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

Case No: 6562/2015

In the matter between:

JOAO JOSÉ RIBEIRA DA CRUZ	First Applicant
THE BODY CORPORATE OF THE FOUR SEASONS SECTIONAL TITLE SCHEME (SS 269/08)	Second Applicant

and

THE CITY OF CAPE TOWN	First Respondent
THE TRUSTEES OF THE SIMCHA TRUST	Second Respondent

JUDGMENT (Leave to appeal application)
Delivered on 10 March 2017

BINNS-WARD J:

[1] The respondents in the principal case have applied for leave to appeal from the judgment of this court delivered on 13 January 2017 upholding the applicants' application for the review and setting aside of the decision by the City of Cape Town, in terms of s 7 of the National Building Regulations and Building Standards Act 103 of 1977 ('the Act'), to approve building plans submitted by the second respondent in respect of a building development on a property adjoining that of the applicants. The approved building plan provided for the construction of a solid wall directly abutting the existing balconies on the eighth floor apartments in the applicants' building. The wall rises more than two storeys above the balconies, opposite the ninth and tenth floors of the applicants' building. The review was upheld on the grounds that it was apparent on the evidence (in particular the building control officer's report and the reasons given by the decision-maker in a memorandum dated 25 February 2015 and in the answering affidavit he made on behalf of the City) that the relevant functionaries of the local authority had failed to undertake the second stage of the two-part test required in terms of s 7(1)

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of the Act consistently with the statutory provision, as it has been construed in accordance with the pertinent Constitutional Court jurisprudence. This court's conclusions in that regard were summarised at paras. 68 and 69 of the principal judgment.

[2] The City's notice of application for leave to appeal set out several grounds in support of the application, but at the hearing its counsel – without abandoning any of them – argued only two.

[3] The first – which was encapsulated in ground no. 4 of the City's application for leave to appeal – was that there was a reasonable prospect that another court might hold on appeal that this court was wrong to have held that determining the existence of the disqualifying factors in s 7(1)(b)(ii) (aa) **(aaa)** and **(bbb)**[1]) falls to be approached by a local authority on the basis stated in respect of the factor in s 7(1)(b)(ii) (aa) **(ccc)**[2] in *Camps Bay Ratepayers' and Residents' Association and Another v Harrison and Another* 2011 (4) SA 42 (CC), at para. 40. This ground for leave to appeal appears to arise from what was said at paras. 26 -29 of the principal judgment.

[4] Paragraph 40 of the Constitutional Court's judgment in *Harrison*, which was reaffirmed in that court's subsequent judgment in *Turnbull-Jackson v Hibiscus Court Municipality and Others* 2014 (6) SA 592 (CC), at para. 79 (of the majority judgment) and para 106 (of the minority judgment), goes as follows:

> Derogation from market value, therefore, only commences: *(a)* when the negative influence of the new building on the subject property contravenes the restrictions imposed by law; or *(b)* because the new building, though in accordance with legally imposed restrictions, is, for example, so unattractive or intrusive that it exceeds the legitimate expectations of the parties to the hypothetical sale. In *(a)* the cause of the depreciation will flow from a non-compliance with s 7(1)*(a)*. It is only in the event of *(b)* that s 7(1)*(b)*(ii) comes into play.

[5] I remarked in the principal judgment (at para. 29) that although the disqualifying factors in paragraphs (aaa), (bbb) and (ccc) are stated discretely, and require individual consideration by a local authority in terms of s 7(1)(b)(ii)(aa) of the Act, it is readily conceivable that any structure that would qualify as disfiguring of the area or as unsightly or objectionable would consequently also occasion a derogation from the value of the neighbouring properties. The

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[1] That is that the area in which the proposed building is to be erected will probably or in fact be disfigured thereby (s 7(1)(b)(ii)(aa)(aaa)), and that the building will probably or in fact be unsightly or objectionable (s 7(1)(b)(ii)(aa)(bbb)).

[2] That is where the proposed building would probably or in fact derogate from the value of adjoining or neighbouring properties.

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triggering of the disqualifying factors in respect of derogation from value in s 7(1)(b)(ii)(aa)(ccc) by a marked degree of 'unattractiveness' or 'intrusiveness' on the approach postulated in para. 40 of the judgment in *Harrison* bears this out. Unattractiveness is plainly a factor that arises primarily as a consideration in terms of paragraphs (aaa) and/or (bbb), and undue intrusiveness is one that could give rise to an objectionable result and therefore arise primarily in terms of paragraph (bbb). Nothing in para. 40 of *Harrison* supports the notion that a different approach would be indicated to determining whether a building plan should be disqualified by reason of paragraph (bbb), for example, rather than paragraph (ccc). Indeed, all the indications are to the contrary. I therefore agree with the submission made by the applicant's counsel in their 'short note on leave to appeal' that '[t]*he reasonableness or otherwise of the expectations of the owner of a neighbouring property plainly bear not only on the question of whether there is an actionable derogation from value, but also the whether a proposed building will be unsightly or objectionable*'. The 'reasonable' or 'legitimate' expectation litmus test is the very essence of the approach articulated in *Harrison*. It does not seem to me to matter whether one describes it as the expectation of the owner, or of the parties to the hypothetical sale of the neighbouring property. I am not persuaded that there is a reasonable prospect that an appellate court would hold that this court had erred in holding that the test stated in *Harrison* was more widely applicable under s 7(1)(b)(ii) than just in respect of s 7(1)(b)(ii)(aa)(ccc).

[6] More pertinently in respect of the opinion that I am required by s 17(1) of the Superior Courts Act 10 of 2013 to form at this stage, I am not persuaded that there is a reasonable prospect that another court might find that this court erred in holding that the building control officer and decision-maker with delegated authority misapprehended the import of s 7(1)(b)(ii)(aa) of the Act and, in consequence, failed to consider the pertinent questions obviously raised on the confessedly unusual facts of the present case. Some of these questions were identified in the discussion at paras. 58-64 of the principal judgment. In short, even were an appellate court persuaded to formulate the approach to be adopted to paragraphs (aaa) and (bbb) differently to that stated in *Harrison* at para. 40, I am not persuaded that that would result in any difference to the outcome of the judicial review application in this court.

[7] What is expected of a local authority in the second part of the prescribed two-part enquiry has been stated clearly enough by the Constitutional Court in no less than three judgments. Any 'controversy' that might previously have surrounded the proper construction of the provision has been authoritatively settled. This court found that the City fell materially

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short of compliance with those requirements. I am not persuaded that there is a reasonable prospect that another court could arrive at a different conclusion on the evidence.

[8] The second ground that was argued by the City's counsel was that this court had effectively determined that the building plan application could not be lawfully approved and thereby - notwithstanding the formulation of the remedial order, in terms of which the matter was referred back for consideration afresh - effectively substituted its decision for that of the statutory functionary. The essence of the complaint, as I understood it, was that this court had engaged inappropriately with the merits of the building plan application, and made findings that dictated the result of any reconsideration by the City of the building plan application (see ground no.7 in the City's notice of application for leave to appeal).

[9] I am not persuaded that there is a reasonable prospect that another court would be persuaded on appeal to endorse that criticism. The review could not be decided in a factual vacuum. It was necessary to engage with the merits of what both the City and the second respondent appeared to concede was a 'difficult' or 'unusual' case on the facts to illustrate the obvious questions to which it gave rise in the second part of the two-stage enquiry required of the local authority decision-maker by the Act. The physically intrusive and overbearing effect of the building proposed by the second respondent was manifest when construction was stopped by the interdict granted in December 2012. As mentioned in the principal judgment (at para. 10), its nature is amply illustrated in the photographs annexed as annexure JC8 to the founding affidavit. This matter concerns no ordinary adjunction of neighbouring buildings of the sort illustrated in numerous photographic examples in the papers of other buildings in the city centre that had been erected hard up against each other.

[10] As I remarked, with reference to the extract from the second respondent's submissions to the City quoted at para. 15 of the principal judgment, the peculiar facts of the case bearing on the interplay between the proposed building and the adjoining existing building of the applicants raised '*out of the ordinary questions*'. This is so irrespective of whether or not one might prefer a different description of the effect of the proposed new building on the neighbouring pre-existing building than that conveyed in the description that this court thought in point. The failure by the building control officer and decision-maker functionary to identify and answer them was a material aspect of what demonstrated their failure to properly engage in the required second part enquiry. The City's answer was that because the applicant's building complied with the zoning scheme and so would the second respondent's proposed structure, there was nothing objectionable about the new building being constructed hard up

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against the existing building's balconies. As pointed out in the principal judgment (at para. 65), that was an answer founded entirely in the first part of the two-part enquiry. It was used by the City's functionaries to avoid engagement with the questions the facts plainly presented to be answered in the discrete, and distinctly different, second part of the required enquiry. I consider that it is unlikely that another court would be persuaded on appeal, on a fair reading of the judgment, that this court engaged inappropriately with the facts or effectively determined the building plan application. It identified some of the obvious questions that fell to be answered on the peculiar facts, and left it to the local authority to address and answer them in a properly conducted second-part enquiry.

[11] I have considered all the other points advanced in the City's notice of application for leave to appeal and am not persuaded that any of them gives rise to a reasonable prospect of another court coming to a different result in the review application or interfering with any of the relief that was granted by this court. Having regard to that assessment of the merits of the appeal, I also do not think that the matter raises any 'other compelling reason' that might in the peculiar circumstances justify the granting of leave to appeal notwithstanding my adverse opinion of the prospects of success; cf. *Minister of Justice and Constitutional Development and Others v Southern Africa Litigation Centre and Others* 2016 (3) SA 317 (SCA) at para. 24, where Wallis JA observed that it does not follow that '*merely because the High Court determines an issue of public importance it must grant leave to appeal. The merits of the appeal remain vitally important and will often be decisive.*' In my view, any argument about the import of s 7(1) of the Act has already been adequately settled by the Constitutional Court.

[12] The second respondent identified itself with the City's application for leave to appeal. It is unnecessary in the circumstances to treat of its application separately, save to observe that ground no.2 in its application is premised on a misreading of para. 53 of the principal judgment. It was not held by this court that the applicants' building had been unlawfully approved. It was stated that even if, *ex hypothesi*, it had been wrongly approved, that would afford no reason for the local authority, in applying s 7(1)(b)(ii) of the Act, to ignore the effect on the extant building erected in accordance with such approval (building A) of the proposed new structure (building B). How its consideration of the effect influenced its decision would, of course, depend on the facts of the given case weighed in the context of the objects of the statutory provision.

[13] For these reasons the applications for leave to appeal are refused with costs, including the costs of two counsel.

A.G. BINNS-WARD