Republic of South Africa

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

Case No: 6481/2015

Before: The Hon. Mr Justice Binns-Ward
Dates of hearing: 18 October 2016
Date of judgment: 2 November 2016

In the matter between:

MARIA BABALETAKIS	First Applicant
STAND 1146 PARKMORE CC	Second Applicant

and

THE MINISTER OF LOCAL GOVERNMENT, ENVIRONMENTAL AFFAIRS AND DEVELOPMENT PLANNING (WESTERN CAPE)	First Respondent
THE CITY OF CAPE TOWN	Second Respondent
PLANNING AND GENERAL APPEALS COMMITTEE OF THE CITY OF CAPE TOWN	Third Respondent
JUDD HARVEY SMITH	Fourth Respondent
THE PROVINCE OF THE WESTERN CAPE	Fifth Respondent

JUDGMENT

BINNS-WARD J:

[1] The applicants have applied for the review and setting aside of the decision by the MEC for Local Government, Environmental Affairs and Development Planning (Western Cape) to reject their jointly submitted appeal in terms of s 44(1)(a) of the

Land Use Planning Ordinance ('LUPO')[1] against the decision by the Planning and General Appeals Committee of the City of Cape Town to uphold the application by the fourth respondent ('the respondent') for certain departures from the Cape Town zoning scheme regulations, as well as against the consent granted to him by the City to deviate from the restrictions applicable to development along a scenic drive. They have also applied for an order in terms whereof the court would substitute for the decision made by the MEC one upholding the appeal, thereby effectively refusing the fourth respondent's planning application. The MEC abides the decision of the court, but the application is opposed by the City and the respondent.[2]

[2] The applicants are the registered owners, respectively, of Erven ..5 and ..4, Bantry Bay, Cape Town. The respondent is the registered owner of Erven ..3 and ..6.[3] The permissions that the applicants seek to impugn concern the development of the respondent's property.

[3] All of the aforementioned properties are situated on Victoria Road, Bantry Bay. The applicants' properties are situated on the landward (eastern) side of the road and that of the respondent on the opposite (western) side of the road, closer to the seafront. The respondent's property is at the intersection of Seacliff Road[4] with Victoria Road. Seacliff Road runs steeply down towards the sea from Victoria Road, where it merges with Beach Road, which, as its name suggests, runs along the seafront. There are a number of developed erven between the respondent's property and the seafront. A 13-storey block of flats stands on one of them.

---

[1] The judgment of the Constitutional Court in *Minister of Local Government, Environmental Affairs and Development Planning, Western Cape v Habitat Council and Others* 2014 (4) SA 437 (CC) that confirmed that s 44 of LUPO was constitutionally incompatible and invalid has no bearing on the prima facie validity of the impugned decision. That is by virtue of paragraph 2 of the court's order, which excluded any retrospective effect of the declaratory order and expressly provided that it did not affect appeals, such the one in issue in the current case, that were already pending when the judgment was delivered. The appeal in the current matter was lodged in November 2013. LUPO has since been repealed in terms of s 77 of the Western Cape Land Use Planning Act, 2014.

[2] I do not understand why the applicants joined the Planning and General Appeals Committee and the Province as separately cited respondents. The Committee is nothing more than a manifestation of the City, and has no legal personality of its own. The Province has no interest in the matter other than that represented by the MEC as the maker of the impugned decision.

[3] It was averred incorrectly (in para. 10 of the founding affidavit) that the respondent is the owner of Erf 649, which is in fact an adjoining section of road reserve that is leased by the respondent from the City. The land comprising Erf 649 had been expropriated by the local authority more than 50 years ago for contemplated road-widening purposes. It has since been determined by the local authority that the contemplated road-widening scheme is impractical and a decision has been made to abandon the idea.

[4] The road name is given as 'Seacliffe' or 'Sea Cliff' in some of the documentation.

[4] The area in question is residential in character. The existing development in the vicinity of the protagonists' properties consists of a mix of single and general residential buildings, as well as a hotel. The planning officials have characterised that part of Bantry Bay as being densely developed; an observation borne out in the numerous photographs in the papers. The photographs also give an indication of the evolving character of the area. The buildings are an assortment of old and new and vary greatly in size and architectural style.

[5] The subject erven are zoned for general residential purposes. An old house, built in 1894, used to stand on the respondent's property. The respondent applied for and was granted permission to alter the existing house by reconfiguring its interior layout and adding a storey. In the course of the execution of the work, however, it was discovered that the fabric of the building was fragile and that the outer walls would be unable to support the additional load; indeed, one of them was on the point of collapse. The respondent proceeded to demolish the old house and erect a new structure in its place. He did so without first obtaining the demolition permit required in terms of the National Heritage Act or the required building and planning permission. It is alleged that he continued with the work notwithstanding the service upon him by the municipality of cease work orders after the City's building inspector had discovered that the work deviated materially from that which had been authorised. The resulting structure, which is designed to provide for a double dwelling, including accommodation for domestic staff, was at an advanced stage of completion when building work was eventually halted after an interim prohibitory interdict was obtained pending the determination of this review application.

[6] The structure is non-compliant with various restrictions on the development of the property that applied in terms of the zoning scheme regulations and the City's Scenic Drive Regulations. It was in order to regularise the development that the respondent made application to the City in terms of s 15 of LUPO - which resorts in chapter II of the Ordinance - for a number of departures from the scheme regulations and for the necessary consent in terms of the Scenic Drive Regulations. His application was turned down by the local sub-council, but that rebuff was reversed by the municipal council's Planning and General Appeals Committee. It was from the latter's decision that the applicants appealed to the MEC against the grant of the departures application.

[7] It bears mention that the respondent's planning application was modified from the form in which it originally had been submitted. This occurred after an official in the City's department of planning and building development management conveyed to the respondent's town planning consultant that the department was '*concerned with the impact of the proposal on the character of the area and specifically the Victoria Road streetscape / presentation. The required departures (i.e. height and setbacks) contribute to the overpowering impact of the building on the street and area. It is strongly recommended that this aspect be considered*'. The passage in the copy of that communication in the administrative record bears a handwritten endorsement by an unidentified person, which, in legible part, reads '*(Suggestion not accepted ... by applicant)*'. The respondent did, however, commission a land surveyor and a new architect to vet and revise the proposed development.

[8] The land survey revealed that the lowest floor of the structure actually qualified as a 'basement' within the meaning of the zoning scheme regulations. That, together with an amendment of the building plan to remove a bathroom between two other levels of the structure, meant that what had originally qualified as a five storey building requiring departures from the height restrictions, now fell to be treated for zoning purposes as a three storey building. The result was that the respondent no longer required any departures from the height restriction, notwithstanding that the physical height of the intended structure remained unaffected. Minor modifications to the plans effected by the new architect also meant that fewer building line departures were required. The main input of the architect was to seek to improve the aesthetic effect of the building. In the latter regard he seems to have succeeded in winning over - at least provisionally - the local ratepayers' association, which had also objected to the application.

[9] The covering letter, dated 29 June 2012, from the town planning consultant under which the respondent's modified application was submitted to the City, recorded that the concerns raised by the objectors had been taken into account. It stated '*One of the main concerns with the existing incomplete building is that of aesthetics (and in particular the lack thereof) and in this regard the main brief to the newly appointed architect was to address the scale, overall form and mass of the building and to ensure that the external façades are re-designed to ensure a building*

which is aesthetically pleasing and of an outstanding standard to complement the surrounding built environment'.

[10] The applicants' counsel argued that it was evident from the concerns expressed in the objections to the application and the aforementioned letter by a city official, as well as the acknowledgment quoted from the respondent's town planner's letter, that it was 'common cause', as he put it, that the respondent's application presented issues concerning the mass, form and scale of the building that required to be addressed in the decision-making. Certainly, the applicants' stated objections go to the way in which they maintain the structure looms intrusively over the street and the adverse effect of its bulk on the amount of natural light previously enjoyed by street facing façade of the first applicant's residence. The applicants' counsel submitted that the decisions granting the planning approval sought by the respondent were unsupportable because the reduction in the number of departures sought left essentially unaffected the characteristics of the structure about which the city's official had expressed concerns early in the application process, and which the respondent professed to have addressed.

[11] The review has been brought in terms of s 6 of the Promotion of Administrative Justice Act 3 of 2000 ('PAJA'); in particular s 6(2)(h) and (e)(iii).[5] Section 6(2)(h) pertains to the court's power to judicially review an administrative action if '*the exercise of the power or the performance of the function authorised by the empowering provision, in pursuance of which the administrative action was purportedly taken, is so unreasonable that no reasonable person could have so exercised the power or performed the function*' and s 6(2)(e)(iii) goes to its review power if the administrative action in issue was taken '*because irrelevant considerations were taken into account or relevant considerations were not considered*'.

[12] I should say at once that inasmuch as the applicant's counsel appeared to submit that the administrator had to concern himself with whether the application adequately addressed the expressed concerns about the mass, scale and form of the structure, any such submission would be unsustainable. As the application was

[5] Certain complaints by the applicants founded on alleged procedural irregularity were abandoned. I have referred to the paragraphs in s 6(2) of PAJA relied upon by the applicants' counsel in oral argument. The applicants' reliance on s 6(2)(f) in the founding affidavit was not persisted with in argument.

directed at the regularisation of an existing structure and the approvals are expressly linked to the plans submitted in support of the application, the mass, scale and form of the building were undoubtedly relevant considerations. But the statutory question that the administrator was required to answer was whether it was 'desirable', within the meaning of s 36 of LUPO, to grant the departures that had been applied for. The aforementioned considerations fell to be weighed integrally in the context of answering that question.

[13] Section 36 of LUPO provides:

> **36 Basis of refusal of applications and particulars applicable at granting thereof**
>
> (1) Any application under Chapter II or III shall be refused solely on the basis of a lack of desirability of the contemplated utilisation of land concerned including the guideline proposals included in a relevant structure plan insofar as it relates to desirability, or on the basis of its effect on existing rights concerned (except any alleged right to protection against trade competition).
>
> (2) Where an application under Chapter II or III is not refused by virtue of the matters referred to in subsection (1) of this section, regard shall be had, in considering relevant particulars, to only the safety and welfare of the members of the community concerned, the preservation of the natural and developed environment concerned or the effect of the application on existing rights concerned (with the exception of any alleged right to protection against trade competition).

[14] The proper construction of s 36 has given difficulty, and the jurisprudence on the subject is not harmonious.[6] But I consider, with respect, that Rogers J fathomed the import of the provision correctly in *Booth* supra,[7] at para 45-48, where he held:

> [45] Section 36 as a whole, which applies to applications for departures and rezoning (under Ch II) and applications for subdivision (under Ch III), is not easy to construe. Among the aspects creating ambiguity are the phrase 'shall be refused solely on the basis of' in s 36(1) and the phrase 'in considering the relevant particulars' in s 36(2). One might read s 36(1) as compelling the decision-maker to refuse the application if there is a lack of desirability or an adverse effect on existing rights, with s 36(2) setting out the further bases on which a discretionary assessment of the refusal or grant of the application must be adjudicated. On this reading, s 36(1) sets out mandatory grounds of refusal while s 36(2) sets out discretionary grounds if the application does not fail at the first hurdle. There are several difficulties with this interpretation. Firstly, such a view would surely require the grounds in s 36(1) and s 36(2) to be different (since otherwise there would always be a refusal under s 36(1)) yet there is an almost complete overlap between the grounds specified in s 36(1) and s 36(2): the safety and welfare of the community and the preservation of the natural and developed environment (the factors mentioned in s 36(2)) are surely at the heart of a desirability assessment (the criterion

[6] See H*ayes and Another v Minister of Finance and Development Planning, Western Cape, and Others* 2003 (4) SA 598 (C). At 624J – 625A, *Lagoon Bay Lifestyle Estate (Pty) Ltd v Minister of Local Government, Environmental Affairs and Development Planning, Western Cape and Others* [2011] 4 All SA 270 (WCC) at paras 22 – 23 and contrast *Booth and Others NNO v Minister of Local Government, Environmental Affairs and Development Planning and Another* 2013 (4) SA 519 (WCC) at paras. 45-48.

[7] See note 6.

> mentioned in s 36(1)); while effect on existing rights features in both subsections. Second, the criteria of desirability and effect on existing rights are too general and varying in their intensity to serve as a sensible basis for mandatory refusal. Third, a reading of s 36(1) as laying down mandatory grounds of refusal is incompatible with the Afrikaans text, which states that applications under Chs II and III 'mag slegs op grond van . . . .'
> [46] The section as a whole thus makes more sense if s 36(1) is read as providing that the only grounds on which an application may be refused (though refusal is not mandatory in these circumstances) are lack of desirability and effect of existing rights, with s 36(2) then meaning that if the application is not refused (but instead granted), the terms of approval (for example, the extent and duration of a permitted departure or the conditions imposed under s 42 in respect of a departure or rezoning or the detailed content of a subdivision decision) must take into account only the matters specified in s 36(2) (which are in essence, once again, matters going to desirability and effect on existing rights). It must be conceded that s 36(2) does not expressly state that it is dealing with the case where an application is approved, and the phrase 'in considering the relevant particulars' is hardly the most natural way to refer to the conditions or terms of an approval. Nevertheless, the overlap between the criteria in s 36(1) and s 36(2) and the other matters I have mentioned make it difficult to avoid the conclusion that, in context s 36(2) is dealing with the case where the decision-maker has decided not to refuse the application but to grant it.
> [47] Be that as it may, and whatever s 36(2) may mean, I do not think the purpose of s 36(1) is to compel a refusal of the application if certain prescribed circumstances exist. The function of s 36(1), in my view, is to make lack of desirability and effect on existing rights the only bases on which a decision-maker may refuse an application. He is not compelled to refuse an application merely because there is some element of undesirability or some adverse effect on existing rights - whether, with reference to these criteria, the application should be refused or granted is a matter for the decision-maker's judgment and discretion. But what he may not do is refuse the application with reference to any other criteria.
> [48] Since the purpose of s 36(1) is to identify the relevant criteria which the decision-maker may take into account in deciding whether to refuse an application, the decision-maker acts lawfully provided his decision to refuse or allow the application is based on desirability and effect on existing rights. I respectfully doubt whether the abstract noun 'desirability' and the phrase 'lack of desirability' are apt concepts to which to apply an onus or a distinction between a positive or negative test. If the decision-maker finds that a rezoning would bring about certain identifiable disadvantages, he could naturally find a lack of desirability. But the same is true if he finds that, while there are no identifiable disadvantages, there are also no identifiable advantages; in that situation the element of desirability (positive advantage) is lacking — a 'lack of desirability'. I think this latter form of 'lack of desirability' is what the learned judge had in mind in *Hayes*. [8] I would, though, with respect differ from him to the extent that his judgment implies that the decision-maker cannot grant an application unless the applicant establishes a positive advantage. He *may* refuse it on that basis but whether a lack of desirability in this form (absence of positive advantage) should lead to refusal is a matter for the decision-maker's judgment and discretion on the facts of the particular case.

(In addition to the considerations mentioned by the learned judge, the heading to the section - to which regard may properly be had as an aid to construction when the body of the provision is ambiguous[9] – also supports his interpretation.)

[15] It is clear then that the decision whether or not to grant applications in terms of chapters II of LUPO for departures from the land use provisions of a zoning scheme entailed the exercise of a discretion by the decision-maker. That it fell to be exercised with reference to the criterion of 'desirability' – something about which individuals

[8] See note 6, above.

[9] See Joubert et al. (ed.), LAWSA Second Edition vol 25(1) at para. 363 and the authority cited there.

may reasonably hold quite disparate and opposing views – highlights the broad nature of the discretion. The 'existing rights' referred to in s 36, being the other criterion to be taken into account in the decision-making exercise, were the rights of other persons to require the local authority to enforce the restrictions applicable to the development of land units in terms of the zoning scheme. The very nature of the exercise involved when the decision concerned an application for a departure from those restrictions demonstrates that the 'existing rights' were not to be regarded as absolute. In point of fact they were nothing more than a factor which the decision-maker was bound to take into consideration and weigh in the balance. Thus, as Rogers J noted in *Booth* supra, at para 47, '*He is not compelled to refuse an application merely because there is some element of undesirability or some adverse effect on existing rights*'.

[16] The MEC had before him when he made the impugned decision all the documentation that had been before the City's decision-making bodies for the purposes of their determinations mentioned above and also the minutes of their proceedings. That documentation included the reports to the municipal decision-makers by the City's officials in which the approval of the planning application had been comprehensively motivated. He also had a report from the Head of the Directorate: Land Use Planning, Region 2, of the Province, which in essence relayed the content of a report prepared earlier by the Chief Town and Regional Planner in the Province's Land Use Management Directorate for the purpose of assisting the MEC to decide the appeal.

[17] The provincial Chief Town Planner's report to the MEC accurately summarised the process that had preceded the appeal and set out the reasons given by the sub-council for having refused the planning application, as well as those of the planning appeals committee for having reached the opposite result. It also fairly and accurately summarised the import of the grounds upon which the appeal was advanced and cogently reasoned why the appeal should be refused. Photographs of the area were attached to the report.

[18] The MEC adopted the recommendations of his departmental advisors when he made the impugned decision.

[19] In his argument in support of the review great emphasis was placed by the applicants' counsel on the fact that notwithstanding the reduction in what he termed '*the basket of departures*' sought in the originally submitted planning application, '*a building of the same size and envelope as that which had been unanimously rejected* [by the sub-council] *was approved*'. This argument was developed on the basis of the contention that I have already rejected; viz. that the relevant enquiry was into whether the scale, form and mass of the structure as originally represented had been adequately ameliorated in the modified application. It is of no moment that the decision-makers involved in the various stages of the determinative process arrived at mutually conflicting conclusions. Such an outcome is an inherent and unexceptionable possibility in any situation in which the decision to be made expresses a value judgment by the decision-maker, and in which the appeals provided for in the statutory scheme allow for the exercise by the respective appellate tribunals of their own discretion as if they had been decision-makers at first instance.

[20] Turning to examine the ground of review based on s 6(2)(h) of PAJA. In *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and others* 2004 (4) SA 490 (CC), at para 44-45, the import of the statutory provision and the manner in which courts should approach review challenges brought in terms of it were explained as follows:

> [44] … Section 6(2)*(h)* should then be understood to require a simple test, namely that an administrative decision will be reviewable if … it is one that a reasonable decision-maker could not reach.
> [45] What will constitute a reasonable decision will depend on the circumstances of each case, much as what will constitute a fair procedure will depend on the circumstances of each case. Factors relevant to determining whether a decision is reasonable or not will include the nature of the decision, the identity and expertise of the decision-maker, the range of factors relevant to the decision, the reasons given for the decision, the nature of the competing interests involved and the impact of the decision on the lives and well-being of those affected. Although the review functions of the Court now have a substantive as well as a procedural ingredient, the distinction between appeals and reviews continues to be significant. The Court should take care not to usurp the functions of administrative agencies. Its task is to ensure that the decisions taken by administrative agencies fall within the bounds of reasonableness as required by the Constitution. (Footnotes omitted.)

[21] The Court added (at para. 48):

> In treating the decisions of administrative agencies with the appropriate respect, a Court is recognising the proper role of the Executive within the Constitution. In doing so a Court should be careful not to attribute to itself superior wisdom in relation to matters entrusted to other branches of government. A Court should thus give due weight to findings of fact and policy decisions made by those with special expertise and experience in the field. The extent to which a Court should give weight to these considerations will depend upon the character of the decision itself, as well as on the identity of the decision-maker. A decision that requires an equilibrium to be struck between a range of competing interests or considerations and which is

> to be taken by a person or institution with specific expertise in that area must be shown respect by the Courts. Often a power will identify a goal to be achieved, but will not dictate which route should be followed to achieve that goal. In such circumstances a Court should pay due respect to the route selected by the decision-maker. This does not mean, however, that where the decision is one which will not reasonably result in the achievement of the goal, or which is not reasonably supported on the facts or not reasonable in the light of the reasons given for it, a Court may not review that decision. A Court should not rubber-stamp an unreasonable decision simply because of the complexity of the decision or the identity of the decision-maker.

[22] As counsel for the City pointed out, the departures granted fell into four categories.

[23] The first category concerned the departure granted in terms of reg. 93 of the zoning scheme regulations to permit the growing of trees projecting above the nearest point of the footway on Victoria Road. That departure was not subject to appeal in terms of LUPO, and therefore does not fall within the ambit of the matters considered by the MEC on appeal. It is any event not material to the applicants' complaint.

[24] The second category concerned five departures from reg. 47 of the scheme regulations (street setbacks); viz (i) to permit the building at ground and first storeys to be set back 1,295m and 1,34m instead of 3m from Victoria Road, (ii) to permit the building to be set back 1,34m instead of 3m from Victoria Road at basement and second storey levels, (iii) to permit the building to be set back at 2,04 and 2,485m instead of 4,5m from the Victoria and Seacliff Roads splay at the ground and first storey levels, (iv) to permit the building to be set back from the splay at 2,485m instead of 4,5m at the splay at the second storey level and (v) to permit the building to be set back at 2,99m instead of 4,5m from Seacliff Road at its ground, first and second storey levels.

[25] The third category concerned three departures from reg. 54 of the scheme regulations (common boundary setbacks); viz. (i) to permit the building at first and second storey levels and the bulkhead at roof level with overlooking features to be set back at 2,95m and 3,235m from the northern common boundary instead of 6m, (ii) to permit the first and second storeys with overlooking features to be set back from the western boundary at 1,82m and 2,1m instead of 2,5m and (iii) to permit the bulkhead at roof level with overlooking features to be set back at 1,82m from the western boundary instead of 2,5m.

[26] The fourth category concerned a departure from reg. 93 to permit the building to project above the nearest point of the footway of Victoria Road. The departure was required on account of the road being a 'scenic drive'.

[27] The extent of the effect of the street setback departures from Victoria Road appears more extreme in the abstract than it is in reality. This is because the measurements from the eastern edges of the building are taken to the site boundary of the respondent's property with Erf …9 (the expropriated road-widening reserve), rather than to the actual pavement of Victoria Road. As mentioned, Erf ..9 formerly comprised part of the property now owned by the respondent, and is leased by the City to him. For practical purposes Erf ..9 will comprise the greater part of the forecourt and off-street parking area for the proposed structure. It is not amenable to development on its own and it is not going to be used by the City for street-widening. The same observation can be made, albeit to a lesser extent, about the setbacks from the splay at the Seacliff \ Victoria Roads intersection. The line of the site boundary between that part of the respondent's property that is Erf ..3 and Erf ..9 indicates that the extent of the expropriated land must have been determined with the intention of providing for an accentuation of the width of the splay as part of the road-widening scheme.

[28] The western and northern common boundary setback departures have no or very little bearing on the applicants' complaints. The complaints relate in essence to the distance between the eastern side of the new structure and Victoria Road and its height. As already noted, if Erf ..9 were treated as part of the respondent's property, which it effectively is, the setback departures from Victoria Road would not be required. When account is taken of the street facing area between the respondent's property and Victoria Road, the impact of the setbacks on what might have been constructed within the restrictions imposed by the scheme regulations had the expropriation for street-widening not happened is insignificant. It bears mention in this regard that the structure that the respondent is in the course of completing is in all material respects superimposed on the footprint of the house that previously stood on the spot.

[29] The height of the structure, which undeniably gives it a far more imposing effect on the streetscape than the house that it replaces, falls within the parameters permitted in terms of the scheme regulations. The applicants have therefore sought to

invoke the scenic drive provisions to contend for a height limitation. The reported object of the scenic drive provisions is to protect views of the surrounding scenery (in the context of the subject area, those would be sea and mountain views) for users of the road. The object is not to provide height restrictions for the benefit of owners of property adjoining the road. It is therefore doubtful to say the least whether the applicants could competently call in aid the scenic drive provisions for the purpose of their objections. It is also doubtful that the height of the proposed structure affects their existing rights. In any event, the photographs of the area included in the papers bear out the reports by the City's officials that the section of Victoria Drive alongside which the protagonists' properties are situated does not in fact enjoy the characteristics of a scenic drive. That this stretch of road was characterised as a 'scenic drive' by the City's zoning scheme regulations actually made a mockery of the concept. It offers little opportunity to the road users to enjoy vistas of mountain and sea.

[30] I accept though that, in considering whether to uphold the departures granted by the City in respect of the street-facing building line setbacks, the decision-makers would have to take into account the effect of the height of the proposed structure. That would be an obvious consideration in any evaluation of the impact of the departures. In the current matter, by reason of the advanced state of completion of the structure when the application was considered, the decision-makers had the advantage of real evidence. When regard is had to the photographic evidence it is apparent that the structure's impact on the streetscape is not starkly incommensurate with that of a number of other buildings in the vicinity. It does look unsightly, but that has much to do with its unfinished state. The uncontroverted evidence before the decision-makers is that the aesthetic appearance of the structure in its completed state will be significantly improved as a result of the modifications to the building plan by the new architect.

[31] While I can readily understand why the applicants should have preferred the less intrusive nature of the previous building on the respondent's property and have some sympathy with their dislike of its replacement, the situation of their properties in a highly sought after area on Cape Town's Atlantic coastline means that they have no alternative but to accept that it is subject to exceptional development pressure. More pertinently, I am unable to hold that the decisions to grant the respondent's

application for the departures he required were decisions that a reasonable decision-maker could not have made. That finding applies equally to the decision made by the MEC on appeal and to the consents granted by the City's planning appeals committee that were not appealable. In the result the application for judicial review in terms of s 6(2)(h) will be dismissed.

[32] The review in terms of s 6(2)(e)(iii) was argued on the grounds that the decision-maker had failed to appreciate that 'the core to which the enquiry had crystallised' was 'whether there had been a reduction in scale, form and mass from that which was unanimously unacceptable to achieve something which was acceptable'.[10] It was contended on that premise that the decision-maker failed to take into account a relevant consideration. It follows from what has been said earlier in this judgment that there is no merit in the point.

[33] It was also argued that the decision-maker took into account an irrelevant consideration by 'considering each departure/consent separately and on a piecemeal basis without considering, and therefore losing sight of the common cause requirement that scale, form and mass and their overall effect on the streetscape had to be reduced, taking into account that a departure application is always linked to a specific intended building project and individual departures are not granted in the abstract'.[11] This argument has also already effectively been disposed of adversely to the applicants. I should indicate, however, that there is no merit in the allegation that a piecemeal approach was adopted by the decision-makers. The reports before the decision-makers reflect that detailed consideration was given in the advice upon which the functionaries acted to all aspects of the proposed development, including its 'aesthetic and built' form. It is plain that regard was had to what the contextual impact of the structure would be in its finished form.

[34] The second ground of review also fails.

Costs

[35] The prayer for costs in terms of the applicants' notice of motion was framed in the customary manner in applications of this sort. Costs were sought only against the

[10] Paragraph 15.4 of the applicants' heads of argument.

[11] Paragraph 15.5 of the applicants' heads of argument.

respondent, and against the MEC and the City, jointly and severally with the respondent, only should they, or either of them, oppose the application.

[36] The MEC abided the judgment of the court on condition that the applicants did not persist with their allegations of procedural irregularity. The allegations of procedural irregularity related to the alleged failure by the City to have given notice to the objectors of the modifications to the application. They were demonstrably without substance, and not persisted with. The City, however, entered the fray to defend the decision. It sought the dismissal of the application with costs and briefed counsel to appear at the hearing. The answering papers of the City (cited as second respondent) and the respondent covered essentially the same ground and so did the heads of argument filed by their respective counsel. After a helpful and able argument by the City's counsel, senior counsel for the respondent was left with nothing much to add, either on the merits of the review, or the applicants' prayer that should the review be upheld the court should substitute its own decision in the place of that of the planning authorities. I cannot think that the City's counsel would have had anything material to add if the respondent's counsel had argued first and he had had to follow. The fact that the City took the respondent's part in the application materially increased the applicants' potential exposure in respect of the costs of the proceedings.

[37] I raised my reservations about the fairness of visiting the unsuccessful applicants with these additional costs in the circumstances.[12] It was not evident that the case raised any issues in respect of which the City could be said to have a plausible institutional interest. It seemed to me that it would be of no moment to the City whether the respondent were permitted to regularise his offending structure or required to alter his development plans to meet his neighbours' objections. The issues involved were of no identifiable interest to the broader community of Cape Town and did not raise questions of general importance affecting the City's administration.[13]

---

[12] Counsel for the City was caught by surprise by the point that I raised *mero motu*. I therefore invited him to put in a note after the hearing. Detailed submissions on costs running to over 20 pages were thereafter received by me on 31 October 2016, after counsel had requested extra time because of his engagement in other pressing matters.

[13] Cf. *Camps Bay Ratepayers' and Residents' Association v Harrison and Another* 2011 (4) SA 42 (CC) at para 71, where the Court characterised the dispute about the legality of the City's approval of Harrison's building plans as '*in reality a property dispute between two neighbours*'.

[38] The essentially interested protagonists were the respondent, as the developer, who sought departures from the zoning scheme, and the applicants, as owners of neighbouring properties, who were objecting to some of the deviations from the scheme being permitted. The role of the decision-maker in such a situation, whether it be the local authority at first instance, or as was the case in terms of s 44 of LUPO, the provincial authority on appeal, is to weigh the contesting arguments and professional opinions and in the light of them and the objective facts make a reasonable decision. It is obviously expected of it in fulfilling its statutory function to act objectively and impartially. The exercise entailed administrative decision-making of the sort that in yesteryear's administrative law parlance was called 'quasi-judicial'. The fact that the label has fallen out of fashion is not material.

[39] It was with those considerations in mind that I put my reservations about the appropriateness of making the applicants pay the City's costs to counsel. I had in mind the principles discussed and applied in cases such as *MacLean v Haasbroek* NO 1957 (1) SA 464 (A), *Hall v Military Pensions Appeal Tribunal* 1963 (3) SA 407 (T) and *Du Toit v Voorsitter, Nasionale Vervoerkommissie* 1985 (3) SA 56 (SWA) at 66C-67B.

[40] In *MacLean*, Centlivres CJ held that in a case in which a public officer whose decision has been made in a quasi-judicial capacity is impugned, but no order in costs is sought against him, there was no reason, if the public officer opposes unsuccessfully, why he should not be ordered to pay the costs occasioned by his opposition, unless there are circumstances which entitle the Court in the exercise of its discretion to make no order as to costs. Of particular pertinence to the question currently under consideration, the Chief Justice then proceeded (at p. 469A-B) to note that as the first respondent in the appeal had acted in a judicial or quasi-judicial capacity '*he had no personal interest in the result and he should in the circumstances of this case not have taken sides. He should have submitted to the judgment of the Court and he could, if he had wished to do so, have filed his reasons for coming to the decision which was the subject of the attack*'.

[41] In *Hall*'s case supra, Galgut J applied the principle stated in *MacLean* and granted costs against the Military Pensions Appeal Tribunal, which had opposed Mrs Hall's application in terms of s 33(4) of the War Pensions Act 44 of 1942. The learned judge made the following relevant remarks at 410 fin – 411A:

> The respondent is a quasi-judicial body. The applicant does not attack its *bona fides*. The applicant asks for costs only in the event of the respondent opposing the application. That being so, it would have been sufficient for the respondent to have filed its reasons for the benefit of the Court or even to have briefed counsel to assist the Court in coming to a conclusion without actively opposing this application. The respondent, however, decided to come to this Court and oppose the application.

[42] In *Maclean* and *Hall*, the applicants were successful parties. *Du Toit*'s case supra affords an example of the application of the approach in a matter in which the application was unsuccessful. The applicants in that matter unsuccessfully took a road transport permit related decision of the National Transport Commission on judicial review. The Commission was cited as the first respondent and the applicant's competitor in the transport business, who had been awarded a permit, as the second respondent. The argument advanced by counsel for the unsuccessful applicants in respect of costs was summarised by the court at 65H-66B as follows:

> Wat die koste betref het mnr *Henning* aan die hand gedoen dat, selfs al sou die respondente slaag, die eerste respondent nie op sy koste geregtig is nie. Die Kommissie vervul 'n kwasi-judisiële rol, wie se optrede op hersiening onder die soeklig geplaas word. In hierdie opsig is daar dus geen verskil tussen die posisie van die Kommissie en 'n hof nie. (Vgl *Minister of Agricultural Economics and Marketing v Virginia Cheese and Food Co (1941) (Pty) Ltd* 1961 (4) SA 415 (T) op 422F). Dit was moontlik - so lui die betoog - dat hierdie saak na die Kommissie terugverwys moes word. Hoe kon geregtigheid onder daardie omstandighede geskied as die Kommissie hom aktief met die ander party vereenselwig het? Sy deelname, by wyse van afsonderlike regsverteenwoordigers, hou die gevaar in dat indien hy weereens oor dieselfde aangeleentheid moes beslis, sy onpartydigheid daardeur beïnvloed kan word. Die Kommissie behoort, in die lig van die voorafgaande, die redes vir sy besluit te verstrek het en daarna nie verder aan die verrigtinge deelgeneem het nie.
> Alhoewel geen direkte gesag vir die stelling aangehaal is nie, is daar wel steun vir hierdie benadering te vinde.

The court (Odes AJ, Mouton J concurring) then referred to the *dicta* of Centlivres CJ in *MacLean* supra, at pp. 468H-469B, and proceeded as follows:

> Alhoewel die Staatsamptenaar in die *MacLean*- saak supra 'n onsuksesvolle respondent was, doen die feit dat die eerste respondent in hierdie aansoek suksesvol was, geen afbreuk aan die beginsel wat deur die Appèlhof neergelê is nie.
> Die vereiste dat 'n amptenaar wat judisiële of kwasi-judisiële funksies uitoefen onpartydig moes wees, word ook in die saak *Odendaal v Registrar of Deeds, Natal* 1939 NPD 327 weerspieël. Op 366 van die laasgenoemde saak, het Feetham RP hom soos volg uitgelaat:
>
> > "In the event of the Registrar being represented in Court, we have no doubt that the attitude of his counsel should be that of *amicus curiae* rather than that of a partisan. We think the same attitude should be adopted by counsel for the Registrar in cases in which he is the respondent. Otherwise the Registrar would lose his semi-judicial character and thus destroy the basis upon which his immunity from liability for costs is founded."
>
> (Kyk ook *Reeskens v Registrar of Deeds* 1964 (4) SA 369 (N) op 373; Cilliers *The Law of Costs* op 181 - 4.)
> In die saak nou onder bespreking, het die applikante geen koste teen die eerste respondent geëis, tensy hy die aansoek bestry het nie. Die tweede respondent het 'n houding ingeneem wat identies met die van die eerste respondent was. Die aansoek het hoofsaaklik oor die uitleg van sekere permitte gegaan en die eerste respondent kon dus verwag dat sy uitleg deur die tweede respondent se regsverteenwoordiger volledig uiteengesit en argumenteer sou word. Dit was, myns insiens, dus heeltemal onnodig vir die eerste respondent om kant te kies en opdrag

> aan twee advokate te gee. Daar is geen rede na my mening waarom applikante met die eerste respondent se koste belas moet wees nie.

It is plain from the reasoning in *Du Toit* that while the ordinary rule that a successful party is ordinarily entitled to its costs [14] was applied in respect of the second respondent, the position of the administrator was, for the reasons given, regarded as distinguishable.

[43] In my respectful view the aforegoing approach to costs commends itself in the current case. It must also be borne in mind that review proceedings in terms of s 6 of PAJA involve the assertion by the applicants of their constitutional right to lawful, reasonable and procedurally fair administrative action. A recognised consideration is that the chilling prospect of an adverse costs order should not be allowed to become an undue disincentive to persons seeking to assert their basic rights.[15] The weight to be attached to that consideration depends, of course, on the nature of the given case. It does not stand as a warrant for obviously meritless or vexatious litigation.

[44] I do not wish what I have said to be misunderstood to suggest that a decision-making body such as the City should never be entitled to its costs were it to successfully oppose an application for review of this nature. The award of costs entails the exercise of judicial discretion, and the facts and circumstances of each case must be weighed individually in the decision. Ultimately, the court must make an award that it considers to be just and equitable. [16]

[45] The matter of *Camps Bay Ratepayers' and Residents' Association v Harrison and Another* 2011 (4) SA 42 (CC), for example, affords an instance of a local authority being awarded its costs for actively and successfully opposing a review application in respect of its decision to approve building plans. It is quite clear, however, that the City had an objectively justifiable reason going beyond the contesting positions of the parties involved in the neighbourhood dispute at the core of that matter to become actively engaged in the case. The City was concerned to determinatively establish the legal effect of title deed restrictions in the context of the assessment by local authorities of applications for building plan approval in terms of

---

[14] Cf. *Merber v Merber* 1948 (1) SA 446 (A) from p.452.

[15] Cf. *Biowatch Trust v Registrar, Genetic Resources, and Others* 2009 (6) SA 232 (CC).

[16] Cf. *Chonco and Others v President of the Republic of South Africa* [2010] ZACC 7; 2010 (6) BCLR 511 (CC) at para. 6.

the Building Act.[17] Similar considerations having an important institutional effect would explain the City's active opposition to a building plan review in *City of Cape Town v Reader and Others* 2009 (1) SA 555 (SCA). In that matter the operation of the internal appeal provision afforded in terms of s 62 of the Local Government: Municipal Systems Act 32 of 2000 was centrally in issue. The City was not taking a partisan role in a dispute between neighbours in that case; it was seeking to obtain clarity on a matter of considerable institutional importance.[18] The institutional importance of the matter for local authorities in general was confirmed by the intervention in the matter at its own cost of the Ethekwini Municipality as *amicus curiae*. The Ethekwini Municipality participated on the same basis in *True Motives 84 (Pty) Ltd v Mahdi and Another* 2009 (4) SA 153 (SCA), which concerned the import of s 7 of the Building Act.[19] The correct interpretation of s 7 of the Building Act was a matter of significant importance to municipalities. That it raised thorny questions with which local authorities had good reason to wish to be actively engaged is borne out by the sometimes stormy jurisprudential history from *Walele*[20] to *Turnbull- Jackson*.[21] An indication by the applicant for judicial review that it would seek compensation in damages against the decision-maker would be another example of a situation in which the latter might be justified in actively opposing the application and seeking its costs for doing so.[22]

---

[17] The National Building Regulations and Building Standards Act 103 of 1977.

[18] In the current matter the City's counsel attempted to persuade me that the application bore materially on the City's policy of densification. In my view the argument was far-fetched. The proposed development would result in a double dwelling on the property. There was nothing in the applicants' objections that suggested that they were opposed to a double dwelling being constructed on the property.

[19] The Ethekwini Municipality's intervention in *True Motives* was prompted by the invitation extended to it to do so by the presiding judge in *Reader*, who had then already been empanelled as part of the bench to hear the appeal in *True Motives* a week after the appeal in *Reader* was heard. I know this because I appeared as counsel for the City in *Reader*. The invitation was extended during the course of argument in the case.

[20] *Walele v City of Cape Town and Others* 2008 (6) SA 129 (CC), 2008 (11) BCLR 1067.

[21] *Turnbull-Jackson v Hibiscus Coast Municipality and Others* 2014 (6) SA 592 (CC).

[22] The matter of *Booth* supra (note 6) on which the City's counsel placed reliance was plainly a matter in which the City was entitled to its costs. It involved interdict proceedings in which the City, in compliance with its statutory duty, had sought to enforce the zoning scheme against a non-compliant property owner. The property owner unsuccessfully tried to avoid the effect of its unlawful conduct by challenging on review the planning authorities' refusal of their rezoning application. The two aspects of the case were inextricably interrelated. The matter also raised the proper construction of s 36 of LUPO, which, as I have noted, had been a contentious issue, the proper determination of which was of institutional concern to the planning authorities.

[46] I also do not wish to be mistook as advocating an approach that would relieve a public authority whose decision is taken on review from conscientiously complying with the obligations imposed in terms of rule 53 to file a complete and accurate record of the proceedings or from assisting the court insofar as appropriate with an explanation of the decision in issue to the extent that is not already documented in the record, or briefing counsel to assist the court effectively as *amicus curiae*.[23] The duties imposed in terms of the rules of court and s 165(4) of the Constitution are quite independent of the question whether or not it would be appropriate in a given case for the administrator to actively oppose the application, or seek a costs order against the applicant.

[47] I would have been inclined to make no order in respect of the City's costs. Probably sensing some vulnerability in the applicants' fallacious allegations of procedural irregularity, their counsel, however, accepted that his clients should pay the City's costs up to and including the delivery of the City's answering papers in the application in the event of the application being refused. I find no reason to interfere with that concession.

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

1. The application for the judicial review and setting aside of the impugned decisions of the first and second respondents is dismissed.

2. The applicants shall pay the costs of suit of the fourth respondent, including the costs of two counsel and the fourth respondent's costs in the interdict application; and also the costs of the second respondent incurred up to and including the delivery of the second respondent's answering papers in the application.

A.G. BINNS-WARD

[23] It was the administrator's remissness in these respects that aroused the court's displeasure in matters such as *BSB International Link CC v Readam South* Africa *(Pty) Ltd* 2016 (4) 83 (SCA) and *South African Football Association v Stanton Woodrush (Pty) Ltd t/a Stan Smidt & Sons and Another* 2003 (3) SA 313 (SCA) at para. 5-6. In the latter case it was the conduct of Registrar of Trade Marks that was remarked on adversely.

Judge of the High Court

APPEARANCES

Applicant's counsel:	**A. Kantor**
Applicant's attorneys:	**Rubensteins Attorneys** **Cape Town**
Second Respondent's counsel	**R. Paschke**
Second Respondent's attorneys	**Hayes Incorporated** **Cape Town**
Fourth Respondent's counsel	**S.P. Rosenberg SC** **D.W. Baguley**
Fourth Respondent's attorneys	**Slabbert Venter Yanoutsos Wynberg** **Norton Rose Fulbright** **Cape Town**