prejudicial effects which delay can have on the ability of litigants to furnish proof of relevant facts. In his explanatory affidavit Maughan-Brown says that the passage of time has necessarily had an impact on the 'institutional memory' of the Municipality and on the ability of the parties involved to recall relevant aspects. He records the process which Ms Fick and Ms Kruger to the best of their recollection believe was followed in the approval of Berkel's plans in February 2009. As I have mentioned, the senior building inspector, Kakora, had left the Municipality's employ by February 2012. He was involved in the approval process in February 2009. He is also the official who allegedly gave Du Toit assurances over the period 2006-2010 and who was involved in an exchange with another building control official, Mr Pierre Korsten, in the first half of 2006 to which Du Toit made reference in his supplementary founding affidavit.[11] Whether Korsten was still employed by the Municipality when the review application was launched does not appear. Some of the events with which they might have been expected to

[11] See para 88 below.

deal went back more than eight years and were not recorded, or fully recorded, in documents.

[70] The prejudicial effect of delay on the administration of justice in the present case is a relevant factor though I would not place too much weight on it. I do not understand the Municipality to say that documents relating to the approval of the 2004 plans are no longer available.

Effect of delay on Berkel

[71] Prejudice to other parties in this context is usually concerned with action which a party took on the strength of the administrative action before the institution of review proceedings. Prejudice in that sense is not present here because Berkel built the house on No 9 before the 2004 plans were approved.

[72] Berkel would obviously be prejudiced if the review were now granted and if, as a consequence, it were required partially to demolish the house on No 9. While Berkel may, in view of its unlawful construction of the house, have had to suffer that prejudice if the review had been promptly instituted, the position has changed with the passing of time. As I have said, Du Toit and his attorney did not correspond at all with Berkel over the period 2005-2014 except for sending Berkel a courtesy copy of the letter of 8 April 2013. The Palmers relocated to South Africa in November 2010. The house had been occupied by the Palmers' family for some years by the time the review was instituted in February 2014. The belated challenge to their settled way of life would self-evidently be prejudicial.

[73] In any event, proof of prejudice to Berkel is not necessary before an extension of time may properly be refused. This is not a case where the delay was 'very slight' (cf *Gqwetha* supra) and where prejudice is thus a decisive consideration.

Importance of the issues

[74] The grounds of review do not strike me as of general public importance. They relate to the particular facts of the case. In regard to the process to be followed for the approval of plans in terms of s 7(1) of the NBR Act, the law has been laid down in *Walele* and several subsequent judgments.[12] In his explanatory affidavit Mr Maughan-Brown says that the Municipality had not been able by February 2009 to implement procedures to give effect to *Walele*. There is no reason to believe that this deficiency has not subsequently been put right.

[75] The fact that Berkel built the house on No 9 during 2005 at a time when building plans for that structure had not yet been approved is, needless to say, quite unacceptable. The courts should do nothing to encourage a culture of non-compliance with planning and building controls. The Municipality's conduct was also deplorable. Even if Berkel was frustrated by the Municipality's failure to process the building plans expeditiously (and there is no evidence that this was the reason it went ahead), Berkel was acting illegally by building without approved plans (see s 4 of the NBR Act). Berkel's remedy, if there was unreasonable delay in the approval process, was to institute an application in terms of PAJA to compel a decision ('administrative action' in s 1 of PAJA includes a failure to take a decision; see also s 6(2)(g) of PAJA and s 8 of the NBR Act). Be that as it may, Berkel's unlawful conduct tainted the construction of the house rather than the approval of the plans and was something which could and should have been addressed by the Municipality or Du Toit during the period 2005/2006 and at any rate well before February 2009.

Prospects of success

[76] Du Toit has good prospects of success on the *Walele* issue (the absence of a proper recommendation from the BCO).

[77] I do not think it has been proved that Ms Kruger did not have delegated authority to approve the plans.

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[12] See in particular *Turnbull-Jackson v Hibiscus Coast Municipality & Others* 2014 (6) 592 (CC).

[78] Although, because of the consolidation, two dwellings were not permitted on the property as at February 2009, the subsequent subdivision renders this objection academic. It is unlikely that a court would, in the light of the subdivision, grant the discretionary remedy of review on this ground.

[79] There are two aspects to the height restriction: the two-storey limit and the 8m limit. In both instances Du Toit's complaint is that, unless and until departures were duly granted in terms of s 15 of LUPO, the Municipality was precluded from approving the 2004 plans. This is because in terms of s 7(1)(a) of the NBR Act a local authority cannot approve building plans unless it is satisfied that the application complies with the requirements of the NBR Act and any other applicable law. LUPO and the Zoning Scheme are 'applicable laws'. Berkel should have applied to the local authority in terms of s 15(1) for the requisite departures. Had Berkel done so, Du Toit would have received notice thereof in terms of s 15(2) and objected.

[80] It is not altogether clear that s 15 of LUPO needs to be complied with in relation to a third storey complying with the qualifications specified in the Zoning Scheme. There may be a distinction between the relaxation power contained in s 15 of LUPO and the relaxation power contained in the Zoning Scheme Itself. In the latter case one would arguably not need to have recourse to s 15. However, and even if this were so, the Municipality's discretion in terms of the Zoning Scheme is subject to the qualification that the additional storey must be added to the building 'on the lower side of the slope'. A third storey added on the higher side of the slope would be outside the Zoning Scheme and thus require a relaxation in terms of s 15 of LUPO.

[81] In the present case the third storey was added on the higher side of the slope. Mr van der Merwe expressed puzzlement as to the practical purpose and effect of this qualification in the Zoning Scheme as applied to a house of the kind depicted in the 2004 plans, namely a house stepped down with the slope (the third storey ends about two-thirds down the slope). If one accepts Friedman's depiction of the natural ground levels for the south-west elevation, there are only two storeys (being the second and third storeys) on the highest side of the slope. The ground floor (or 'basement', as Berkel calls it) starts a little way down the slope and is at

first almost completely below the natural ground level. The highest and lowest thirds of the house are two storeys (or less) above the natural ground level; only in the middle third is there a part of the house which is about two and a half storeys above natural ground level.

[82] Nevertheless, I do not see any real difficulty in the practical and sensible application of the Zoning Scheme's qualification. That qualification must be understood in conjunction with the other condition for allowing a third storey, namely observance of the 8m height restriction. A third storey added on the lower side of the slope and running through to the back of the house (ie ending on the higher side of the slope) would have to comply at all points with the 8m height restriction. In the nature of things, the maximum height of the third storey would thus be determined by a height 8m above the natural ground level at the front of the house (ie at the lowest point of the slope). A third storey complying with this restriction would, if it ran through to the back of the house, inevitably be considerably lower than 8m above natural ground level at the highest end of the slope. It is clear in the present case that if the third storey, as actually constructed on the higher side of the slope, had extended forward to the front of the house (ie to the lower side which faces the lagoon), the third storey would, at the front of the house, have exceeded the 8m height by some distance. The only way in which a third storey could have been added on the lower side of the slope while observing the 8m height restriction would have been to locate the finished ground floor (or 'basement') level at a lower level (by further excavation) and reducing the internal heights of the rooms. The result would have been a house with a considerably lower overall height.

[83] Du Toit would thus has good prospects on his complaint that the third storey as depicted in the 2004 plans should not have been approved without a duly granted departure in terms of s 15 of LUPO.

[84] Quite apart from the need for a departure in relation to the third storey, any relaxation of the 8m height restriction requires a departure in terms of s 15 of LUPO, since the Zoning Scheme itself does not confer any discretion on the local authority in that regard. In response to Friedman's report and affidavit, Berkel filed an affidavit by its own land surveyor, Mr Rohan Kohler ('Kohler'). Although he made some

sniping attacks on Friedman's methodology, I do not think there is any genuine factual dispute regarding Friedman's conclusions.

[85] Berkel's 2004 plans depicted natural ground levels which were derived from a contour plan drawn by Kohler's own firm before construction began at No 9[13] and which was submitted to the Municipality by Berkel's architects. Because of differences in the natural ground levels on the north-east and south-west sides of the house (the right and left sides as one looks out towards the lagoon), the height above natural ground level at any given point differs as one moves from the north-east side to the south-west side. According to Friedman the highest part of the third storey parapet as constructed is (i) within the 8m limit on the north-east side; (ii) 0,7m above the 8m limit at a cross-section more or less midway through the house, reducing to 8m over a distance of 2,35m; (iii) 1,01m above the 8m limit on the south-west side, reducing to 8m over a distance of 3,87m. If Kohler's measurements are used, the height encroachment may be about 0,2m less.

[86] More difficult to determine is whether the plans approved in February 2009 in fact sought permission for a building which would exceed the 8m limit. Friedman pointed out in his affidavit that two dotted parallel lines were depicted on the 2004 plans, the lower one purportedly being the natural ground level and the upper one the 8m limit. The plans show the house as being within the limit on both the north-east and south-west sides. Friedman states that these lines do not correctly reflect the height above natural ground level immediately contiguous to the building. If one compares Friedman's south-west elevation[14] with the south-west elevations forming part of the 2004 plans,[15] one will see that the two parallel lines on the 2004 plans should be at a lower level. It seems that in the 2004 plans the parallel lines for the north-east elevation[16] and south-west elevation were depicted as practically identical whereas in truth the natural ground level on the south-west side of the building is lower than on the north-east side. The error can also be seen if one compares the south-west elevation in the 2004 plans with the south-west elevation in the 2003

[13] See the site plan by Cecilia Architects at record 76, which has the same contours as the contour plan at record 68 produced by VPM Surveys (Kohler's firm).
[14] Record 148.
[15] Record 69, 72 and 74.
[16] Record 73.

plans.[17] In both plans the finished floor level of the ground floor is given as 95,5m above mean sea level yet the dotted line for the natural ground level is significantly lower in the 2003 plan than in the corresponding 2004 plan.

[87] In one of the south-west elevations forming part of the 2004 plans (this is where the height above natural ground level would be at its maximum), an official appears to have marked a natural ground level of 97,8m vertically beneath the highest part of the building and a top height of 105,35m (excluding an additional parapet marked as 'not built').[18] This would indicate a height above natural ground level at that point of 7,5m.[19] Since the natural ground level line on this drawing is too high, the conclusion that the building complied with the 8m limit was factually incorrect, but the notations support the view that in February 2009 the officials involved in the approval process regarded the structure as complying with the 8m limit.

[88] The 2004 plans received some attention from municipal officials in the first half of 2006, probably following De Swardt's letter of 9 December 2005. There is an internal worksheet recording an exchange between a Mr Pierre Korsten and Kakora.[20] Korsten asked where the original plans with his attached notes were. The next note says that they are 'Missing!!'. Korsten made a further note on 23 February 2006 that the roof exceeded the 8m height restriction by 420mm. Kakora replied on 30 May 2006 that Berkel had 'cancelled the top bit' ('*die boonste stukkie … gekanseleer*'). Korsten responded on the same day, stating that the roof exceeded the height restriction if Berkel had built according to the plans: '*Dit was nooit die stukkie wat hulle weggelaat het nie. Sien my 97.35 lyn op die terrein plan*'. The Municipality did not file explanatory affidavits by Kakora (who had left the Municipality's employ some years previously) or Korsten (whether he was still in the Municipality's service does not appear). It is difficult to tell whether Korsten was

[17] The comparison is between record 63 (2003) and record 69 (2004).
[18] Record 72.
[19] The dimensions on the elevations (record 73 and 74) show a height between the finished floor level of the second storey and the parapet above the third storey of 6,72m (3200mm + 250mm + 770mm + 500mm). The natural ground level depicted (albeit wrongly) on the south-west elevation is, at the highest point of the building, less than one metre below the finished floor level of the second storey, which is another way of deriving the supposed compliance with the 8m height restriction.
[20] Record 194.

looking at the 2004 plans as approved in February 2009.[21] It is possible that Korsten, back in 2006, had detected the problem. However, there is no indication that he was involved in the approval process which culminated in the decision of February 2009.

[89] The Municipality thus seems to have approved the plans in February 2009 under a misapprehension that the three-storey house was within the 8m limit. In other words, the Municipality did not see itself as approving a departure from the 8m limit. (This is consistent with the Municipality's explanatory affidavits.) If the Municipality had been aware that the structure as depicted would exceed the 8m limit, it would not have approved the plans unless a departure in terms of s 15 of LUPO was sought and obtained. Administrative action can be set aside if the administrator, as here, made a material factual mistake (*Pepcor Retirement Fund & Another v Financial Services Board & Another* 2003 (6) SA 38 (SCA); Hoexter *Administrative Law in South Africa* 2nd Ed at 302-306). It would be idle to speculate whether, if Berkel had brought a departure application in terms of s 15 of LUPO, it would have been granted or refused. Du Toit and other affected parties would have been entitled to be heard before the decision was made. One knows that the Municipality refused to relax the height restriction in respect of No 7, a decision upheld by the MEC. A departure application in respect of No 9 may well have suffered the same fate.

[90] On the merits, therefore, Du Toit has favourable prospects on the *Walele* issue, on the third storey issue and on the 8m height issue. It is unnecessary to consider whether, independently of these complaints, approval of the plans should have been refused in terms of s 7(1) of the NBR Act because of adverse effect on the value of Du Toit's property. What can be said is that, but for non-compliance with the qualifications in the Zoning Scheme relating to third storeys and the 8m height restriction, the house on No 9 would have been considerably lower than it actually is, and the excess height probably derogates from the value of Du Toit's property.

[21] The plans attached to the founding affidavit, and the originals forming part of the rule 53 record, do not reflect a 97,35m line.

[91] However, in order to conclude that Du Toit has good prospects of success in the review, one would also need to find that the review court would not in its discretion refuse review relief. This discretion, in which considerations of pragmatism and practicality are relevant, exists even where the applicant has not been guilty of culpable delay (*Chairperson, Standing Committee & Others v JFE Sapela Electronics (Pty) Ltd & Others* 2008 (2) SA 638 (SCA) paras 28-29). I have already observed that Du Toit's failure to take action in the face of the illegal construction of the house in 2005/2006 or to have done anything in that regard prior to the approval of the plans in February 2009 would be relevant to the exercise of the review court's discretion, quite apart from the impact of such failure in assessing the delay after February 2009. Even if there were a good explanation for Du Toit's failure to institute the review proceedings earlier than February 2014, a review court might well regard it as inappropriate, so long after the event, to grant relief. The review relief would only be of practical assistance to Du Toit if it led in due course to a partial demolition of the house on No 9. By February 2014, when the review was launched, that house had been standing for more than eight years, and now the period is nine and a half years.

[92] Ultimately, therefore, Du Toit's prospects of success in the review are fair but he would be at significant risk of a discretionary refusal of relief.

Conclusion on extension of time

[93] In this case, as no doubt in many others, the ultimately decisive considerations are, in my view, the extent of the delay and the validity of the explanations given for the delay. In my opinion, the extent was very significant and the explanations unsatisfactory. When one adds to this the ultimate object of the review application (partial demolition) and the length of time for which the completed house has been standing, this is a case where the interests of justice come down in favour of a conclusion that the invalid administrative act must, for the sake of finality, be allowed to stand.

[94] The present case is distinguishable in many respects from the *Lester* decision supra, on which Mr Bruwer placed some reliance. In *Lester* the neighbours

acted vigilantly and promptly, bringing no fewer than six applications for interdicts and review as each unlawful step unfolded. By the end of an arduous judicial process, Mr Lester was left with no approved building plans for an existing structure. In those circumstances the Supreme Court of Appeal, emphasising the doctrine of legality as part of the rule of law, concluded that there was no discretion to refuse a demolition order. In the present case, by contrast, the question is whether a potentially impeachable approval of building plans should be set aside. Our law recognises that sometimes defective decisions must be allowed to stand and thereby be 'validated' (*Oudekraal Estates (Pty) Ltd v City of Cape Town & Others* 2004 (6) SA 222 (SCA) para 27; *Sapela* supra para 28). That is the position here, and the result is that Berkel's house on No 9 is not an illegal structure (unless, to any extent, it has not actually been built in accordance with the plans approved in February 2009).

Conclusion

[95] It follows from everything said above that the prayer for an extension of time in para 1.4 of the notice of motion and the prayer for review in para 1.1 must be refused.

[96] In para 1.5 of the notice of motion Du Toit seeks an order that the Municipality give him notice in terms of s 15 of LUPO of any departure application in respect of No 9. As I understand it, this concerns the departure application which Berkel would have to bring if the approval of the 2004 plans were set aside. Since the review relief has been refused, para 1.5 falls away.

[97] In para 1.3 of the notice of motion, and in the alternative to the review relief, Du Toit asks that Berkel be ordered to comply with the approved plans and that the Municipality be ordered to enforce compliance therewith as well as compliance with the building line restrictions. The difficulty with this prayer is that the evidence does not satisfy me that the structure as built is not in accordance with the approved plans. The plans may have been approved by the Municipality under a misapprehension that the depicted structure was within the 8m height limit. It by no means follows that the structure as built is not the one depicted in the plans or that it

was not located at the levels indicated on the plans (ie with a finished ground floor level of 95,3m above mean sea level and with storey heights as specified in the plans).

[98] Mr Bruwer submitted that part of the approval of the 2004 plans was a condition that the building height could not exceed the height indicated on the plans and that this was to be certified by a registered surveyor on completion. It appears that the Municipality has not obtained this height certificate, an omission to be deprecated. I think that the building height referred to in this condition is the height from the finished ground floor level indicated on the plans. I do not understand it to be suggested that the building was not located at the finished ground floor level indicated on the plans (95,3m) or that any of the storeys are higher than the dimensions specified on the plans. Although the Municipality was at fault in not obtaining the certificate, I am not sure that para 1.3 of the notice of motion is sufficiently wide to include a prayer compelling the Municipality now to obtain the certificate. In any event, the grant of such relief would be subject to the same discretionary considerations as apply to the review relief.

[99] In para 1.6 of the notice of motion Du Toit asks that Berkel be interdicted from effecting any building work on No 9 in conflict with lawfully approved plans and that Berkel be ordered to comply with the plans and building line restrictions. In part, this relief overlaps with that sought in para 1.3. For the rest, there is no evidence that when the application was launched in February 2014 Berkel was undertaking or threatening to undertake any building work on No 9. The house had been finished some years previously. Although Berkel had wanted to construct a covered walkway between the houses on No 7 and No 9, its application for a relaxation to allow this was refused. Mr van der Merwe told me from the bar that the covered walkway was never constructed. At any rate, there is no evidence to indicate otherwise.

[100] Para 1.7 of the notice of motion sought leave for Du Toit to approach the court on amended papers for consequential demolition relief. This falls away with the refusal of the other relief.

[101] In regard to costs, both Berkel and the Municipality have at times acted in a manner worthy of censure. However, such conduct predated by some time the launching of the review application in February 2014. By the latter date, delay loomed large as a litigation risk for Du Toit. The Municipality abided the court's decision and Berkel opposed, devoting most of its energy to the question of delay. I do not think in the circumstances that I would be justified in departing the from general rule that costs follow the result.

[102] I thus make the following order: The application is dismissed with costs.

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ROGERS J

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