REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case Number: A592/15

In the matter between:

ANDREAS DU TOIT Appellant

And

KNYSNA MUNICIPALITY First Respondent

BERKEL AFRICA (PTY) LTD Second Respondent

Coram: Davis, Samela & Boqwana JJJ

Delivered: 31 August 2016

JUDGMENT

BOQWANA, J

Introduction

[1] This appeal concerns an application brought by the appellant on 20 February 2014 for the review and setting aside of building plans submitted by the second respondent in September 2004 and approved by the first respondent ('the municipality') on 20 February 2009 in respect of a building structure constructed on erf 1….. situated at 9 E… W…., K….. ('No.9'/'erf 1…') and completed in December 2005. Extension of time for the institution of the review in terms of s 9 (2) of the Promotion of Administrative Justice Act 3 of 2000 ('PAJA') is sought as well as other relief which I consider not necessary to set out in detail, save to state that the ultimate goal of the appellant is the consequential demolition of the impugned structure at No.9.

[2] The application was initially opposed by both the municipality and the second respondent. The municipality withdrew its opposition and elected to abide by the court's decision. To assist the court, it filed an explanatory affidavit deposed to by Mr Michael Maughan-Brown, Director: Planning and Development.

[3] The matter came before Rogers J who dismissed the application with costs. In short, Rogers J found that whilst there appeared to have been irregularities pertaining to the approval of the building plans, the extent of the delay in bringing the review application was significant and the explanation given for the delay unsatisfactory. In his view, interests of justice favoured a conclusion that the invalid administrative act must be allowed to stand, for the sake of finality, taking into account the fact that the building sought to ultimately be demolished had been standing for a long time. This appeal is with the leave of the court *a quo*.

Factual background

[4] The facts of this case span over a number of years. The appellant is a retiree and has been a resident at No.8 E… W…., K….. ('No.8') for many years. He lives across No. 7 E…. W… ('No.7') and diagonally across No.9, which forms the subject of these proceedings. Both properties are owned by the second respondent. The property at No. 7, then known as erf 7….., was built in 1993. Building plans

for the construction of a second dwelling at No.9, then known as erf 7…... were approved on 16 October 2003. In 2004, the two erven were consolidated into erf 1….. This was to allow for simpler administration of the two properties by the second respondent.

[5] It was later found that the two dwellings contravened the development parameters of the single residential property in that the total square metres of land were over the limit as a result of the consolidation. In 2007, a process was initiated to re-subdivide the two dwellings to two erven and form erven 1…. ('No.9') and 16319 ('No.7'). For some reason, the process of subdivision did not proceed resulting in the withdrawal of the subdivision approval by the Surveyor-General on 4 February 2011.

[6] On 1 September 2004, prior to commencing with construction at No.9, the second respondent submitted an application for the building plans with the municipality. The application was described as an extension to the existing dwelling with the new area indicated as 16m^2 and the existing area as 398m^2.The plans however related to a whole new dwelling in its entirety and not an addition of 16 m^2. It appears that the plan moved between different departments of the municipality between the period of 23 December 2005 and 31 May 2006. The town planner signed for approval of the plans on 23 January 2009. The plans were eventually approved on 20 February 2009. It is common cause that building works at No.9 started in early 2006 before the approval of the plans. The structure consisted of three storeys.

[7] Mr Maughan-Brown states in his affidavit that construction at No.9 appeared to have proceeded in accordance with revised plans and not the October 2003 building plans and this was not picked up by the municipality at the time. These plans, according to him, may have been submitted to the municipality's building control department but the municipality has not been able to establish this. He further confirms that these plans were not approved when construction took place. According to him, steps were taken to process the backlog in 2008 and as

part of addressing the backlog, the revised drawings in respect of the dwelling at No.9 were considered and approved in February 2009.

[8] Written recommendations were not done by the responsible building control officer, Ms C Fick, for consideration by the municipal functionary who approved the February 2009 plans in line with the Constitutional Court judgment of *Walele v City of Cape Town and Others* 2008 (6) SA 129 (CC). The approval followed the standard procedure followed by the municipality at the time. The plans would have been first considered by the senior building inspector, Mr L Kakora, who would thereafter have recommended them to Ms Fick and Ms Fick would have then recommended approval of the application to the municipal functionary, Ms F Kruger, having considered the provisions of the National Building Regulations and Building Standards Act 103 of 1977 ('the NBR Act'). According to Mr Maughan-Brown, the application for approval of the plans by the second respondent gave rise to the requirements of s 3.2.2 of the scheme regulations. The property in question was zoned as single residential in terms of the scheme regulations and attention had to be given to proper application of the height. Section 3.2.2 provides as follows in relation to height:

'Height:

- At most 8m, above natural ground level directly below a given point of the building with a maximum of 2 storeys;
- provided that a departure from the two 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.'

[9] As can be seen, the two storey limit was a limitation applicable to buildings within the single residential zone. According to Mr Maughan-Brown, Ms Fick and Ms Kruger recognised that the February 2009 building plans provided for a three storey building but concluded that it fell within the 8 metre height restriction required in s 3.2.2. They concluded further that the additional third storey could be

approved given the slope of the site in question and considering that the additional storey was added on the lower side of the slope. Ms Kruger was accordingly prepared to allow a departure from the two storey limit in terms of the provisions of s 3.2.2 and approved the application. The view adopted by the municipality was that the departure referred to in s15 of the Land Use Planning Ordinance, 1985 (Ordinance 15 of 1985) ('LUPO') and the procedure followed in terms thereof for the application and granting of departure finds no application in the context of s 3.2.2. Both Ms Fick and Ms Kruger were satisfied that the application complied with the NBR Act, the scheme regulations and the applicable law. They were also satisfied that the building would probably not cause any one of the undesirable outcomes contemplated in s 7 (1) (b) (ii) of the NBR Act. Mr Maughan-Brown alluded to the fact that the passage of time since the administrative actions referred to in the application necessarily had an impact on the institutional memory of the municipality and the ability of those involved to recall aspects of the decisions challenged by the appellant.

[10] The appellant is of the view that the municipality may not have been aware of the fact that the subdivision of the two erven was abandoned by the second respondent when it granted the approval of building plans in February 2009.

[11] Moving along, in October 2010, the second respondent replaced the balustrade on No.7 and also erected a covered pergola on the top storey of the building. It was instructed by the municipality to stop the building work and submit 'as-built' plans for those alterations and also apply for the necessary relaxations in order to have those alterations approved. The second respondent applied for the amendment of property boundaries for erven 1… and 1…. (which according to the appellant did not exist).

[12] In December 2010, the second respondent appointed Marike Vreken Town Planners ('Ms Vreken') to apply for further relaxations to accommodate height restriction, to allow building line relaxations so as to be able to build a covered walkway link between the two buildings and to remove building lines prescribed in

the registered title deeds of the properties in order to allow for the relaxation of the lateral building lines. Ms Vreken states in her confirmatory affidavit to the answering affidavit that she erred when she stated in the application for approval that '*the existing dwelling Erven 1…. and 1….. [e]xceed two storeys, and even though the dwelling on Erf 1….. complies with the 8m height restriction; the building exceeds two storeys. A height departure for the number of storeys is therefore required.'* She alleges that she had failed to have proper regard to the definition of basement and natural ground level as defined in the scheme regulations applicable at the time and the approved building plans. "Basement" is defined as:

> '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 a definition of a storey.'

[13] "Ground level" means:

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

[14] On 7 April 2011, the appellant objected to the application submitted by Ms Vreken in writing, stating that '*Both buildings on the above property are clearly three storey buildings and not two storey as stated by Vreken in Section B, paragraph 7'*. He further stated that '*no mention is made of an existing wall (2 to 3 meters high) that connects the two buildings. Surely this wall also breaches the lateral building line as would the proposed covered walkway. The information provided to us does not include a site development plan that shows the relaxation of the existing two buildings in relation to the erf boundary and building lines'*.

[15] He also raised doubts about the claim that the building on erf 1….. (9 E… W…...) does not exceed the 8 metre height restriction. In his submission, he indicated that the second respondent had built an illegal additional storey apparently without the submission of plans for approval by the municipality. The

appellant alleges that he was not aware of the approval of plans of 20 February 2009 at that stage and that the municipality had approved a second dwelling on the consolidated erf, which had not been subdivided.

[16] Following his objection, the appellant received a letter dated 10 January 2012 addressed to Ms Verken where the council of the municipality refused the application for departure submitted by Ms Verken on behalf of the second respondent. The key paragraph of the letter which indicated the decision of the municipality read as follows:

'[e] That the application for a departure in terms of Section 15 of the Land Use Planning Ordinance, 1985 (Ordinance 15 of 1985) to exceed the 8m maximum building height restriction to 8.612m above natural ground level on Erf 1…… for a balustrade roof (be refused) in order to protect the amenity and welfare of property owners to the south east of Erf 1….., K…..' (Own emphasis)

[17] I return to the significance of this letter later in the judgment. The letter instructed the second respondent to rectify the illegal structures in terms of s 40 (1) (a) (iii) to comply with the scheme regulations as per approved plans within 21 days of receipt of the letter.

[18] Towards the end of January 2012, the appellant learnt from the municipality officials that plans in respect of the building structure at No.9 were approved in February 2009. He instructed Mr Howard Ross of ED Ras Attorneys who wrote a letter to the acting municipal manager of the municipality on 31 January 2012 seeking clarity as to the wording of the council's resolution of 10 January 2012. He sought to clarify the meaning of the illegal structures to be rectified. He requested that the 'illegal structure' stated by council in its resolution should include the entire additional storey added to the building in erf 1……, which according to him, was improperly approved. He also highlighted that 'illegal structures' on erf 1….. were more serious and invasive and had a far greater adverse impact on the appellant's view and on the value of his property than those on erf 1….. He

accordingly urged the municipality to take all necessary steps to ensure that all offending structures on the properties were rectified.

[19] On 14 February 2012, Mr Maughan-Brown sent a response letter to Mr Ross denying any lack of clarity in the council's decision. According to him, the letter made it clear that the 'structures' referred to [as illegal] in the resolution were any and all structures that did not appear on the building plans that had been approved. He denied that the additional storey on erf 1…… constituted an illegal structure and further refuted that the approval of the additional storey was improper. He specified that according to the evidence available to the delegated official who approved the plan, the structure complied in all respects with the scheme regulations. He denied the suggestion that the departure of the senior official from the municipality had anything to do with erf 1……. as claimed by the appellant. In his letter he concluded by stating the following:

> 'Given the circumstances outlined above I am confident that you will agree that Council's decision deals with all illegal structures on the property. In this regard we should note that the applicant has appealed against the Council's decision and we will, therefore, not be in a position to enforce Council's decision until such time as the appeal has been finalised.' (Underlined for emphasis)

[20] The appellant contends that this part of the letter created confusion as to what was to be considered on appeal. This issue is discussed in more detail below.

[21] The appellant and Mr Ross apparently obtained the February 2009 plans and examined them. Mr Ross addressed a letter dated 15 May 2012 to the municipality that the plans bore no stamp of approval from the municipality. He further mentioned that despite claims that the 2009 plans were approved, the building department of the municipality had informed the appellant throughout 2009 and 2010 that the third storey was 'not yet approved' and that he would be afforded an opportunity to object thereto. He once again stressed that the earlier letter of 10 January 2012 (council's resolution) was silent on the more serious departure from height restriction on erf 1….. and accused the municipality of withholding

important information. He further noted that visual evidence existed to the effect that the front sections of the three storey exceeded the 8 metres restriction and the third storey on erf 1…… was constructed on the highest extremity of the slope. He reserved his client's rights that once the appeal [by the second respondent] was known he would consider his position.

[22] On 28 May 2015, Mr Maughan-Brown responded by stating that it was possible that Mr Ross had received a wrong set of plans and apologised. He refuted the assertions contained in Mr Ross' letter, particularly denying any deliberate or negligent withholding of information by the municipality or exceeding of powers by its officials.

[23] On 5 July 2012, Mr Ross replied as follows: '*Upon inspection at your offices on 3 July it was noted that the 2004 Plans do indeed have an approval stamp dated 2009. The stamp is very faint and this is probably why it was not visible on the copies given to our client and hence led to our comment in our letter of 15 May 2012.'* (Own emphasis)

[24] He disputed other allegations and concluded by stating that: '*Whilst we do not wish to be involved in a paper war, our instructions are to reserve all our client's rights at least until such time as the outcome of the present appeal is known*.'

[25] What followed was an email by Mr Ross to the members of the municipality seeking acknowledgment of receipt of correspondence of 5 July 2012 which he alleged had not been responded to. He consequently requested that they be advised timeously of the outcome of the appeal so that they could advise their client of his rights. Ms Melony Paulsen of the municipality responded on 30 October 2012 informing Mr Ross that Mr Maughan-Brown was attending a course and would be back on 5 November 2012.

[26] Mr Ross wrote another letter on 4 December 2012 for the attention of Mr Maughan-Brown and Ms Paulsen expressing his dissatisfaction about not having received any response given the unfortunate history of the matter.

[27] He again wrote another letter on 8 January 2013 still voicing unhappiness about lack of response by various officials of the municipality. This was followed up by another letter dated 7 February 2013 referring to previous correspondence and asking that his firm be advised timeously of the outcome of the appeal.

[28] On 11 February 2013, Annaleen Cilliers of the municipality sent an email to Mr Ross attaching a copy of a letter dated 14 November 2012 which she alleged was erroneously sent to an incorrect address for which she apologised.

[29] Attached to the letter of 14 November 2012 was a copy of a letter addressed to Ms Vreken dated 7 November 2012 as well as a copy of a letter received from the Western Cape Government: Environmental Affairs and Development Planning dated 25 October 2012. The 25 October 2012 letter contained the outcome of the appeal which stated, *inter alia*, the following:

> '2. The Competent Authority to the administration of the Land Use Planning Ordinance, 1985 (Ordinance 15 of 1985), has in terms of section 44(2) of the said Ordinance, resolved that the appeals against the Municipality's decision to refuse an application for the relaxation of the 8m height restriction for an existing lean-to-roof and balustrade, erected on the deck on the top level of the dwelling on erf 1……, Kynsna, be dismissed.
>
> 3. It is further recommended that the applicant be instructed by the Municipality in terms of section 40 (1) (i) of LUPO to rectify the illegal structures as per approved building plans within 21 days from receipt of the letter that the appeal was dismissed, failure of which would result in the structure being demolished by the Municipality at the cost of the owner.' (Own emphasis)

[30] The letter dated 7 November 2012 from Mr Maughan-Brown instructed the second respondent to rectify the illegal structures as per approved plan within 21 days of receipt of the letter; that the appeal was dismissed and failure to do so would result in legal action.

[31] On 14 February 2013, Mr Ross wrote another letter noting the outcome of the appeal process and his client's happiness about the decision. He further raised

his client's concerns that the issues they raised in their letter of 15 May 2012 (regarding erf 1……) were still not properly addressed. He concluded by stating the following: *'In our earlier correspondence we reserved our client's rights to deal with these aspects once the outcome of the appeal was known…. Our instructions are that our client now intends doing exactly this, and you will hear from us further shortly in this regard.'*

[32] Nothing happened until Mr Ross wrote another letter again on 8 April 2013 setting out the history of the matter in sequence and inviting the municipality's *'comments and positive reaction'* on how they were going to rectify the situation as section 15(2) of LUPO had allegedly not been complied with. He further threatened to launch a review application if the municipality failed to revert by 30 April 2013. A copy of this letter was also sent to the second respondent. This was the first time that any correspondence was copied or sent to the second respondent.

[33] On 17 April 2013, Ms Paulsen sent an email to Mr Ross indicating that the municipality wished to obtain external legal opinion and sought indulgence until such time as the municipality had received such legal opinion.

[34] On 18 April 2013 Mr Ross responded indicating that his client agreed that they would hold the matter over for one month until Monday, 20 May 2013.

[35] Shortly before this correspondence, the appellant, in the meantime, had instructed Mr Ross to make enquiries about how erf 7…. and 7…. became erven 1……. and 1…… respectively. Mr Ross was assisted by his associate, Mr Ras to make those enquiries.

[36] On 18 April 2013, Mr Ras came back with a report that, according to his research at the Registrar of Deeds, erf 1…... K…... was created with the consolidation of erven 7……. (No. 9) and 7…… (No.7) – this then became consolidated erf 1……; that it was the registered property of the second respondent; it appeared that the second respondent attempted to subdivide erf 1….. into two components, namely, erf 1……. (a portion of erf 1…… square metres in extent) and erf 1……. (the remainder of erf 13913); for some reason it was never

proceeded with. According to the appellant, this meant that erf 1…….. neither existed in the past nor does it exist presently; therefore, the second respondent became the proprietor of erf 1…., throughout all applications since the two erven were consolidated in 2004. Mr Ras' further research also indicated that on 14 June 2012, the consolidated erf 1…. was sub-divided into erf 1…… (remaining extent) - (No. 9) and erf 1….. (No.7). According to the appellant, at the time of Ms Verken's application on 14 March 2011, the house which had been newly built at No.9 on stand 1…… was therefore unlawful on the face of it as the structure was not allowed by the scheme regulations.

[37] The appellant alleges that on 20 May 2013, Mr Ross reminded the municipality in writing that their response was due by that date. (No correspondence is attached in this regard). According to the appellant, Ms Paulsen responded that they had not received the legal opinion and their legal representative was tied up in court.

[38] On 29 May 2013, Mr Ross once again contacted Ms Paulsen to enquire about the matter. Ms Paulsen informed him that they had instructed Mr André Swart, an attorney who would liaise with him.

[39] Mr Ross and Mr Swart met and held off the record discussions. It is not clear when these meetings took place and over what period. According to the appellant some confusion arose as to exactly which plans were approved. Mr Swart undertook to obtain a full set of approved plans from his client and make them available to Mr Ross. It is not clear when this all happened and what kind of confusion there was regarding these approved plans.

[40] On 3 September 2013, Mr Ross addressed a letter to Mr Swart indicating that almost five months had passed since Mr Ross first wrote to the municipality advising it about the problems with its conduct of the matter. He again indicated that he intended to institute review proceedings. He also queried that he had not received the building plans as undertaken by Mr Swart. He threatened that unless Mr Swart responded 'positively' within 14 days, his instructions were to proceed

(with legal action). He also sent a copy of this letter to Ms Paulsen and the municipal manager.

[41] On 9 September 2013, Mr Swart sent an email with a copy of building plans to Mr Ross. The appellant states that Mr Ross received these plans on 13 September 2013 and upon examination they appeared to be no different to those they already had in their possession.

[42] On 9 October 2013, Mr Swart sent an email to Mr Ross indicating that he had referred Mr Ross' letter to his client for instructions. On the same day of 9 October 2013, Mr Swart wrote back to Mr Ross stating that he had consulted with the officials of the municipality and his instructions were that the municipality viewed the building plans as being approved. This is the date from which the appellant submits the 180 days in which to launch a review application commenced.

[43] According to the appellant, when Mr Swart terminated the line of communication between him and Mr Ross, the issues raised in the letter of 8 April 2013 were still not addressed. In the meantime, the appellant had decided that his suspicion that the municipality was wrong on the height of 8 metre on No.9 required proper investigation. To that end he decided to employ the services of a land surveyor, Mr Friedman of P…… B…….. Mr Friedman had difficulties in gaining access at No.9. This delayed Mr Friedman's report. The appellant only obtained Mr Friedman's report in draft form on 31 January 2014. In short, Mr Friedman found that the building exceeded the 8 metres height restriction. He also found that the building plans were misleading as they could create an impression that the height fell within 8 metres.

[44] Ms Verken had apparently also launched another departure application in regard to No.7 during May 2013. The appellant objected to that application too. That application was withdrawn on 7 November 2013. On 22 November 2013, Mr Ross wrote to the municipality in consequence of the withdrawal referring to the municipality's conduct in respect of erf 1……. The municipality replied on 11

December 2013 reiterating the stance it indicated in its letter of 14 February 2012. The appellant then informed Mr Ross to proceed with the review application. Mr Ross however moved to Johannesburg. As a result of this move and the festive season, Mr Ross only wrote a letter to the municipality on 27 January 2014 complaining about the fact that the issues raised in the letter of 8 April [2013] had not been fully responded to.

[45] He once again indicated that he awaited a response and still afforded the municipality indulgence which he alleged was sought by the municipality. There is no record of the request for this 'second' indulgence. Mr Ross further indicated that he was holding back further action in anticipation of the municipality's response. He also stated that the purpose of the letter was to formally call upon the municipality to fully respond to his letter of 8 April 2013 by no later than Wednesday, 12 February 2014, failing which their application would be served on the municipality.

[46] Ms Paulsen wrote to him on 10 February 2014 informing him that his letter was forwarded to the external attorney whom the municipality had instructed to act on its behalf and to the Manager: Town Planning & Building Control, Mr Hennie Smit. It will be recalled that Mr Swart had already indicated on 9 October 2013 that the municipality viewed the plans as approved. The review application was instituted on 20 February 2014.

The issues

[47] The issues before us are whether the court *a quo* erred in finding:

(a) that the 180-day period within which to bring a review application as envisaged in s 7(1) of PAJA had expired by the time the review application was launched on 20 February 2014;

(b) that it was not in the interest of justice that the 180-day period as envisaged in s 9 (2) of PAJA be extended and thereby exercising its

discretion not to entertain the review application; and by dismissing the interdictory relief sought in the notice of motion.

The delay

[48] As stated by the Supreme Court of Appeal in its decision in *Opposition to Urban Tolling Alliance v South African National Roads Agency Limited [2013] 4 All SA 639 SCA ('OUTA')* at para 22, absent the extension under s 9 of PAJA, the 180-day bar precludes the court from entertaining the review application. (See also paras 26, 40 and 43).

[49] Section 7(1) of PAJA provides:

> 'Any proceedings for judicial review in terms of section 6 (1) must be instituted without unreasonable delay and not later than 180 days after the date-
>
> (a) …on which any proceedings instituted in terms of internal remedies as contemplated in subsection (2) (a) have been concluded; or
>
> (b) where no such remedies exist, on which the person concerned was informed of the administrative action, 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.' (Own emphasis)

[50] Thus, any person seeking the setting aside of administration decisions on judicial review must launch such proceedings within a reasonable time.

[51] The common delay rule is a long standing rule which entails a two-stage enquiry; First, whether there was an unreasonable delay and second, if so, whether the delay should in all circumstances be condoned.' (*OUTA* supra at para 26). Brand JA observed in OUTA *supra* that this two stage approach is equally applicable to PAJA and the only difference is that the legislature in PAJA has determined that a delay exceeding 180 days is *per se* unreasonable.

[52] The rationale for the delay rule was stated in *Gqwetha v Transkei Development Corporation Ltd and Others* 2006 (2) SA 603 (SCA) as two-fold:

'…First, the failure to bring a review within a reasonable time may cause prejudice to the respondent. Secondly, and in my view more importantly, there is a public interest element in the finality of administrative decisions and the exercise of administrative functions. As pointed out by Miller JA in Wolgroeiers Afslaers (Edms) Bpk v Munisipaliteit van Kaapstad 1978 (1) SA 13 (A) at 41 E-F (my translation):

'It is desirable and important that finality should be arrived at within a reasonable time in relation to judicial and administrative decisions or acts. It can be contrary to the administration of justice and the public interest to allow such decisions or acts to be set aside after an unreasonably long period of time has elapsed - interest reipublicae ut sit finis litium ... Considerations of this kind undoubtedly constitute part of the underlying reasons for the existence of this rule.' (at para 22)

[53] Thus, if a challenge is not initiated timeously an unlawful administrative action may be validated by the delay. *Harnaker v Minister of the Interior* 1965 (1) SA 372 (C) at 381C.

[54] The issue of whether there was any delay in bringing the review has been brought into question in this matter. It is therefore appropriate to first determine when the period of 180 days commenced.

The commencement of the 180 day period – was there unreasonable delay?

[55] The appellant submits that the 180 period commenced on 9 October 2013. The court *a quo* found that, at best, for the appellant the date of actual knowledge of the action and reasons for it was 5 July 2012. It also found however that, in truth, he reasonably might have been expected to have become aware of the decision and its reasons well before that date.

[56] By his own admission in the founding affidavit, the appellant was aware of the building activities taking place at No.9. He watched the progress during 2005 and 2006 up to completion. In his mind, he initially thought that the house that was being built was a double storey dwelling which he thought had been legally

approved. From a certain point however, when the two storeys had been completed, the building works continued and a third storey was erected on the two storeys which had been built. To his recollection this happened in 2006. At that stage plans had not been approved. So, by then no administrative decision had been made and therefore he could not have brought any judicial review in terms of PAJA then. (That however does not mean that other legal steps such as approaching the court for an interdict could not have been brought – I deal with this elsewhere in the judgment).

[57] The appellant alleges that the municipality's officials from the building department informed him from about 2006 to 2010 that the 'as built' plans had not yet been approved and he would still have an opportunity to object. We now know that the decision was made in February 2009.

[58] In *Mandela v Executors Estate Late Mandela and Others [2016] 2 All SA 833 (ECM)* at para 17, the Court observed that the court should determine whether: *'the existence of a decision would have been uncovered by the taking of reasonable steps in the particular circumstances and the period of delay should be reckoned from that date, event or period.'*

[59] In my view, had reasonable steps been taken by the appellant during 2009, he could have discovered that a decision was made. He could further not rely on information from some officials who told him between 2006 and 2010 that the structure was not yet approved. He did not show any active involvement and had he done so, he might have reasonably become aware that a decision was made. His actions do not demonstrate the kind of reasonableness one would expect from a person negatively affected by an offending structure. He made no follow up action. No single letter was written to the municipality in all those four years in protest. Instead, he happily watched a structure being completed and years passing. The court *a quo* was correct by stating that the 180 day period could be calculated from a point before 5 July 2012. In my view, it could be reckoned from the period when the plans were approved in 2009 (as that is when the decision was made) or

between 2010 and 2011. During those periods he would also have been expected to ask for reasons for the decision for the purposes of bringing the review application.

[60] Even if it were to be found in his favour that indeed he might reasonably not have been expected to be aware of the plans between 2009 and 2011, in January 2012, he was informed by the municipality officials that the plans for structure had been approved. This is expressed in Mr Ross' letter of 31 January 2012 to the municipality. Thus, even if the application for departure by Ms Verken would have created an impression that it sought relaxation for the third storey at No.9, the information that the appellant received in January 2012 made him aware that the structure was approved.

[61] The municipality's response of 14 February 2012 clearly confirmed the existence of approved plans which Mr Maughan-Brown denied were unlawful and set out reasons for the approval. It could thus be found that, even at that point, the appellant had actual knowledge of the existence of the administrative action and reasons thereof and the 180 days could be computed from then.

[62] Mr Ross raised an issue of the stamp not showing on the plans in his letter of 15 May 2012. If there was any doubt as to the approval of the plans, as raised by Mr Ross, correspondence that followed clearly placed that issue beyond doubt. The letter of 5 July 2012 by Mr Ross unquestionably put an end to any uncertainty as to whether plans were approved. It clearly demonstrated that the appellant and Mr Ross were at that point actually aware of the approval. I therefore agree with the court *a quo* that any attempt to place the date of actual knowledge of the plans to a date beyond 5 July 2012 is contrived.

[63] As to reasons for the decision, the letters of 14 February 2012 and 28 May 2012 clearly articulated the reasons for approving the plans which were adequate for the appellant to bring a case on review. The case on review would hinge on whether or not the scheme regulations, title deed and/or the provisions of the LUPO and the NBR Act were infringed. Nothing beyond what was in those letters was required for purposes of instituting a review.

[64] Therefore, calculating the 180 day period in which to bring a review application based on the actual knowledge of 5 July 2012 was the best case scenario for the appellant. That period would have expired in early January 2013. The review application was launched more than a year later i.e. in February 2014.

[65] If the period of 180 days is calculated on the basis that the appellant might reasonably have been expected to have become aware of the municipality's decision and the reasons already given between the period of 2009 and 2011, the delay in bringing the review runs into a number of years. There is therefore no question about the fact that the delay was *per se* unreasonable.

[66] In support of his contention that the 180 days commenced on 9 October 2013, the appellant submits that he waited for the outcome of the appeal which was brought by the second respondent against the refusal of its relaxation application, before he could take action and further gave the municipality indulgence to seek an external opinion and revert to him. These arguments are without any merit.

[67] Apart from the fact that the case advanced in argument is slightly different from what is expressed in the founding papers, the appellant's attempts to link the appeal with the commencement of the 180 day period does not withstand scrutiny. It can never be held that the appeal brought by the second respondent was an internal remedy that must be exhausted before bringing the matter on review as contemplated in s 7 (2) (a) of PAJA for the following reasons: firstly, council's decision in the municipality's letter of 10 January 2012 clearly articulated what application was refused. There can be no ambiguity on that. The refusal was in connection with an application made in respect of erf 1…….. and not erf 1…… as the appellant seeks to suggest. The passage in the letter of 10 January 2012 that I have quoted above nails the point.

[68] The appeal therefore had nothing to do with the issue that the appellant wanted 'resolved' which was the rectification of the additional storey at No.9, which he regarded as illegal. No confusion was created by the municipality on this issue. If anything, the municipality made its stance very clear in all its

correspondence that it did not consider the approved structure in erf 1…… as illegal. Mr Maughan-Brown's letter of 14 February 2012 created no misunderstanding about what the subject of the appeal was. The fact that he indicated that council's decision dealt with all illegal structures at the end of his letter and that the municipality could not enforce the decision of council until the appeal was finalised did not amount to an acknowledgement that erf 1…… was illegal. He also did not suggest that the complaint about the additional storey in erf 1….. formed part of the appeal. In fact, he denied that the additional storey in erf 1……. was illegal throughout his letters.

[69] The appeal is therefore not relevant to the computation of the 180 days. It is a consideration that may become relevant when the reasonableness of the explanation for the delay is considered on the second leg of the inquiry.

[70] The issue of the indulgence sought by the municipality equally plays no role in the calculation of the 180 days in this case. It did not suspend the running of the 180 days whatsoever. In any event, the indulgence came way after the appellant became aware of the outcome of the appeal and it was only for one month.

[71] On 9 October 2013, Mr Swart stated what was already known, which was that the plans were taken by the municipality as approved. A different view could not have changed that in any event as the municipality was *functus officio*. This argument is accordingly flawed and legally untenable. It has been showed that there was a delay which was *per se* unreasonable as it exceeded the period of 180 days.

[72] That conveniently takes me to the second leg of the enquiry which is whether the delay should have been condoned.

Should the delay have been condoned?

[73] Section 9 of the PAJA allows the parties to extend the period of 180 days to a fixed date, by agreement, or failing that, the court to do so, on application where the interests of justice so require.

[74] Whether it is in the interests of justice to grant condonation depends on the facts and circumstances of each case. In *Van Wyk v Unitas Hospital & Another (Open Democratic Advice Centre as Amicus Curiae)* 2008 (2) SA 472 (CC), the Court held at para 20 that factors relevant to the enquiry of what entails interests of justice in a particular case include: *'but are not limited to the nature of the relief sought, 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, the importance of the issue to be raised in the intended appeal and the prospects of success.'* The court further held at para 22 that: *'An applicant for condonation must give a full explanation for the delay. In addition, the explanation must cover the entire period of delay. And, what is more, the explanation given must be reasonable.'*

[75] The extract from Van *Wyk supra* denotes that a wide range of considerations are relevant. A debate of whether the merits of the case form part of this assessment was settled in the Constitutional Court decision of *Khumalo and Another v MEC for Education, KwaZulu-Natal* 2014 (5) SA 579 (CC) at para 57. There the Court held:

> *'An additional consideration in overlooking an unreasonable delay lies in the nature of the impugned decision. In my view this requires analysing the impugned decision within the legal challenge made against it and considering the merits of that challenge.'*

[76] In assessing prospects of success, the court should be mindful of the principles surrounding the delay rule (which I have discussed above) which highlight the importance of finality and certainty in decision making. The extent to which a favourable assessment of the prospects of success will affect the decision whether to condone an unreasonable delay will depend on the other features of the case (*Cape Town City v South African National Roads Agency Ltd and Others* 2015 (6) SA 535 at para 26 ('*Sanral*'). In *Sanral* supra, the court held that, the strength of the prospects of a case in an unreasonably delayed review application has to be weighed in the balance in the peculiar context with the policy

considerations that inform the delay rule [as expressed in *Gqwetha* supra at paras 33 and 34]. Furthermore, '[*t*]*he principle enunciated by Nugent JA amounts to a recognition that a good case on the merits cannot, by itself, negate the effect of s 7(1) of the Act and be sufficient cause, without more, to grant condonation in terms of s9*.' (See *Sanral* supra at para 27). Finally on this point it is appropriate to note that the court in *Sanral* said that: '*Actually adjudicating a review on its merits entails a different undertaking from merely considering the merits of a review for the purposes of assessing its prospects of success for another purpose, such as whether to condone the delay, or grant interim relief. The former exercise is determinative and thus final, while the latter involves arriving at an essentially provisional conclusion. However, even if the court is inclined to pronounce conclusively on the illegality of an impugned decision, [such as it could be the case here] its finding in that regard will not, without more, displace the effect of the delay rule on its ability or preparedness to exercise its power of judicial review*.' (See *Sanral* supra at para 29). (Own emphasis)

[77] Against that background, I deal with the circumstances of this case. I have taken time to deal with the explanation and the extent of the delay that is apparent from the facts. The appellant noticed the building of a structure already in 2005 which was completed in December 2006. The explanation that he was told by the officials of the municipality over the period of 2006 to 2010, that the structure had not yet been approved and that he would get an opportunity to object thereto is not only vague and lacking in substance and detail, it is also not convincing. It is strange that the appellant would take so inactive a stance for all those years. Surely, even if the building inspector told him that at some point, as he alleges in the replying affidavit, that the structure was not approved, he should have taken further steps after not hearing anything from the officials of the municipality for over a period of four years.

[78] If his version is to be believed, he would have noticed that the municipality officials were either avoiding or fobbing him off or they were not doing their job

by allowing a structure to stand without approving it, especially after he had informed them of its existence. He would have noticed that no notice was forthcoming allowing him to object as promised by the said officials. That should at least have necessitated the writing of a letter, for instance, demanding answers.

[79] As I have already stated, not a single letter was written to the neighbour raising any concerns about this newly built structure, in fact, it is alleged on behalf of the second respondent that at some point in December 2007 when K….. experienced water shortages, the appellant and his family requested and made use of bathroom facilities at the house at No.9 which had rainwater stored for household purposes and raised no complaints. The appellant and his family were given unrestricted access to the house and property. The appellant was thus fully acquainted with the physical structure of the building works, as well as the design and construction.

[80] He took no steps to prevent the completion of the structure. He watched the progress but not once did he address any correspondence to the second respondent except copying it with the letter dated 8 April 2013. He neither wrote to the second respondent seeking compliance with the law nor to the municipality to enforce such compliance during that period. An interdict was also not sought to prevent the second respondent from completing the structure.

[81] His actions are different from those taken by the neighbour in the case of *Lester v Ndlambe Municipality & Another* [2014] 1 All SA 402 (SCA. In *Lester*, Haslam, a neighbour obtained copies of the plans from the Ndlambe Municipality officials after he saw foundations being cast for the new dwelling. He made it plain to the officials at that early stage that he had an interest in the matter and that he required to be notified of Lester's building plans prior to their approval. Haslam raised an objection to the construction of a second separate dwelling because it contravened the title deed restriction which prohibited more than one dwelling on the same property. Lester was notified of this objection but chose to continue building, pending a council decision. Haslam applied for an interdict restraining

Lester from continuing with the building pending the outcome of review proceedings. Other applications which I need not deal with followed. The Lester case presents an example of an applicant who took active steps to protect his rights as soon as he noticed construction taking place, unlike the appellant who sat back for close to eight years.

[82] In this case, even though the appellant's immediate goal would have been to have the structure removed, he did not approach the court to seek an interdict nor protest to the municipality.

[83] The first time that the appellant generated any correspondence was in April 2011, when he wrote to the municipality reacting and objecting to Ms Verken's relaxation application where he expressed objection to an illegal storey on erf 1……. The appellant did nothing constructive until end of January 2012 when he phoned the municipality's officials and learnt of plans approved in 2009. He was also aware on 10 January 2012 that his objection to the alleged illegal third storey on erf 1…… was overlooked. The appellant threatened to take legal action if no action was taken within one month to rectify all offending structures in the property in the letter of 31 January 2012. Notwithstanding the municipality's denial of the allegations of approving an illegal structure in their letter of 14 February 2012, the appellant took no action to effectively address the issue.

[84] Another letter was written by Mr Ross three months later on 15 May 2012 restating the concerns with the municipality's actions in approving the structure and reserving all his client's rights that he will consider his further position once the outcome of the appeal was known. The appeal had no relevance to erf 1…… as I have already stated. Therefore nothing prevented the appellant from launching review proceedings early in 2012 as he had threatened in the letter.

[85] The municipality denied allegations against in a letter dated 28 May 2012 and certainly did not undertake to rectify the 'illegal structure' he sought to be rectified. Once again, at that point it would have been clear that the municipality would not relent and action could be taken then too. To the contrary, no resolve to

take action was shown, the appellant only responded to the letter of 28 May 2012 on 5 July 2012.

[86] The outcome of the appeal became known to the appellant on 11 February 2013. The appeal did not produce what he was supposedly waiting for. But still, he did not act as he said he would. On 14 February 2013, he merely expressed his intention to proceed with legal action and that the municipality would hear from him shortly. That did not happen, instead a period of approximately two months went by, with no action taken. Instead of proceeding with legal action as he said he would, the appellant wrote a long letter on 8 April 2013 restating what was already known and what had been communicated to the municipality many times, giving the municipality until 30 April 2013 to respond.

[87] This letter was unnecessary. It is not clear why the appellant kept requiring a response or for the issues raised in that letter to be addressed when none was forthcoming, especially when he had already stated his intentions. The municipality's stance was clear: writing letters would, in any event, not have helped to correct the situation.

[88] The indulgence to obtain external opinion was only sought by the municipality after the letter of 8 April 2013 and they were only given a month. More than four months passed with no response from the municipality. Instead of proceeding with the review, the appellant simply wrote another letter expressing concern about the months that have passed with no response and further stated his intention to institute review proceedings. There was no reason to give the municipality a further 14 days to respond. Allegations regarding the 'off the record discussions' with Mr Swart are vague and not accompanied by any dates. It is not clear how long these took. The information that came with Mr Swart on 9 October 2013 brought nothing new. It had always been the municipality's view that the plans were duly approved as borne out by the correspondence dating back to 2012. The appellant did not seem to be serious about taking this matter on review, he also

did not treat it with any urgency given the period that had passed since he became aware of the structure and the plans.

[89] It is also not clear what he sought to achieve with these letters as the municipality officials were *functus officio*. They could not rescind the approval without the second respondent's consent. So, ultimately the appellant would not be able to achieve his ultimate goal of demolition without coming to court. Even after getting the view of the municipality in October 2013, the appellant did not immediately take action. He waited for another three months and wrote another letter on 27 January 2014 calling upon the municipality to respond fully to the letter of 8 April 2013 by no later than 12 February 2014 and only issued the review application on 20 February 2014. The appellant's inactions, his continuous writing of letters complaining about the conduct of the municipality and threatening legal action cannot serve as a reasonable explanation for the undue delay in instituting review proceedings.

[90] As to the effect of the delay, it goes without saying that the second respondent would be prejudiced if the review were to succeed. The structure had been standing for eight years before the review proceedings were instituted and almost ten years when the review application was heard although the decision itself had been taken five years earlier. There is no doubt that if the review was brought in 2009 for instance, or shortly thereafter, the second respondent would have had to comply with any consequential relief, moreso, because the second respondent acted unlawfully. It did not build the structure on the strength of the decision of the municipality; it constructed the structure before any plans were approved. So, if the review was brought timeously, it would have had to suffer the consequences of its actions. I agree with the court *a quo* that with the passing of time things changed, people settled in their homes and life continued with them not knowing that a neighbour had concerns about the structure that they built. This is obviously a relevant factor to be taken into account. In *OUTA supra* at para 41, Brand JA held that *'the delay rule gives expression to the fact that there are circumstances in*

which it is contrary to the public interest to attempt to undo history.' The clock cannot be turned back so to speak because a lot has happened. Prejudice is but one of the factors to be considered and not by itself decisive.

[91] As regards the importance of this case, the appellant's counsel argued that both the officials of the municipality and the appellant exhibited fraudulent and dishonest conduct and the court should frown upon this and use its discretion to extend the delay. The appellant alleges that the second respondent misrepresented the true state of affairs in order to obtain an advantage and that constituted fraud. There is no doubt that the second respondent acted unlawfully by building a structure before the plans were approved, which structure was also found to have contravened the scheme regulations. This however happened in full view of the appellant who very well suspected wrongdoing but did nothing to stop it. This is not to condone the actions of the second respondent. Clearly, as the court a *quo* put it, the actions of the second respondent are worthy of censure. The question is whether the second respondent should be 'punished' for such conduct by this court some ten years after the construction of the building in a case where such conduct was effectively regularised by the approval and a challenge connected to it only brought in 2014. While what was done was wrong and unlawful, there is no evidence of underhandedness and fraud. The court should therefore be careful of making findings of fraud and dishonesty unless pleaded and proven.

[92] I equally echo the remarks of the court *a quo* that the conduct of the officials of the municipality was equally unacceptable. But, once more, it could not be said that the evidence on the papers showed dishonesty on their part. Their conduct could be attributed to many factors such as incapacity. I agree that it was expected of the municipality officials to be more diligent in checking compliance with the scheme regulations and all applicable law thoroughly before approving plans and should have insisted that its laws are complied with. Inspections should also have been done to ensure that, that which was approved was indeed lawful.

[93] Whilst there was laxity and lack of vigilance which led to irregularities in the approval of the plans, there is no evidence that those could be elevated to dishonesty.

[94] In my view, this case does not raise matters of general importance. It is true that courts have a duty to ensure that the doctrine of legality is upheld and that recourse is granted at the instance of public bodies with the duty to uphold the law (See *Lester supra* at para 24). However, the effect of an inordinate delay may 'validate' the invalid administrative action.

[95] As regards prospects of success, it is evident that the appellant enjoys good prospects of success on review. It is admitted firstly by the municipality that the *Walele* procedure in making recommendations before approval was not followed. Secondly, the second respondent built the structure before plans could be approved. Thirdly, the process of approval was questionable and the third storey seems to have been added on the higher side of the slope which would have exceeded the 8 metre requirement. The only way the third storey would have been compliant with the restriction was if it was built on the lower side of the slope. The municipality seemed to think that the three-storey house was within the 8 metre limit. It is possible that it was not aware that the 8 metre restriction was contravened when it granted approval, something that may not have been checked properly. If no approval was granted a departure application would probably have been necessary to submit.

[96] There are no allegations on the papers on whether the additional storey derogated from the value of the appellant's property. The issue of the impact of this structure on the appellant is mentioned only in a letter and not alleged on the papers. This leaves one with the impression that, coupled with the leisurely approach followed by the appellant in pursuing the review application, there possibly was no real prejudice to him, or if there was it was not as pressing as ensuring that his neighbour complied with the law and scheme regulations.

[97] Having considered all the features relevant to the question of whether the court ought to have extended the 180 day period, I am of the view that the court *a quo* was correct in finding that the extent of the delay and the unsatisfactory explanation given for it, coupled with other practical considerations such as the length of time in which the structure has been standing, militated against the extension of the 180 day period.

[98] The relief sought in the form of a directive to the municipality to give the appellant notice in terms of s 15 of LUPO and the consequential relief to bring an application resulting in the demolition structure fall away since the review has not been granted.

[99] I do not consider the ground of alternative relief in seeking compliance with approved plans appropriate since there is no clear evidence that the structure was not built in accordance with those approved plans. In fact, Mr Friedman alleged, as I understand it, that the plans were misleading in that they gave an impression that there was compliance with the 8 metre restriction.

[100] As to the interdictory relief, there is no evidence that the second respondent is embarking on or threatening to undertake any further building works warranting an interdict.

[101] For these reasons, the appeal must fail and there is no reason why costs should not follow the result.

[102] In the result, the following order is made:

1. The appeal is dismissed with costs

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N P BOQWANA

Judge of the High Court

Concurred:

DM DAVIS & M I SAMELA

Judges of the High Court

APPEARANCES

For the Appellant: Adv ECD Bruwer

Instructed by: ED Ras Attorneys, c/o Abrahams & Gross Inc., Cape Town

For the Second Respondent: Adv D L v.d. Merwe

Instructed by: Logan Martin Inc., Knysna c/o BM Attorneys, Bellville