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THE REPUBLIC OF SOUTH AFRICA

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

Case No: 15570/2013

Before the Hon. Mr Justice Bozalek

Hearing: 10 – 12; 16 – 17 May 2016
Judgment Delivered: 10 October 2016

In the matter between:

CHRISTINE PHILLIPS **Applicant**

and

DAVID STUART BRADBURY **1st Respondent**

THE CITY OF CAPE TOWN **2nd Respondent**

JUDGMENT

BOZALEK J

[1] The applicant in this matter, Ms Christine Phillips ('the applicant') seeks extensive relief against her neighbour, Mr David Bradbury ('first respondent') and the City of Cape Town ('the City'), as second respondent, arising out of first respondent's development of a property on the Atlantic Seaboard at the corner of Victoria and Beta Roads, Bakoven. Applicant is the owner of an adjoining property, Erf [...] , located in B. Road.

[2] The primary relief sought by the applicant is the enforcement of the provisions of a written agreement concluded between her and other neighbouring parties on the one hand, and first respondent on the other, relating to the development of his property and to enforce certain title conditions registered against the title deed of his property consequent upon that agreement. In essence the applicant's case is that first respondent developed his property, through the construction of a dwelling house and other features thereon, in disregard of the agreement and the title deed conditions registered pursuant thereto. The applicant seeks in the first place an order compelling first respondent to bring his building/s into compliance with certain building plans as provided for in the agreement and to demolish and rectify those parts of the structure which do not comply with the agreement or which are in contravention of the title deed conditions.

[3] In addition the applicant seeks an interdict against first respondent restraining him from any further construction work on his property which does not comply with certain agreed plans or certain registered title deed conditions.

[4] Finally, the applicant seeks an order reviewing and setting aside two decisions taken by the City approving two different sets of plans for the construction of the dwelling on first respondent's property ('the review relief').

[5] The application was opposed by both respondents and has given rise to a voluminous set of papers, in excess of 1000 pages, plus the Rule 53 record comprising approximately another 150 pages. The papers are replete with numerous sets of building plans, closely typed *'minutes'* of meetings, correspondence, including numerous emails, and other annexures.

THE PROGRESSION OF THE APPLICATION

[6] Because of its relevance to certain questions which arise it is necessary to set out the sequence of the main steps in the application. It was instituted in September 2013 when the main relief sought was for an order that first respondent take all steps necessary to rectify the dwelling house to bring it in accord with the terms of the agreement, the plans provided for therein and the conditions of the title deed, more particularly:

1. to demolish those parts of the ground floor of the building situated nearer than 4.5 meters from the common boundary with applicant's erf, in particular a newly built garage;

2. to demolish all elements of the first floor of the building situated nearer than 6 meters from the common boundary with applicant's erf;

3. to demolish a newly built swimming pool on first respondent's property and reinstate what was garden area on the north and north-western side as a level grassed lawn at the pre-existing ground level;

4. to reinstate the garage as it previously existed on the property;

5. to interdict first respondent from any building work or construction on his erf which did not comply with the original agreement and associated plans or which contravened any of the title conditions;

6. to review and set aside the City's decision approving, in June 2012, certain building plans in relation to first respondent's dwelling;

7. to extend the period referred to in sec 7(1) of the Promotion of Administrative Justice Act, No 3 of 2000 ('PAJA') within which the aforesaid review could be brought.

[7] In February 2014 the applicant filed an amended notice of motion in which she sought further relief, namely, the review of the City's decision approving, in April 2010, certain building plans in respect of first respondent's dwelling and similarly extending

the time period within such review could be instituted. This amended notice of motion was supported by a supplementary founding affidavit by the applicant.

COMMON CAUSE HISTORY

[8] Prior to the redevelopment of first respondent's property the improvements thereon comprised a dwelling house, a separate single garage with a flat roof and a swimming pool built into the grounds of the garden. In approximately 2008 first respondent applied to the City for the approval of plans to build a new dwelling on the site and detailed building plans were submitted by his representatives. His property was subject at that time to the Zoning Scheme Regulations of the Municipality of the City of Cape Town zoning scheme, as published in Provincial Gazette 4649 dated 29 June 1990 ('the scheme regulations'). His property was further subject to existing special title conditions including one which provided that:

> *'(c) he shall be obliged to set back all such building to a line of building frontage….which shall not be less than 4.72 meters from the back line of the footway in Victoria Road, or in the case of side streets marked on the plan, not less than 3.15 meters, so as to form a forecourt or garden in front thereof…'*

[9] Section 93 of the applicable scheme regulations comprised a *'scenic drive'* provision preserving most of Victoria Road, on which his property was situated, as a scenic drive. In essence the provision was designed to preserve the ocean views from Victoria Road by providing that roofs of buildings on the side of the road closer to the ocean could not be higher than the curb on that side of the road. In addition sec 98(4)(b) of the scheme regulations restricted the height of buildings on first respondent's property to 6 meters from the finished ground level.

[10] In November 2008 it came to first respondent's attention that the proposed plans for redevelopment of his erf were in contravention of sec 93 of the scheme regulations and that he would have to apply for a *'departure'* from the regulations to *'permit*

structures above the footway of Victoria Road'. He also became aware that a further departure from the scheme regulations was required in that his proposed dwelling would exceed the 6 meter height restriction applicable under sec 98(4)(b) of the scheme regulations.

[11] These intended departures required first respondent to give notice thereof to the owners of adjoining erven and the relevant ratepayers association, the Camps Bay Residence Ratepayers Association ('the CBRRA').

[12] Through his town planner, Mr T Brummer, first respondent commenced a process of discussion and negotiation with those of his neighbours, including the applicant, affected by his proposed building plans and departures, and with the CBRRA. It is common cause that first respondent was seeking the consent of his neighbours and the CBRRA to his application to the City for the requisite departures from the applicable scheme regulations with a view to facilitating the execution of his proposed development. This process culminated in a written agreement on 9 July 2009 which made provision for first respondent to seek the departures which he required without objection from his neighbours or the CBRRA. In exchange, the agreement regulated the future development of his property in a manner acceptable to all interested parties.

[13] In essence the affected parties, i.e. first respondent's neighbours and the CBRRA, would not object to the departures required by him in consideration for his undertaking to adhere to the agreement and build only in accordance with the plans incorporated in the agreement and an agreed development proposal - some of which protections would be secured by way of conditions to be registered against the title deeds to first respondent's property.

[14] In particular, the agreement provided that the height of the proposed structure would not exceed 23.4 meters above mean sea level, all flat roofs would be non-trafficable and covered in a non-reflective material, the property would be restricted to a single dwelling house and certain clauses in the agreement would be registered as new title deed restrictions in a Notarial Deed of *Praedial* Servitude against the title deed of erf [...] . The agreement further provided that first respondent would not be entitled to deviate from the conditions contained in the agreement without the written consent of the affected parties.

[15] The plans incorporated in the agreement, which I shall refer to as 'the agreed plans', provided for a dwelling with a basement level, a ground floor level and an upper level. This was possible, in theory, without infringing too greatly on the scenic drive provisions relating to Victoria Road because there is a relatively steep fall-off from that level towards the sea i.e. as one progresses down Beta Road in the direction of applicant's property. The applicant's property is a double storey dwelling, facing north i.e. away from first respondent's property, and only just over 1.3 meters from the boundary with first respondent's property. The first respondent's plans provided inter alia that the existing garage would be retained, there would be no swimming pool on the ground level and there would be a level grass area in front of the lounge, the retaining wall of the basement and the ground level of the building would be set back 4.5 meters from the boundary of the applicant's property whilst the side walls and deck area on the top level would be set back 6 meters from the same boundary i.e. they would be *'stepped back'* to ensure that the top floor was set back further from the boundary of the applicant's property. In addition, approximately half of the western wall of the dwelling (on the northern side) would be set back towards Victoria Road to accommodate the existing garage and maintain the set back from the common boundary. This produced a

so-called *'kink'* in that wall. Further, the deck on the top floor would be set back 4.5 meters from the boundary on the Beta Road side of the development.

[16] Five clauses in the agreement were incorporated into a notarial deed which was registered in the deeds office in May 2011. These provided inter alia that the *'envelope'* of the stipulated plans would define and limit any future development on the property, that no further subdivision of the property would be permitted and that the dwelling house could only be used for private residential use and not, for example, as a guest house or bed and breakfast establishment.

[17] As far as the applicant was concerned the proposed development reflected on the agreed plans, in conjunction with the retention of the existing garage and the retention of the garden area, would ensure that the intrusion on her privacy would be kept to a minimum. In particular the existing garage created a barrier behind which was first respondent's main outdoor entertainment area, the top floor deck, with the result that overlooking, noise and any other intrusion into her property was minimised.

[18] In October 2009 the CBRRA wrote to the City confirming that five neighbours, including the applicant had concluded an agreement with first respondent following *'extensive consultative meetings'* held with the CBRRA and that *'no objections were submitted by any of the affected parties'*. Importantly that letter from the CBRRA gave no detail of the agreement, nor did it include a copy thereof.

[19] Approximately a month later the City advised first respondent's town planner that a departure from the *'scenic drive'* provisions of sec 93 of the scheme regulations had been granted in terms of sec 15 of the Land Use Planning Ordinance, 15 of 1989 ('LUPO'). The letter recorded that the scenic drive departure had been circulated to neighbours and that no objection had been raised by them. It recorded further that the

increase in the height of the proposed dwelling would have no material impact on the scenic drive experience and that there were other double storey houses in the area. The scenic drive departure was granted by the City in relation to certain building plans dated November 2009, as its letter indicated.

[20] Subsequently, on 9 April 2010, the City granted a further departure, this time to permit points on the structure to exceed the 6 meter height restriction, in terms of sec 98(4)(b) of the scheme regulations. The City's letter incorporating its decision also referred to building plans dated November 2009. It recorded that the proposed structure was 8.6 meters above the lowest point on the finished ground level but that the new dwelling would not be higher than the top of the roof pitch of the existing house and neighbouring property owners would not be able to view more than the top 6 meters of the building due to the fact that the building's basement level was below the surface of the ground. The departure was therefore regarded as a *'technical'* departure having no impact on the character of the surrounding environment.

[21] A motivating memorandum prepared by a City planning official recorded that the proposed departure had not been advertised to neighbours because they had previously had no objection to the same structure when the scenic drive departure had been considered and thus no point would be served by further advertisement.

[22] Later that month, on 21 April 2010, the November 2009 building plans were approved by the City. It is the applicant's case, however, that the November 2009 building plans, upon the basis of which the two departures were granted were, unbeknownst to her, different from the agreed plans in that the positioning of the ground floor of the dwelling had been amended and extended up to the garage on the western corner of the property (i.e. the *'kink'* had been removed) although they still provided for

the building to be set back from the boundary of applicant's erf, retained the existing garage, made no provision for a swimming pool and retained the garden.

[23] In September 2010 first respondent commenced with the demolition of the existing dwelling and then the building phase. However, the entire building project was marked by unharmonious relations between the neighbouring parties. The applicant complained that first respondent failed to erect certain screens prior to demolition, that contractors' vehicle obstructed access to her property and that first respondent failed to ensure effective dust and dirt control. Finally, a dispute arose over the position of a partly demolished boundary wall which led, in April 2011, to the applicant retaining the services of a land surveyor to investigate this dispute. Through him the applicant became aware that the dwelling under construction was not built in accordance with an approved building plan. A building inspector in the employ of the City issued a *'cease works'* order and gave first respondent notice that he must obtain approval for an unauthorised roof or pergola structure. Ultimately first respondent demolished the offending structure.

[24] On 3 May 2011 the applicant complained in writing to the City that the proposed dwelling was non-compliant with the approved plans in that the set back of 6 meters on the top floor level was absent, a swimming pool being constructed was not set back 3.15 meters from Beta Road, the basement had not been constructed according to plan and nor had the balcony. In addition, the applicant sought from the City a copy of the building plans *'as had been originally approved'*. In the meantime first respondent had submitted a rider plan to regularise the construction on his property, but approval thereof was refused by the City. What followed was a lengthy period of engagement between the applicant, her representative/s, first respondent and his representatives and representatives of the City in which process the applicant sought to have her

concerns regarding the building under construction addressed whilst first respondent sought to satisfy these concerns and proceed with construction.

[25] The process comprised meetings, letters and inspections in what can be fairly described as a consultative process. According to the applicant no success was achieved by this process. However, according to first respondent the process yielded various concessions on his part although not overall agreement.

[26] This consultative process commenced in December 2011. It comprised seven meetings and lasted until May 2012. In that month first respondent submitted an application for the approval of rider plans. Despite objections by the CBRRA on behalf of the applicant and other affected parties, these were approved by the City in July 2012. Amongst other features, they contained a proposed new garage and swimming pool. By June 2013 the parties were still at loggerheads with applicant complaining to the City regarding a trafficable deck on top of the newly built garage, the set back of the garage from her boundary wall, aspects of the basement courtyard and the set back from the Beta Road street boundary. In September 2013 a new building plan submitted on behalf of first respondent was approved by the City. The applicant's attempts to obtain copies of the 2012 plan were, for a lengthy period, unsuccessful inasmuch as first respondent refused to furnish a copy of the plans to her and the City required her to follow a process of application for information under the Promotion of Access to Information Act, 2 of 2000 ('PAIA'). The applicant duly followed this process but the City only provided the plans on 19 July 2013. In September 2013 the applicant launched the present application.

THE APPLICANT'S CASE

[27] The case made out on behalf of the applicant is that at all material times the City's planning officials were aware that she and other affected parties did not object to

the two departures obtained by first respondent but solely on the basis of his undertaking that his property would be developed strictly in accordance with the terms of the agreement between the parties and in accordance with the plans annexed thereto (the agreed plans) and the title deed conditions registered in terms of that agreement. However, unbeknownst to the applicant those departures were granted on the basis of building plans other than the agreed plans i.e. the November 2009 building plans which were approved in April 2010, but which contravened the title conditions applicable by virtue of the agreement.

[28] The applicant's case is further that she then relied on the City to address her various concerns concerning the proposed building project and to protect her interests in that regard. To the extent that first respondent's dwelling was eventually built in accordance with building plans approved in 2012, the applicant relies on the fact that despite her best efforts to obtain such plans from first respondent and the City, she only received these from the City in July 2013. Similar considerations apply, as far as the applicant was concerned, to the building plans approved by the City in September 2013. Her case is further that first respondent was well aware that, absent an agreement, he had no right to deviate from the agreed plans and, to the extent that he had, he should be compelled to demolish the non-compliant features.

[29] As far as the review relief sought by the applicant against the respondents, her case is that inasmuch as the dwelling constructed by first respondent is not in accordance with the agreement and the agreed plans, she had provided the City with a copy of these documents in 2011 and thus it must be taken to have been aware of its terms and conditions.

[30] As regards the 2012 building plans approved by the City, the applicant's case is that, once again, it must have been aware of the basis upon which the departure from

the scenic drive provision had been procured; inasmuch as the 2012 plans did not accord with those plans upon which *'assent'* to the departure had initially been procured, the City should not have granted approval of the 2012 plans without requiring first respondent to apply afresh for a departure from the scenic drive provision and affording affected parties the opportunity to object thereto. The applicant also avers that inasmuch as the dwelling contemplated by the 2012 plan exceeded a height restriction on its western façade, on similar grounds a further departure requiring a deviation from the height restriction was required, with a similar process embracing the affected parties before such departure could be granted.

[31] To sum up, the applicant's case is that given the basis upon which the initial scenic drive provision and height departures and approval of the 2010 plans had been procured, fair administrative action required that prior to the approval of the 2012 building plans by the City, first respondent should have applied afresh for the two departures, that the affected parties should have been given notice of those applications and an opportunity to object before any decision was taken by the City. Instead, the applicant's case proceeds, the decision was taken on the explicit basis that the application for the approval of the plans enjoyed *'the approval of all the parties'*.

[32] Before dealing with the further aspects of the applicant's case, essentially responses to defences raised by the respondents, it is appropriate to set out the basis upon which first respondent and the City oppose the relief sought against them.

THE FIRST RESPONDENT'S CASE

[33] First respondent's answer to the case made out by the applicant is essentially a confession and avoidance. He concedes, as he must, the agreement concluded between himself and his neighbours, including the applicant, and that his dwelling was ultimately constructed on the basis of the 2012 building plans approved by the City and

not in accordance with the agreed plans. However, he contends that the applicant had extensive input into the 2012 plans prior to their approval through the consultative process mentioned previously. His case is further that he advised the applicant that he intended to build according to those plans timeously in July 2012 and that notwithstanding this notification the applicant only launched the proceedings in September 2013 by which stage first respondent's dwelling was almost complete. Thus first respondent relies in the main, in relation to the review relief, on unreasonable delays on the part of the applicant as precluding the granting of such relief. As regards the deviations from the agreed building plans first respondent relies on an exercise in his favour of the Court's discretion to grant or refuse orders of specific performance. Finally, as regards the interdictory relief sought first respondent denies that he has any intention of further construction on the site in contravention of the agreement, the agreed plans or the title deed conditions.

[34] By way of explanation for his deviations from the agreed plans first respondent testified that after the approval of the scenic drive departure in November 2009 and the submission of his building plans to the City for approval, it advised him that the eastern corner of his proposed dwelling protruded over the relevant road improvement line and thus had to be reconfigured. Accordingly he submitted amended plans to the City in April 2010 which differed from the agreed plans. This he did because the *'loss'* of the eastern corner of the dwelling resulted in the loss of some 9m² of floor area per level of the dwelling. To compensate for this loss first respondent's new plans extended the northern portion of the west wall on the ground floor with the result that it was 1.5 meters closer to the applicant's property on the ground floor i.e. the *'kink'* was eliminated. Apart from the lopping off of the east corner of the house on all three levels the only other major change was that a cantilevered roof structure over the outdoor

deck on the top floor which was shown on the agreed plans but was mistakenly omitted from the 2010 plans.

[35] The only explanation afforded by first respondent for not presenting the 2010 plan to the applicant or the CBRRA was that it simply *'did not occur to him'* that these deviations had to be approved since the proposed dwelling remained within the *'development envelope'* as set out in the agreed plans.

[36] First respondent commenced demolition of the existing dwelling in September 2010 and proceeded to build in compliance with the 2010 approved plans save in two respects: firstly, he constructed the concrete cantilevered structure to serve as a pergola although it was not reflected on the 2010 approved plans and secondly, he also constructed the west wall of the top floor in a non-set back position i.e. closer to the applicant's property. He gives no feasible explanation for those non-compliant actions. Upon receipt of a *'cease works'* order in April 2011, at the instance of the applicant, he submitted rider plans to the City which were then the subject of objections from the applicant. Following unsuccessful attempts to obtain her acceptance of these plans, first respondent abandoned them and resumed construction in accordance with the 2010 approved plans. This entailed demolition of the *'wrongly positioned'* west wall of the top floor and replacing it with a *'no set back'* wall which nonetheless offered the applicant greater privacy and for which option she had expressed a preference.

[37] It should be said that any overall agreement at that point appeared to flounder on first respondent's refusal to agree to pay quite substantial damages to various neighbours and submit to other punitive clauses to be incorporated in an agreement.

[38] In November 2011 a series of seven meetings commenced between himself and/or his representative, the applicant and/or her representatives and City officials,

which extended over a period of six months. At these meetings building plans revised by first respondent were presented, the applicant conveyed her concerns there and then and these were addressed via amendments to the plans. According to first respondent the applicant indicated, by the end of this process, that she was happy with the features of the new plan. Once again, however, no formal agreement was reached, the stumbling block again being first respondent's refusal to accept what appears to have been a financial *'package'* similar to that which blocked an agreement the previous year and the plans were duly submitted for approval to the City. Accordingly, the applicant objected to the plans and these objections were considered by the City, which in July 2012, approved the plans. In that same month, shortly after the plans were approved, first respondent's attorney wrote to the CBRRA and the applicant advising them of this fact, further that first respondent intended developing his house accordingly and that if those parties intended litigating to set the plans aside or to stop construction they should serve papers on him expeditiously. First respondent then proceeded to execute the construction works. In September 2013, fourteen months later, the applicant launched the present proceedings. First respondent's certificates of occupancy were issued three weeks later, in October 2013.

[39] In relation to the positive interdictory relief i.e. the specific performance sought by the applicant, first respondent's case is that there are good and sufficient grounds for refusing a decree of specific performance taking into account the hardship to him if it is ordered, the absence of prejudice to the applicant if it is refused and particularly her delay in initiating these proceedings.

[40] As regards the application for review relief, which clearly also affects first respondent, his case is that it should be dismissed on the basis of the applicant's unreasonable delay in bringing the applications. In this regard reliance is placed on sec 7(1) of PAJA requiring judicial review to be brought without unreasonable delay and

within 180 days after the administrative action or the aggrieved party becoming aware of it or when she ought to have become aware of it. In regard to the 2012 approved plan first respondent points out that the application to review was only brought fifteen months after the applicant became aware of the approval. As far as the 2010 approved plans are concerned the delay was even lengthier, from April 2011 until such supplementary relief was sought by the applicant in February 2014. As regards the merits of the review relief, first respondent aligned itself with the substantive defences raised by the City.

THE CITY'S CASE

[41] The City also relied on what it considered were unreasonable delays on the part of the applicant in launching her applications for review relief. In the alternative, as far as the merits were concerned, the City contended that the review applications were misconceived in that they were premised on the mistaken notion that the City had an obligation to enforce the private agreement between first respondent, the applicant and other affected parties. It contended that it was not permitted to take such agreements into account when approving building plans in terms of the National Building Regulations and Buildings Standards Act, 103 of 1977 ('the NBRBSA') and that in any event doing so would be an impossible task.

THE APPLICATION FOR REFERRAL TO EVIDENCE

[42] At the commencement of argument the applicant sought to have certain disputes of fact referred to evidence, notably:

1. whether the scenic drive and height departures granted by the City in respect of first respondent's property were granted on the basis of the agreement, more particularly whether the City was aware of the agreement and its terms;

2. whether there had been any amendment of the agreement or the agreed plans, whether by any consultative process or otherwise;

3. whether the applicant represented to first respondent that she consented to an amendment of the agreement or the agreed plans.

[43] The application for the referral of these and other factual disputes was opposed by both respondents and argued at length. In the result the application was refused with full reasons. I shall accordingly not traverse that ground again save to record that my ruling was that the application should be declined at that stage but that it would remain open to the applicant to renew the application in respect of some or all of the factual disputes raised. Thereafter full argument was heard on the merits of the matter as set out in the papers. I understood Mr Bremridge, on behalf of the applicant, to persist with the application for a referral to trial. Nothing I heard in argument served to persuade me that my initial ruling was wrong, namely, that a referral to evidence of any of the alleged disputes of fact would not contribute to the fair and expeditious resolution of the matter as a whole for reasons which are either apparent from the ruling that I made or which will appear from this judgment.

INSPECTION IN LOCO AND PHOTOGRAPHIC EVIDENCE

[44] On 10 May 2016, immediately before the start of the hearing, all parties attended an inspection in loco where salient features of first respondent's property were pointed out as well as some on the applicant's property. In relation to first respondent's property these included the position of the east corner of the house, the view from that property towards the applicant's property and the position of the west wall on the top floor, the *'contested roof area'* and planter structures. On the ground floor the position of the *'kink'* on the northern portion of the west wall (as built and as per the agreed plans), the swimming pool, the new garage and its roof were pointed out. The garage is separated from the deck or patio by a simple (detachable) iron balustrade and was covered by artificial turf.

[45] Photographs in the record confirm that the two properties lie in a densely built up area, Bakoven being close to the ocean and a sought after residential area. They indicate further that large multi-storeyed dwellings are not uncommon in the vicinity of the two properties. These factors make it likely that most residents in the area will have to sacrifice some aspects of their privacy for the advantages of living there. The photographs of the two properties, post development, show that they are in quite close proximity and that this would be exacerbated were the roof of the garage on first respondent's property to be used as a trafficable area. As it is the planter boxes on both the garage and top deck are necessary to afford the applicant a greater degree of privacy. The applicant's dwelling is itself double-storeyed and hard up on the boundary with first respondent's property.

[46] On the basement level the position of the *'kink'* was shown (as per the agreed plans and as built) and the garage and courtyard area and the vibracrete boundary wall were inspected. The position of the timber screen constructed from wooden poles erected by the applicant on her property was pointed out.

[47] Aspects pointed out on the applicant's property were: on the ground floor the view from her garden towards first respondent's property and from her bedroom at that level. On the first floor, the view from her balcony towards first respondent's property and the position of the screen on the applicant's property which is the subject of first respondent's counter-application were pointed out. As photographs in the record indicated, persons on the ground floor and top decks are visible from the applicant's balcony and vice versa.

THE POSITIVE INTERDICTORY RELIEF

[48] It is common cause that there are extensive deviations from the agreed plans in the building works as finally completed. These include elements of the ground floor of

the building situated nearer than 4.5 meters to the common boundary with the applicant's property including the new garage, elements of the first floor of the dwelling which are situated nearer than 6 meters to the common boundary with the applicant's property, the swimming pool structure which was not provided for in the agreed plans and the concomitant failure to reinstate the garden are on the western and north western side of first respondent's property. That these deviations from the agreed plans are significant is borne out by evidence presented by first respondent himself to the effect that should specific performance be ordered this would cost in the region of R6 249 480-00 and would involve demolition of parts of the roof slabs and walls, the swimming pool, the garage, the north west corner of the house and north east corner of the basement. The brickwork walls and concrete structure would then have to be rebuilt, bigger windows installed on the top floor, the entire kitchen dismantled and rebuilt, plus a host of other consequential work.

[49] This figure was disputed by the applicant as will be dealt with in greater detail hereunder.

[50] The first respondent raises various reasons and justifications for the deviations in the finished dwelling from that which was originally provided for in the agreed plans. These include his assertion that, upon discovering that the north east corner of the planned dwelling would be lost due to the road improvement line and hence that he needed to *'recover'* this lost area by amendment of the plans in other respects and, further, that it never occurred to him to submit these amended plans to the CBRRA or affected neighbours. Other grounds relied upon him in this regard were that he regarded other amendments to the building plans as no more than rider plans which are customarily sought in building projects where unforeseen amendments to the original plans are necessary. He also sought refuge in the extended nature of the consultative

process in which, in his view at least, the applicant was afforded a full opportunity to comment on the plans which eventually became the 2012 approved plans.

[51] Although some of these explanations may carry some weight, in my view, neither individually nor collectively do they amount to anything approaching cogent grounds for first respondent's failure to comply with the provisions of the agreement and the registered title conditions which flowed therefrom. These provided, in clear terms, that he was to build strictly in accordance with the agreement and the agreed plans, that he would not be entitled to deviate in any respect from the conditions contained in the agreement without the written consent of the affected parties and that no alteration, cancellation, variation or addition to the agreement would be valid unless reduced to writing and signed by all parties to the agreement.

[52] Although first respondent disavowed any dishonest intent it is impossible to escape the conclusion that, having obtained the consent of his neighbours to the departures on the basis of the agreement, he deliberately avoided playing open cards with the applicant and other affected parties when changing circumstances dictated that his building plans as originally drawn up could or would not be approved by the City. His explanation that it simply did not occur to him to submit the amended building plans to his neighbours is, in my view, disingenuous to say the least.

THE QUESTION OF SPECIFIC PERFORMANCE

[53] It is well established, as was held in *Benson v SA Mutual Life Assurance Society*[1], that the granting of an order of specific performance is entirely a matter of the discretion of the Court, which is to be exercised judicially upon all the relevant facts. In that case it was said of the discretion:

[1] 1986 (1) SA 776 (A).

> *'...It is aimed at preventing an injustice - for cases do arise where justice demands that a plaintiff be denied his right to performance - and the basic principle thus is that the order which the Court makes should not produce an unjust result which will be the case, eg, if, in the particular circumstances, the order will operate unduly harshly on the defendant. Another principle is that the remedy of specific performance should always be granted or withheld in accordance with legal and public policy'*[2].

[54] Whilst there can be no doubt that it lies within the Court's discretion to order that the offending or non-complaint sections of first respondent's building works be demolished, as was held in *Trustees, Brian Lackey Trust v Annandale*[3] a relevant factor is that *'there is a natural aversion on the part of the Courts to order the destruction of economically valuable building works.'* That matter, it should be said, dealt with an encroaching structure in the sense that the plaintiffs mistakenly built on a neighbouring erf. Also relevant to the present matter are Griesel J's remarks in that case regarding the principles of neighbour law which fortified his conclusion that a demolition order, as opposed to compensation, would be an inappropriate remedy. The learned judge stated:

> *'I am fortified in this conclusion by the rules and principles of neighbour law, which place certain restrictions on the unencumbered exercise of powers of ownership. Neighbour law is aimed at achieving harmony in the relationship between neighbouring landowners in the case of conflicting ownership interests. Considerations of reasonableness and fairness are prominent factors in the exercise of the Court's discretion in this field.'*[4]

[55] In considering whether to order specific performance regard must firstly be had to the nature and degree of encroachment, in the present case, the non-compliance with the agreement and the agreed plans. It is also appropriate to consider the extent to which the applicant had any prior notice of, or input into, the decision relating to those particular elements of the building works.

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[2] Ibid aAt 783 C – E.
[3] 2004 (3) SA 281 (CPD).
[4] *Ibid* para [40].

ALL ELEMENTS OF THE GROUND FLOOR OF THE BUILDING SITUATED NEARER THAN 4.5 METERS FROM THE COMMON BOUNDARY WITH THE APPLICANT'S ERF, INCLUDING THE NEW GARAGE

[56] The agreed plans indicated that the original garage would remain. According to first respondent during the course of the construction work, however, it was discovered that it had no proper foundation, that its walls were cracked and damp. and accordingly by December 2011 it was demolished. In the first of the six consultative meetings first respondent indicated that he intended to use the space where the garage had been as an open carport but applicant indicated that the resulting noise and fumes adjacent to her property would cause her inconvenience. At a later meeting plans were presented on behalf of first respondent showing a covered garage to address these concerns. The applicant was, however, concerned that the roof over the garage would be used as a trafficable area with the ensuing privacy problems. It was then suggested that the roof be turned into a non-trafficable garden area. A further concern the applicant had was that a new garage wall on the side of her property would damage existing trees as a result whereof it was agreed to leave the existing wall intact and to build a new wall, set back half a meter from the existing wall. In principle it would appear that this compromise was acceptable to the applicant but an overall agreement could not be reached for lack of agreement over damages and/or penalties which the applicant, assisted by CBRRA, demanded.

[57] In the event the 2012 approved plans eventually provided for the closing of the area as a covered garage and the positioning of its west wall half a meter inside the common boundary wall, leaving the existing boundary wall intact and the rendering of the garage as a non-trafficable garden. The ultimate result is that although the existing garage was not retained, a replacement garage has been built albeit in a slightly

different position which probably affords the applicant less privacy than was previously the case.

THE CANTILEVERED AWNING STRUCTURE OR PERGOLA

[58] If first respondent's dwelling is rebuilt in accordance with the agreed plans, as the prayer for specific performance envisages, this will allow him to build a cantilevered awning structure on the top floor of the dwelling. This was initially built by first respondent but because it was approximately 300mm higher than was shown on the agreed plans, it was ultimately demolished by him. The applicant strongly objected to that structure as originally built.

THE EAST CORNER

[59] As previously explained the City required amendments to the original plans in relation to the east corner of the proposed dwelling so as to comply with road improvement line requirements. This led to first respondent losing approximately 9m² of dwelling space on each of the three floors on the proposed dwelling. Obviously any order for specific performance cannot override the City's lawful requirements in this respect and first respondent will either have to build the truncated dwelling or fashion some other compromise acceptable to the applicant.

THE NORTH SECTION OF THE WEST WALL – BASEMENT FLOOR AND GROUND FLOOR

[60] The agreed plans showed that the north section of the basement and ground floors would be set back by just over one meter more than is now the case, producing a kink in the west wall as a whole. As built in accordance with the 2012 approved plans there was no set back because the pre-existing garage no longer stood, the effect being that the external west wall of these floors was closer to the applicant's property although still 4.5 meters from the common boundary.

THE NORTH PORTION OF THE GROUND FLOOR

[61] On the agreed plans the whole of the north area of the ground floor was depicted as a sitting area linked to the main bedroom. However, according to the 2012 approved plan, and as built, the area became an outside patio which could be closed off on the west side by louvered shutters and flowing from a TV lounge with a brick wall on the west side.

THE SWIMMING POOL

[62] No swimming pool was shown in the agreed plans but, in accordance with the 2012 approved plan, a swimming pool, surrounded by a deck, was built at ground level between first respondent's dwelling and Beta Road. In the agreed plans the area in question was depicted as lawn at a height of 17.45 meters above mean sea level. The new swimming pool appears to have been built at 17.42 meters above mean sea level. The extent to which it creates greater intrusion onto the privacy of the applicant cannot be determined since it will depend to a large extent on whether the pool will generate more human traffic than if the grass lawn had been retained.

THE POSITION OF THE WEST WALL ON THE TOP FLOOR

[63] The agreed plans depicted the entire length of the west wall on the top floor set back from the floor below so that it would be 6 meters from the common boundary with the applicant. However, as built in accordance with the 2012 approved plans, the west wall was not so set back so that there was only a 4.5 meter set back from the boundary. The agreed plans made provision for a large picture window facing the applicant's property whereas the wall as constructed featured a *'non-overlooking high level window sill above 1700mm'* in order to minimise any overlooking and intrusion onto the applicant's property. First respondent also agreed to fit these windows with acoustic glass.

THE CONTESTED ROOF AREA

[64] The omission of the set back of the north section of the ground and basement floors left exposed an area of roof/floor slab to the west of the top floor deck which was referred to by the parties as the 'contested roof area'. The agreed plans showed no such area. In the discussions between the parties in 2011/12 the applicant's concern was that the area would be used as a balcony adversely affecting her privacy. First respondent's response was to establish a planter box in reinforced concrete on that area wrapping around the north west corner of the deck. This was duly constructed and renders the area non-trafficable.

FACTORS TO BE TAKEN INTO ACCOUNT IN CONSIDERING AN ORDER FOR SPECIFIC PERFORMANCE

[65] The following factors appear to have relevance to the question of the exercise of the Court's discretion to order specific performance:

PREJUDICE TO THE APPLICANT IF SPECIFIC PERFORMANCE IS REFUSED

[66] This aspect was treated to a large extent as self-evident by the applicant who in her founding papers contented herself with listing the differences between the applicant's dwelling as depicted in the agreed plans and later plans. It is clear, moreover, that the poor relationship between the parties which developed during the lengthy demolition and building process as well as what the applicant considered were first respondent's egregious and underhand departures from the agreed plans were motivating factors in her seeking specific performance.

[67] It is, however, also clear that considerations of privacy with respect to noise, human traffic and overlooking remained strong concerns for the applicant in seeking specific performance. There is, however, a lack of detail in the applicant's papers regarding both the detail thereof and setting out how the dwelling depicted in the agreed

plans would serve these interests better than the dwelling as constructed. In this regard it is relevant that, apart from the garage, the applicant's dwelling is at all points 4.5 meters from the common boundary. By contrast the first respondent's dwelling is just over 1.3 meters from the common boundary. Although the applicant alleged that her property had been devalued by the deviations no evidence in support of this allegation was tendered.

PREJUDICE TO FIRST RESPONDENT

[68] Mr JP Scannell, a quantity surveyor commissioned by first respondent, estimated the costs of carrying out the demolition and rebuilding work necessary to reconstruct the dwelling in accordance with the agreed plans at over R6.2mil. This amount is contested by the applicant who, at a late stage herself filed an affidavit from a quantity surveyor, Ms M Terblanche ('Terblanche'), estimating the cost involved in the demolition of the disputed elements of first respondent's property. In Terblanche's estimate regard was had to demolition of all elements of the ground floor nearer than 4.5 meters from the common boundary (including the garage), all elements of the first floor nearer than 6mm from the common boundary, the swimming pool as well as the reinstatement of the former garage and former garden area. In Terblanche's opinion the total cost would amount to R1.041mil.

[69] Terblanche's much reduced estimate was attributable, inter alia, to her leaving out of account any cost that first respondent would incur in changes to the internal layout of his dwelling such as the reinstallation of plumbing, electrical, TV installations, as well as the reinstalling of the kitchen and air-conditioning. I fail to see why these costs should not be taken into account since it is not a question of *'burdening'* the applicant with those costs (as Terblanche put it) but rather taking into account the costs to first respondent should he have to reconstruct the dwelling according to the agreed plans. Part of doing so would obviously involve him reinstating amenities such as

plumbing and electrical installation which he enjoys in the dwelling as presently constructed. It may well be that first respondent's estimate is exaggerated but it is not possible to determine solely on the affidavits precisely what it will cost for the non-conforming features to be demolished and reconstructed in accordance with the agreed plans. In my view, however, it is highly unlikely to be less than R2-3mil which needless to say, is a very substantial sum.

[70] A closely related question is to what extent any prejudice suffered by the applicant will be removed or alleviated should specific performance be granted. I am prepared to accept that the overall effect of reconstructing the dwelling in accordance with the agreed plans would be to afford the applicant greater privacy but there is no evidence that this will be by any striking margin. By way of example an important element of the applicant's case was the pre-existing garage. A new garage has been built, however, albeit in not precisely the same location. The roof of that garage will, by agreement, remain a non-trafficable area.

[71] Even if demolition is ordered the dwelling will remain one with three levels, the top deck overlooking the applicant's property. One concrete change will be the areas of set back but these too will be limited to a question of 1.5 meters i.e. the difference between portions of first respondent's property being 6 meters from the common boundary as opposed to 4.5 meters.

[72] In this regard too account has to be taken of the fact that reconstruction of the dwelling will, at least theoretically, entitle first respondent to erect the cantilevered concrete awning on the top floor, a feature which he has foregone in terms of the present dispensation.

PRIOR NEGOTIATION BETWEEN THE PARTIES

[73] As a consequence of the extended series of meetings between December 2011 and May 2012 the applicant had considerable input into the detail of what eventually became the 2012 approved plans and pursuant to which the dwelling was eventually constructed. This unquestionably had the effect of alleviating the prejudice which the applicant suffered as a result of first respondent ultimately building in accordance with those plans as opposed to the agreed plans.

[74] The garage represents a good example of the give and take between the parties. After demolition of the existing garage first respondent envisaged building an open carport in its place but the applicant objected to the noise and fumes which this would entail. Ultimately agreement, or perhaps more accurately a *quasi a*greement, was reached whereby the garage in its present form would be built. In this context I hasten to add that there can be no question of a formal agreement ever having been reached regarding the non-conforming features of first respondent's dwelling. The papers do reveal, however, that ultimately what in all probability prevented a formal agreement being reached was first respondent's refusal to undertake to pay substantial sums of money to affected neighbours as a form of reparation or compensation for what was considered by those parties and the CBRRA to be breaches of the original agreement causing them harm.

[75] The same series of meetings produced other compromises which conduced to greater privacy and non-intruding features for the applicant such as the establishment of the large planter boxes on the ground and top floors. Another important compromise related to the set back position of the top floor where, in effect, the applicant ultimately elected to have the non-set back position but with higher windows.

[76] Other compromises related to the building by first respondent of a new boundary wall, set back half a meter from the existing wall in order to protect certain trees on the applicant's property.

DELAY

[77] A further factor relevant to the issue of specific performance is the late stage at which the applicant initiated proceedings seeking specific performance. These were brought in mid-September 2013 but by mid-July 2012, fourteen months earlier, the applicant had known that the City had approved the 2012 plans, that these differed from the agreed plans and that first respondent intended proceeding with construction in accordance with such plans. On 16 July 2012 first respondent's attorney had written to the CBRRA, with copies to the applicant and her attorney (and partner), advising them that the plans had been approved and that his client was intending to build in accordance therewith. In that letter the CBRRA and interested parties were to all intents and purposes invited to litigate the matter since it ended with the sentence *'should the CBRRA and/or any other 'affected party' decide to go the route of litigation nevertheless, you may serve papers on us as that would expedite matters'*. The litigation referred to would have been to have had the plan approval set aside or to stop the construction of the building in accordance with such plans.

[78] Throughout the entire construction process the applicant continued living next door and, despite the presence of building screens, can hardly claim to have been unaware of ongoing construction, including its non-conforming aspects.

[79] In response to these points the applicant emphasised that she looked to the City to protect her rights vis-à-vis first respondent. Secondly, she relies on the difficulty which she had in obtaining copies of approved building plans from both respondents. In regard to the first point, as will be fully discussed when the review relief is considered,

there was ultimately no basis in law for the applicant to rely on the City to enforce the provisions of the 2009 agreement. She was entitled, as she did, to call upon the City to intervene when first respondent was building illegally i.e. not in accordance with approval plans, in response to which the City served a *'cease works'* order on him. This is a quite different proposition, however, to the suggestion that she could in effect sit on her hands and expect the City to enforce her contractual rights vis-à-vis first respondent.

[80] As regards the second point, there is in my view substance to the applicant's complaint that she was unable to obtain copies of building plans for long periods. However, by July 2012 or in the months immediately thereafter the applicant knew that the City has approved first respondent's plans, that these differed from the agreed plans and that first respondent was intent upon building in accordance with the approved plans. It cannot be disputed furthermore that earlier, through her commissioning of a comprehensive report from Jakins, she had become aware of deviations from the agreed plans by April 2011, early on in the building project. Furthermore, the applicant was deeply involved in the details of the proposed construction by reason of the extensive interaction she and her team had with first respondent and his team of professionals not least during the consultative process, together with the fact that she lived next door to the property and could witness construction on a daily basis. There is, in my view, no reasonable excuse or justification for the applicant's failure to act for a further fourteen or fifteen months before launching in September 2013. The lateness of this date is underscored by the fact that three weeks after the institution of the action first respondent received his certificate of occupancy for the dwelling.

[81] Yet a further factor to be brought into account is the contradiction between the applicant requiring first respondent to rebuild in accordance with the agreed plans and the fact that these plans could not be approved in their entirety by the City. The agreed

plans were drawn up on the basis of a road improvement line running parallel to first respondent's property in Victoria Road. It was subsequently ascertained, however, that the line ran parallel to the property's boundary wall with the result that the eastern corner of his proposed dwelling, as per the agreed plan, would have encroached over that line.

CONCLUSION

[82] One cannot help feeling a measure of sympathy for the applicant who concluded an agreement with first respondent and on the strength thereof believed, at least for a period of time, that he would be building a dwelling in accordance with the agreed plans only to face material deviations from that plan. From the applicant's point of view at least, she forfeited her right to object to his application for the scenic drive departure and possibly the height departure in return for illusory benefits. That picture is, however, by no means complete or accurate. The title deed conditions remain in place and bind first respondent and his successors in title to various conditions which he would otherwise not have been subject to as are set out in clauses 2.1 – 2.5 of the agreement. Those include, amongst others, restrictions on the use of the dwelling, on the erf's sub-division, provision for the non-trafficability of all flat roofs and a limitation on any future development to the envelope of the plans, including right of way servitudes.

[83] Then also, as has been set out earlier, the applicant had considerable input into various decisions concerning aspects of the dwelling and its surrounds with the potential to infringe on her privacy albeit that this process never culminated in a formal agreement. There are in addition further undertakings given by first respondent in the course of this litigation to which I will refer later.

[84] When all these factors are taken into account, in my view an order for specific performance would not be fair or equitable and would work too hard upon first

respondent without any corresponding or meaningful benefits for the applicant. For these reasons the applicant's prayer for specific relief in the form of the demolition of the non-conforming elements of the dwelling and the constructed property as a whole cannot succeed.

THE (NEGATIVE) INTERDICTORY RELIEF

[85] The applicant sought an interdict against first respondent in future building other than in compliance with the agreed plans or the newly registered title deed conditions. Her fears in this regard centred around the possibility of first respondent using the roof of the new garage as a trafficable area as an extension of the outdoor entertainment area on the ground floor. To my mind, these fears were by no means far-fetched since at one stage first respondent had clad the roof in wooden decking before removing it following objections from the applicant. A further concern the applicant had related to the planter on the top floor which provides a barrier between the two properties vital to her privacy.

[86] First respondent's counsel ultimately addressed these concerns with undertakings by his client which could be made an order of Court. In my view making these undertakings an order of Court will be salutary.

[87] Over and above these issues I consider that the applicant has failed to make out a case that first respondent will build in breach of the title deed conditions or agreement. There is nothing in the papers to suggest that first respondent's plans or his dwelling as a whole are not completed projects. For these reasons, apart from the agreed order, the applicant has failed to make out a case for future interdictory relief.

THE REVIEW RELIEF

[88] In her initial application the applicant sought an order that the City's decision, taken on or about 1 June 2012, to approve first respondent's building plans ('the 2012 plans'), be reviewed and set aside. The 2012 plans were in fact approved on 12 July 2012. The applicant launched her application on 20 September 2013 and was thus looking to review plans which had been approved some fourteen months earlier. After the review record was filed by the City in terms of Uniform Rule 53 the applicant filed an amended notice of motion in February 2014 in which she sought a further order reviewing and setting aside building plans which had been approved by the City in relation to first respondent's property on 21 April 2010, nearly four years previously ('the 2010 plans'). The respondents raised a preliminary point that the applications had not been brought within a reasonable time as required by sec 7(1) of PAJA. In both the original and the amended notice of motion the applicant sought an order in terms of sec 9(2) of PAJA extending the date within which the applications for judicial review could be instituted. Both respondents opposed the application for an extension and this point must be decided first.

[89] Section 7(1) of PAJA requires that applications for the review of administrative action be brought within a reasonable time but no later than 180 days after the date on which the person concerned was informed of the administrative action, became aware thereof or might reasonably have been expected to become aware of these factors. The test for an extension is set out in sec 9 which provides inter alia that a Court may extend the fixed period '*where the interests of justice so require'*. The Supreme Court of Appeal has held that whether an extension is in the interest of justice depends on the facts and circumstances of each case[5] and that the relevant factors *'generally include the nature of the relief sought; the extent and cause of the delay; its effect on the administration of*

[5] *Aurecon South Africa (Pty) Ltd v Cape Town City* 2016 (2) SA 199 (SCA) para [17].

justice and other litigants; the reasonableness of the explanation for the delay, which must cover the whole period of delay; the importance of the issue to be raised; and the prospects of success'.

[90] Notwithstanding the voluminous nature of the applicant's papers the issue of the extensions sought is not separately or crisply dealt with therein. Instead her case for the extensions must be gleaned from various averments and explanations which she advances. In the heads of argument filed on behalf of the applicant it is stated that the 180 day period must be calculated from the date upon which she could reasonably be said to have become aware of the *'characteristics'* of the administrative action which she seeks to challenge. It is not clear what this means. Argument then follows on the steps which the applicant took to protect her interests and rights through the offices of the City which and culminate in the submission that she should not be prejudiced for having relied on the City she saw as a '*guardian'* of her interests. In this regard reliance is placed on the long consultative process in which the applicant and the respondents engaged and also her difficulty in obtaining copies of the 2012 plans which, she states, she only received in July 2013.

[91] As regards the 2010 plans it is clear that from April 2011 the applicant was aware of their contents at least as regards the salient aspects thereof. During that month she engaged a Mr Mark Jakins ('Jakins'), a planner who furnished her with a report advising that first respondent's building works were not in compliance with approved building plans and pointed out the illegal works to the City's building inspector. By October 2011 Jakins had produced a full report setting out what he considered to be the deviations from the approved plans. Accordingly the applicant was in a position to review the 2010 plans by April 2011 or, at the latest, by October 2011. Instead she only took this action in February 2014.

[92] As regards the 2012 plans it is common cause that by mid-July 2012 the applicant knew that the City had approved those plans and considered them flawed. Using the bench mark of 180 days she was required to launch the review of the approval of these plans by no later than the end of January 2013 but instead instituted proceedings in September 2013 approximately eight months after the outer limit of the period. The applicant stated that she had been advised at the commencement of the construction work to seek an interdict against him but had chosen not to do so. It must also be borne in mind that at all stages the applicant was legally represented, either by her partner, himself an attorney, or by an independent attorney whose services she engaged. As mentioned, as a result of her retaining the services of Jakins in April 2011 and in due course receiving his comprehensive report, the applicant was in a position relatively early on, to identify the discrepancies between the 2010 plans and the agreed plans. As regards the 2012 plans, as a result of her participation in the meetings between her representatives and those of the City and first respondent (as well as the CBRRA), over a period of months preceding the 2012 approval she was aware of their contents and in a position to challenge them immediately. Accordingly she delayed for just short of four years before seeking to review the 2010 approval and for more than a year before seeking to review the 2012 approval. Nonetheless, the applicant did not provide an explanation for the entire duration of the delay.

[93] Bearing in mind that the reason for the delay rule is to ensure finality in administrative decision-making, I turn to consider the applicant's first reason for her delay, namely, that she thought the City would protect her rights and interests in respect of the allegedly unlawful building works. This reason does not stand up to closer scrutiny, however, since it impermissibly conflates two separate issues: the City's duty to approve building plans and to ensure that these are adhered to and her private law or contractual rights which remained her responsibility to protect or enforce. As was

pointed out by the City, once it had approved the two sets of building plans it was *functus officio* in that regard although, of course, as and when first respondent failed to build in compliance with those building plans, it had the power and the duty to take action against him in that regard. The applicant's initial complaint was in respect of building works contrary to the approved building plans and the City duly issued a *'notice to obtain written approval for the unauthorised building work'* pursuant to which the unauthorised building works were eventually demolished by first respondent.

[94] Secondly, the applicant relied also on what she alleged was the City's *'unwillingness'* to provide access to documentation, presumably a reference to the building plans, unless compelled by a Court, contending that this made it difficult for her to ascertain the true facts and to protect her position. However, although the applicant may have had difficulty in physically securing copies of the various sets of plans, she had the information that both the 2010 and 2012 plans were not in accordance with the agreed plans at relatively early stages and in any event well within the 180 day period. On the institution of a review application she would have been entitled to obtain those plans through her receipt of the record. Further, as regards the applicant's reliance on this point, it must be borne in mind that the applicant's averments that the City would not provide a copy of the approved 2012 plans except in a response to a PAIA request, were made in her replying affidavit in response to first respondent's answering affidavit and therefore the City was not on record with an explanation as to the reasons for its approach in this regard. There may well be legitimate reasons for the City's stance in not immediately supplying copies of approved plans to parties in the position of the applicant who was permitted and did in fact gain access to the City's files by September 2012, as did her land surveyor.

[95] Other relevant factors to consider are the nature of the relief sought and its effect on the administration of justice and other litigants. Where the relief is the setting aside of

approved building plans the importance of timeous review action is particularly pronounced since obviously the plans are sought so that the applicant can commence construction work in accordance therewith. One of the consequences of a long-delayed review is that, as in the present case, the construction work has long since been completed and the Court is asked to give an order for specific performance in the form of demolition. Further in this regard it would seem that the purpose of the review relief is to meet any argument that the allegedly offending portions of the construction works are lawful inasmuch as they have been built in accordance with approved plans. In this sense the review relief is academic if the applicant is unsuccessful in obtaining an order for specific performance.

[96] This leads me onto further factors which must be considered in exercising my discretion in terms of sec 9(2), namely, the importance of the issue to be raised and the prospects of success. I accept that the issue is one of considerable importance to the applicant whose case it is that the unauthorised building work materially detracted from her property rights. However, I am doubtful of the applicant's prospects of success for the review relief sought in respect of the 2010 and 2012 plan approvals, the basis of which appears to be four grounds.

DIFFERENCES BETWEEN THE APPROVED PLANS AND THE AGREED PLANS

[97] In the first place the applicant appears to contend that the 2010 and 2012 plan approvals fall to be set aside on the ground that these plans differ from the agreed plans. It is put in the following way: the City was aware of the agreement and, being so aware, must be taken to have been aware of the fact that the decision of the affected parties not to object to the departure from the scenic drive provision was conditional upon and in exchange for the restrictions on developments stipulated in the agreement, one of them being that it would be built in accordance with the agreed plans.

[98] However, sec 7 of the NBRBSA provides that a local authority shall approve building plans if satisfied that the application complies with the requirements of that Act and *'any other applicable law'*. I do not understand it to be seriously disputed that *'applicable law'* includes the zoning scheme regulations and any conditions imposed in terms of sec 42 of LUPO when approving a departure in terms of sec 15 thereof. In my view there is no warrant for contending that a private agreement such as that concluded between the applicant and first respondent comprises *'applicable law'* within the meaning of sec 7 of the NBRBSA. One can readily imagine a private agreement between neighbours which a local authority would not be prepared to countenance. Furthermore, there is also no justification for the applicant to look to or to rely upon the local authority, in this case the City, to enforce any private agreement between her and a neighbour. The City was not a party to the agreement and cannot reasonably be required to enforce it.

[99] Notwithstanding the lack of merit in this first ground it was developed further in relation to the 2012 plans, namely, that to the extent that those plans differed from the agreed plans and given that the agreement had been breached, the City should have required of first respondent that he apply fresh for the departures. However, as was pointed out on behalf of the City, the difficulty with this approach is that the granting of departures is administrative action which stands until set aside by a Court and therefore the City could not simply disregard the departures which it had granted to first respondent at the inception of the building project[6].

THE APPROVED PLANS CONTRAVENED TITLE DEED CONDITIONS

[100] It was further contended on behalf of the applicant that the 2010 and 2012 approved plans contravened title deed conditions registered in May 2011 pursuant to

[6] See in this regard *MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd t/a Eye and Lazer Institute* 2014 (3) SA 481 (CC) paras [97 – 105].

the agreement and were therefore susceptible to review. Once again, however, such title deed conditions do not constitute *'applicable law'* and even if the City had been aware of these discrepancies this would not have entitled it to refuse to approve building plans on this ground alone. As was pointed out on behalf of the City, when it approves building plans it indicates at the same time that this does not absolve the owner of the property from compliance with any conditions in the property's title deed.

[101] A distinction must be drawn here between title deed conditions imposed in terms of LUPO or the Townships Ordinance, 33 of 1934 since such conditions then do constitute *'applicable law'* for the purposes of sec 7 of the NBRBSA. But that was not the case in the current matter. In any event when the City approved first respondent's 2010 building plan the title deed condition had yet to be registered.

THE APPROVED PLANS DIFFERED FROM THE DEPARTURE PLANS

[102] A further ground of review relied upon by the applicant was that the approval of the 2010 and 2012 plans could not stand because these plans differed from the plans submitted with the application for departures which preceded the building plan approvals. Departure applications are considered in terms of sec 15 of LUPO and with reference to the particular departure being sought, however. It is difficult to see that building plans submitted for the purposes of obtaining a departure must invariably be the same as those in respect of which building plan approval is sought since the two processes are different. It is apparently for this reason that applicants are routinely informed that an approval of a departure does not guarantee approval of related building plans sought in terms of the NBRBSA. As the City's representatives pointed out, such an instance occurred in the present case when first respondent was required to amend his building plan to take account of the road line in terms of the Roads Ordinance, 19 of 1976. As was further pointed out, where such an amendment to the building plans does not result in a change relevant to the departure granted, requiring

the applicant to seek a new departure would not be sensible. If it is intended to link a departure to a particular set of building plans that could have been achieved by imposing a condition to that effect in terms of s 42 of LUPO. No such condition was attached.

THE CITY BELIEVED, MISTAKENLY, THAT THERE WAS AN AGREEMENT BETWEEN THE NEIGHBOURS

[103] Finally, in relation to the 2012 approved plans, the applicant contends that they fall to be set aside because a City official, Mr Gonsalves, had conveyed false information to his colleague, Mr Theron, who finally approved the building plans. This false information, the applicant contends, was that the building plan application enjoyed *'the approval of all the parties'*. This was recorded in a note written by Theron on 12 July 2012 in which he mentioned that Gonsalves had attended numerous meetings with all the parties concerned, over a lengthy period of time.

[104] Both Gonsalves and Theron denied under oath that any such communication had been made, but neither official explained how this note came to be written. The only basis upon which the City can escape the implications of the note is Theron's claim that, in any event, he did not make the plan approval decision on the basis of the note's contents since they were not relevant to the issues he was required to consider in terms of sec 7 of the NBRBSA. He goes further to state that, rather, he had regard to the recommendation of the Building Control Officer, a Mr Louwrens. In that detailed recommendation Louwrens made it clear that he was aware of objections from the CBRRA to the approval of the plans, that he had considered them in his evaluation of first respondent's application for approval of the plans but had concluded that nonetheless they complied with the provisions of the scheme regulations and had accordingly recommended its approval.

[105] In the circumstances, therefore, although I consider that Theron's explanation for his note is insufficient and unsatisfactory, the conclusion cannot be reached that, even if he had been misled by the note's content, that this alone invalidated his approval of the 2012 plans.

[106] Having regard to the applicant's grounds of review, both singly and cumulatively, I consider that the prospects of success in any review application, should the extension of time be granted, are weak.

PREJUDICE

[107] Finally, in considering whether to grant the extensions sought account must be taken of the prejudice suffered as a result of the reviewing party's unreasonable delay. As previously mentioned the extension sought of the time period within which to review the approval of the building plans is no mere academic question. First respondent has built in accordance with both sets of plans and the dwelling is long since complete. The review proceedings were brought at such a late stage in relation to the building work completed in accordance with the plans that occupancy certificates to the dwelling were issued to first respondent but a few weeks thereafter. Needless to say there will be considerable prejudice to first respondent if the extensions are granted and the review applications were to succeed.

CONCLUSION

[108] In my view when all these factors are taken into account the only conclusion which can be reached is that the applicant has failed to show that it would be in the interests of justice to extend the 180 day period, in the case of the 2010 plans for a period of over three years and, in the case of the 2012 plans, for a period approaching eight months.

[109] Having concluded that the applicant is not entitled to the extensions which she seeks the Court has no authority to entertain the application insofar as the review relief. See in this regard *Opposition to Urban Tolling Alliance v South African National Roads Agency Ltd* [2013] 4 All SA 639 (SCA) para 26.

THE STRIKING OUT APPLICATION

[110] Second respondent applied to strike out numerous sections of the applicant's replying affidavit on the grounds that the contents were scandalous, vexatious and irrelevant. In the view that I take of the matter as a whole, however, I find it unnecessary to deal with the application. Nonetheless it is appropriate to record that the applicant's replying affidavit which runs to more than 450 pages, was well over double the size of the already bulky founding papers. It goes without saying that an applicant cannot make his/her case in reply and prolixity at that stage is generally counter-productive[7].

THE COUNTER-APPLICATION

[111] The first respondent brought a counterclaim for the removal of a timber screen on the applicant's first floor balcony on the grounds that it was an illegal structure. Despite claiming that she had the City's approval for the screen, the applicant failed to produce the approval, notwithstanding a Rule 35 notice having been served on her calling for production thereof. There is nothing to gainsay first respondent's averment that the screen is unauthorised, illegal and, given its unsightly nature, it must be removed.

COSTS

[112] Costs must now be determined against the background of the applicant having failed to obtain any substantial relief, either as set out in her initial notice of motion or as

[7] See in this regard the remarks of Schutz JA in – *Minister of Environmental Affairs and Tourism and Others v Phambili Fisheries (Pty) Ltd*; *Minister of Environmental Affairs and Tourism and Others v Bato Star Fishing (Pty) Ltd* 2003 (6) SA 407 (SCA) para 80.

amended. Both respondents seek the costs of the application including the costs of two counsel.

[113] A distinction must be drawn between the two respondents. I deal firstly with first respondent. He has succeeded in defeating the applicant's claim and has succeeded in his (minor) counter-application. However, this is essentially because, on balance, I am persuaded that it would be inappropriate to order specific performance in the form of demolition of those elements of the building work which do not conform with the agreed plans and/or are in breach of the agreement reached between the parties after first respondent approached the applicant and others with a view to them not objecting to his application for departures.

[114] As first respondent's counsel himself put it, the perception (I would put it more strongly) that first respondent both had his cake and ate it, that he *'got it away with it',* causes discomfort. On first respondent's own version he failed to adhere to the agreement in material respects. He effectively played ducks and drakes with the applicant regarding the building plans in respect of which he obtained approval from the City. He unilaterally decided, after being advised by the City that his building plans would have to be amended in order to accommodate the road line, to regain the space lost through *'knocking off'* the eastern portion of his dwelling by pushing his house further out towards the applicant's in breach of the agreement both in respect of the set back and the kink. He demolished the existing garage without seeking the applicant's prior approval and similarly made major alterations in the design of the garden and swimming pool. His excuse, in relation to this first infraction (and others) that it simply did not *'occur'* to him or his architect to advise the applicant or any other affected party of the impact on his building plans of the road widening line and his further explanation that he did not consider these to be material changes is, as I have said, to put it at its best, disingenuous.

[115] The applicant's case that the first respondent built in disregard of the agreement and her rights thereunder without disclosing his true intentions to her and, in certain instances, initially without plan approval, has substantially been made out or admitted before the Court. In relation to the 2012 plans, the applicant at least had the benefit of a lengthy consultative process as a result of which she was able to secure certain ameliorative measures or concessions but, to my mind, this does not absolve first respondent of his breaches of the agreement and the numerous infractions. In these circumstances I consider that it would be unfair and inappropriate were first respondent to be awarded an order of costs against the applicant, his immediate neighbour, who has borne the brunt of his cavalier approach to the entire building project.

[116] An order of costs in favour of first respondent would send a wrong message that, notwithstanding the breach of such agreements concluded with neighbours, one may not only ward off specific performance in the form of a demolition order, but also be rewarded with a costs order against the very persons whose cooperation was initially secured by reason of that agreement and who have suffered by reason of such breaches and infractions.

[117] For these reasons I consider that the most appropriate award vis-à-vis the applicant and first respondent is that each party bears their own costs in the application and counter-application.

THE SECOND RESPONDENT

[118] The position as regards the City is somewhat different. It was drawn into these proceedings by virtue of the review relief sought in respect of the 2010 and 2012 approved plans. The applicant has similarly been unsuccessful in this relief. On behalf of the applicant it was contended that the City should bear its own costs inter alia for the reason that its officials had seen fit to engage in meetings and various other

communications between the parties and also by virtue of applicant's case that she had relied on the City to protect her rights. However, as has been pointed out earlier, a distinction must be drawn between those aspects of the building works where the City was duty bound to intervene (and did so) and those aspects where, once it had given approval for the various building plans, it was *functus officio* and could under those circumstances render no further assistance to the applicant.

[119] I do not consider that because the City went out of its way, through its officials, to engage in or facilitate the consultative process, presumably in order to assist the applicant, it should be mulcted in costs as a result.

[120] Reliance was also placed by the applicant's counsel on the City's conduct in obliging the applicant to follow a lengthy procedure under PAIA in order to obtain information she sought, in particular in relation to the 2012 approved plans. As previously mentioned, this issue was only really raised vis-à-vis the City in the applicant's replying affidavit thus giving it no opportunity to justify the procedure which it required the applicant to follow in order to obtain a copy of the approved plans. Furthermore, as previously set out, to all intents and purposes the applicant already had the necessary information and was always able to inspect the City's files.

[121] The applicant is correct in noting that there was no satisfactory explanation by Theron, the City's decision-maker, why he made the note concerning the approval of all parties to the 2012 building plans. That, by itself, cannot justify withholding a costs order from the City. There is much to be said for the City's argument that the matter was in essence a property dispute between two neighbours in which the applicant was perhaps not well-advised to have drawn in the City. At the very least, by the time that the City set out its case in its answering papers, the applicant should have reconsidered her position. Whilst I am sympathetic to the applicant I find myself unable to justify

withholding a costs order from the City. In the result the City will be awarded its costs, including the costs of two counsel.

[122] In the result the following order is made:

1. The first respondent is hereby ordered:

   1.1 to retain the planter on the west side of the top deck floor of his dwelling;

   1.2 to retain the steel balustrade which separates the ground floor of his dwelling from the roof of the garage;

   1.3 to retain the roof of the garage as a non-trafficable area.

2. The applicant's application for further relief against first and second respondents is dismissed;

3. The first respondent's counter-application is upheld and the applicant is directed to remove the timber screen erected on the east edge of the first floor balcony of the dwelling on her property within one month of date hereof; failing which the Deputy Sheriff is authorised to take the necessary steps to effect its removal;

4. The applicant and first respondent shall bear their own costs in both the application and counter-application;

5. The applicant is to pay second respondent's costs, including the costs of two counsel.

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BOZALEK J

APPEARANCES

For the Applicant:	Mr I Bremridge (SC) Instructed by: Werkmans Attorneys
For the 1st Respondent:	Mr S Rosenberg (SC) Ms K Reynolds Instructed by: Du Plessis Hofmeyr Malan Inc
For the 2nd Respondent:	Mr LA Rose-Innes (SC) Ms E van Huyssteen Instructed by: Hayes Incorporated