THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION)

JUDGMENT

Case No: 17764/2018

In the matter between

JO-AN NICOLA EPSTEIN **APPLICANT**

and

THE CITY OF CAPE TOWN **FIRST RESPONDENT**

PAUL ELGIN WALKER **SECOND RESPONDENT**

Coram: Rogers J

Heard: 20 June 2019

Delivered: 3 July 2019

JUDGMENT

Rogers J

[1] The applicant, Ms Jo-An Epstein, seeks the review and setting aside of the approval of building plans by the first respondent, the City of Cape Town (CCT), in respect of property in Fresnaye owned by the second respondent, Mr Paul Walker. Mr Walker's property runs between Avenue B (to the north-east) and Avenue S (to the south-west), with the natural ground level rising from north-east to south-west. There is an old house on the north-east side of the property with access off Avenue B. Ms Epstein's property is immediately behind Mr Walker's property on the south-west side. Unlike Mr Walker's property, hers does not run through to Avenue B; there are two further properties between her property and Avenue B. Her immediate neighbour to the north-east is Mr Denzil Spolander.

[2] There is no house on Mr Walker's property immediately in front of Ms Epstein's house. The building plans under review envisage the construction of a second house on that side of the property as well as the renovation and extension of the existing house. In the language of item 53 of the CCT's Development Management Scheme (DMS) forming scheduled 3 to its Municipal Planning By-law of 2015, the existing house is the 'main dwelling house' and the proposed new house on the south-west side a 'second dwelling'.

[3] Ms Epstein alleges that the approved building plans violate the DMS for the following reasons (all item references are to the DMS):

(a) A second dwelling that is a 'separate structure to a main dwelling house' may not exceed a height of 6 m measured 'from base plate to the wall plate' and 8 m 'to the top of the roof' (item 53(c). The proposed second dwelling is a separate

structure to the main dwelling (this is disputed). If it is a separate structure, it violates the applicable height restrictions (this is agreed). I shall call this the 'separate structure' point.

(b) If the separate structure point fails, the applicable height restrictions for the second dwelling are 9 m/11 m rather than 6 m/8 m (item 22(c)(i) – this is agreed). Even so, the proposed second dwelling has features which contravene these limits (this is disputed). I shall refer to this as the 'roof height point'.

(c) If the 'separate structure' point fails, the proposed second dwelling is 'contained within the same building' as the main dwelling within the meaning of item 53(d) (this is disputed). In terms of that item, such a second dwelling must be so designed 'that the building appears as a single dwelling house'. In the present case, the building containing the main and second dwelling houses will not 'appear as a single dwelling house' (this too is disputed). I shall refer to this as the 'single appearance' point.

(d) The proposed second dwelling contravenes the requirement that it be constructed 'in a style that is similar to the architecture of the main dwelling house' (item 53(b) – this is disputed). I shall refer to this as the 'similar style' point. It is independent of all others.

(e) Finally, Ms Epstein alleges that Mr Walker was guilty of a material non-disclosure to the CCT when seeking approval of the plans, such non-disclosure relating to an agreement in principle reached between Mr Walker and his neighbour Mr Spolander. I shall refer to this as the non-disclosure point

[4] The following definitions in the DMS are relevant (my underlining):

'base level'	'an imaginary plane drawn horizontally at the average ground level of the building, or vertical division of the building.'
'building'	'without in any way limiting its ordinary meaning, includes: (a) any roofed structure;

	(b) any external stairs, steps or landings of a building and any gallery, canopy, balcony, stoep, verandah, porch or similar feature of a building; (c) any walls or railings enclosing any feature referred to in paragraph (b) above; and (d) any other portion of a building.'
'dwelling house'	'a building containing only one dwelling unit, together with such outbuildings as are ordinarily used with a dwelling house, including domestic staff quarters.'
'dwelling unit'	'a self-contained, interleading group of rooms, with not more than one kitchen, used for the living accommodation and housing of one family . . .'
'height of a building'	'a vertical dimensional from a specified level to another specified level, as set out in the development rules of a zoning, measured in metres; provided that – (a) chimneys (maximum horizontal dimensional 1,5 m); (b) flues (maximum horizontal dimensional of 1 m); (c) lift shafts (maximum horizontal dimensional of 2,5 m and maximum vertical dimensional of 2 m per lift shaft); (d) masts, and (e) antennas, shall not be counted for the purpose of height control.'
'outbuilding'	'a structure, whether attached or separate from the main building, which is normally ancillary and subservient to the main building . . ., but does not include a second dwelling.'
'parapet'	'a low projection, wall or moulding which finishes the uppermost edge of a building with a flat or low pitched roof.'
'second dwelling'	'another dwelling unit which may, in terms of this [DMS], be erected on a land unit where a dwelling house is also permitted; and such second dwelling may be a separate structure or attached to an outbuilding or may be contained in the same structure as the dwelling house, . . .'
'structure'	'without in any way limiting its ordinary meaning, includes any building, shelter, wall, fence, pillar, tower, pergola, steps, landing, terrace, sign, ornamental architectural feature, swimming pool, fuel pump or underground tank, any building ancillary to service infrastructure provision, and any portion of a structure.'
'terrace'	'an area to which occupants or users of a building have access,

	created on a flat roof over a portion of the building, resulting from the setting back of part of the building above such portion.'
'top of the roof'	'for the purpose of height control, means the top of the roof ridge in the case of a pitched roof, or the top of the parapet where a parapet extends above the roof.'
'vertical division'	'a portion of the building bounded by any combination of external and internal walls, with or without openings, which portion is, by design, clearly identifiable as a logical vertical component from other portions of the building. . .'
'wallplate'	'the lowest point of a longitudinal member, truss, bracket, pillar, post, structure or any other similar device as determined by the City, supporting a roof.'

[5] Item 21(b) provides that a 'second dwelling' is an 'additional use right' of a property zoned single residential 1 (SR1). Mr Walker's property is so zoned. By virtue of item 21(b)(iv), this additional use right is subject to the conditions stated in item 53, the relevant parts of which I have quoted.

[6] Item 22(c) provides that the 'maximum height of a building, measured from the base level to the wall plate and top of the roof' shall be determined in accordance with the table set out in that item. The relevant column of the table has the heading 'Maximum height above base level' and the sub-headings 'To wallplate' and 'To top of roof'. For a property of the zoning and size of Mr Walker's property, the applicable heights are 9 m and 11 m respectively. The word 'roof' is not defined.

The separate structure point

[7] In my view the second dwelling will not be a 'separate structure' to the main dwelling. The first and second storeys of the main dwelling (with its ground storey being the lowest) will share party walls with the basement parking level and ground storey of the second dwelling. The point at which two dwellings come closest to each other is the point at which there should be a gap if each is to be

‘separate’ from the other. It is at this point that the two dwellings in the present case will be attached and not ‘separate’. The definition of ‘second dwelling’ indicates that a ‘separate structure’ is to be contrasted with one which is either ‘attached to an outbuilding’ or ‘contained in the same structure’ as the main dwelling. The last two cases involve physical attachment or integration. It is the absence of these features which makes a structure ‘separate’.

[8] In the founding affidavit Ms Epstein said that there was no interior access between the two dwellings but her counsel did not argue that this made the second dwelling a ‘separate structure’. By definition a second dwelling is a ‘dwelling unit’ apart from the dwelling unit constituted by the main dwelling. By definition a ‘dwelling house’ can only contain ‘one dwelling unit’. A ‘dwelling unit’ is a ‘self-contained’ group of interleading rooms used for occupation by one family. One would not expect interior access between two ‘self-contained’ units occupied by two families.

[9] Ms Epstein’s counsel had some difficulty in formulating precisely what additional form of physical connection, lacking in the present case, was needed to cause dwellings not to be ‘separate’. He said the dwellings had to be ‘contained within the same structure’, that the ‘external walls must be common to both’. Clearly the second dwelling contemplated by the DMS cannot be a dwelling unit entirely inside another dwelling unit, ie a unit with no exterior walls (and thus no windows or private access), surrounded entirely by the main dwelling unit. One would expect all, or nearly all, the rooms of a second dwelling to have at least one exterior wall.

[10] If that be so, the only sensible way in which two dwelling units can lack separateness is by being physically connected by way of party walls so that one cannot walk around each house separately. That is the position here. There is an

uninterrupted line of exterior wall encompassing the two dwellings which are attached on one side. At any given point the exterior wall is either the exterior wall of the main dwelling or of the second dwelling; it is impossible for a particular segment of an exterior wall to be simultaneously the exterior wall of two separate dwelling units.

[11] It follows that the separate structure point fails; the reduced height restrictions imposed by item 53(c) are not applicable.

The roof height point

[12] The roof height point concerns features to be erected at the top of vertical division 4 of the second dwelling shown on the plan 'JE6'. The roof of that vertical division will mainly be a concrete slab beneath which lie the kitchen, scullery, dining area, guest toilet and patio. In the north-west corner, however, there is an opening in the slab above which is a slanted pop-up roof enclosed by glass and apparently resting on members supported by posts anchored on the edge of the slab or on top of the exterior walls. The pop-up roof and its glass walls provide additional volume and light for the living area beneath.

[13] The slab rests on walls which at their highest point constitute the slab's wall plates. They are just within the 9 m height limit. In terms of the plans the slab will support a roof garden and leisure area (I shall call it the deck) comprising the following features (illustrated in 'MB4A.1'):

(a) The deck will be accessed by stairs at the south-west corner which, at the point where they give out onto the deck, will be enclosed on three sides and covered by a roof. (I refer to this feature as the portico.)

(b) The deck will have a planting area along the south-east side contained by a lower wall at the front and higher walls at the back and side.

(c) Recessed into the garden area, and also surrounded by a low wall, will be a jacuzzi.

(d) The rest of the deck will be clad with wood.

(e) The deck perimeter be cordoned by a combination of the walls and portico already mentioned and iron balustrading.

[14] In the founding papers Ms Epstein did not allege any infringement of the wall plate restriction. In her replying affidavit, however, she alleged that the portico roof and pop-up roof rested on wall plates higher than the wall plates supporting the slab and thus higher than 9 m. When her counsel sought to argue the new points, I invited him to discuss that aspect with opposing counsel during the tea adjournment to ascertain whether Mr Walker might wish to file further affidavits and if so whether Ms Epstein would tender a postponement. After the adjournment her counsel informed me that while he wished to preserve the new points he would not tender a postponement.

[15] Although I allowed argument to proceed on all points, Mr Walker's counsel argued that I should not permit Ms Epstein to rely on those raised in the reply papers. Given the choice Ms Epstein's counsel exercised, I agree. Although I am inclined to think that the new points are both good, I do not know what Mr Walker and his experts would have said if afforded the chance to respond. Furthermore, I have not had the benefit of full argument regarding the definition of 'wall plate' as applied to the pop-up roof and portico roof.

[16] Ms Epstein's counsel, for example, regarded the pop-up roof's wall plate as the lowest point of the vertical posts supporting that roof. I am not sure that is correct; it may well be that the 'longitudinal members' which support the pop-up roof are the beams running more or less horizontally immediately below the roof, in which case the wall plate height would be the lowest side of those horizontal

members, a height considerably above 9 m. However, accepting Ms Epstein's counsel's more modest interpretation, it is not beyond doubt that the pop-up roof has a wall plate higher than 9 m. It is not clear whether the lowest point of the vertical posts is the top of the slab or the top of the exterior walls which – elsewhere in this vertical division – support the slab. If the latter were the case, the pop-up roof's wallplate height would – like the wallplate for the slab – be just within the 9 m limit. If the former were the case, the wall plate height might exceed the permissible height by the depth of the slab (perhaps about 0,3 m).

[17] In the case of the portico, I have greater difficulty in seeing what answer could be given. Mr Walker's counsel submitted that one does not know from what material the portico will be constructed. With reference to 'MB4A.1', he said the portico might be a wooden structure. Having regard to the building plans themselves, I doubt this, but I do not think it matters. The structure which supports a roof need not be a masonry wall or a longitudinal member resting on a masonry wall. The portico will have a flat roof and will be supported on three sides by the vertical structures surrounding the opening of the stairwell. If, as in the case of the roof slab, the wall plate is constituted by the surface of the vertical structure on which the flat roof rests, the portico's wallplate is clearly considerably higher than 9 m.

[18] However it is unfair to reach a definite conclusion when Mr Walker has not had an opportunity of providing countervailing evidence. I may also take into account that the CCT, which abided the court's decision, was not forewarned of this issue in the founding papers. Given the CCT's lack of response on other issues, it is unlikely that it would have provided an explanation on this one, but I cannot be certain of that. In this regard I take into account that the definition of 'wallplate' refers to various features and devices 'as determined by the City'. By

approving the plans the CCT seemingly determined that the wall plate of the portico roof was at the same level as the wall plate of the slab.

[19] I turn to the matters raised in the founding papers, namely whether the various features of the deck which are higher than the cement slab violate an applicable height restriction. Mr Walker's counsel resisted this conclusion on two arguments:

(a) that the features of the deck are all part of the roof, and that because none of the features is higher than 11 m the roof by definition is at no point higher than 11 m;

(b) that if the features in question are higher than the highest point of the roof, the DMS does not prevent this, provided those features are not higher than 11 m.

[20] As to the first argument, the height restriction is framed with reference to the defined expression 'top of the roof'. In the case of a pitched roof, that means the top of the 'roof ridge'. We are not concerned with a pitched roof. In other cases, the 'top of the roof' is the 'top of the parapet where a parapet extends above the roof'. On the assumption that not every non-pitched roof will have a parapet, the relevant part of the definition must be taken to mean that the 'top of the roof' in the case of a non-pitched roof is either the highest point of the 'roof' or – if the roof has a parapet extending above that height – the top of such parapet.

[21] Leaving aside the question of a parapet, what is the highest point of the slab roof? The word 'roof' is not defined. In this context it means the structure or material which covers the top of a building and without which the building would be open to the elements. The function of a roof is to cover. A structure which performs this function may have ornamental features. Such ornamental features have no separate function. However, a structure having some function other than covering the top of the building cannot be regarded as part of the roof.

[22] The wooden decking is not part of the roof. Its function is to provide a floor for the roof garden, not to finish off the roof. Similarly, the jacuzzi, balustrading and planter walls have functions unrelated to the function of a roof. None of these features can be regarded as ornamental embellishments of the roof. They will be erected on top of the roof; they are not themselves part of it.

[23] In regard to the wall around the planter boxes, the expert evidence is that the construction of the slab required an 'upstand beam' around its perimeter. Ms Bell (Mr Walker's architect) stated that the upstand beam had to be at least 0,5 m high but that this did not mean it could not be higher. She contended that it could protrude as high as 2 m, ie up to the 11 m limit. Mr Retief, the civil engineer who provided a confirmatory affidavit, qualified Ms Bell's statement by stating that from a structural perspective the required beam has a constant height. Where Ms Bell spoke of the 'upstand beam rising and falling in height', she was referring to differing heights brought about by brickwork laid on top of the beam. I take this to mean that the upstand beam in the present case needed to be, and was, about 0,5 m in height, and that the rest of the wall depicted in 'MB4A.1' is masonry work built on top of the beam.

[24] The upstand beam would either be part of the 'roof' as ordinarily understood or would qualify as a 'parapet' for purposes of the definition of 'top of the roof'. I reject, though, the argument by Mr Walker's counsel that the wall above the slab could be as high as 2 m while still forming part of the 'roof'. The height of the perimeter wall around the planting area has nothing to do with the function of the roof and is not an ornamental feature of it. Apart from containing the planting area, its function is to provide privacy to those using the deck.

[25] The walls depicted on 'MB4A.1' cannot be regarded as a 'parapet'. The low walls in front of the planting area are not on the 'edge' of the building but on

the interior part of the roof and thus fall outside the definition of ‘parapet’. The higher walls at the back and side of the planting area are on the ‘edge’ of the building but they neither are ‘low’ nor do they ‘finish’ the uppermost edge of the building. The word ‘low’ in the definition of ‘parapet’ qualifies each of the words in the phrase ‘projection, wall or moulding’. Although ‘low’ is dimensionally imprecise, it must be understood in the context of a protrusion which ‘finishes’ the ‘uppermost edge of a building with a flat or low pitched roof’. The perimeter walls in the present case are higher than the most generous allowance for a ‘low’ wall and do not serve the function of finishing the edge of the building but the function of enclosing a planting area and providing privacy for users of the deck.

[26] I thus reject the argument that any of these features form part of the ‘roof’. The very definition of ‘top of the roof’ supports this view. If anything might qualify as forming part of a flat roof it would be a low parapet, yet the definition talks of the parapet extending ‘above the roof’. In other words, the DMS does not conceive of the parapet as part of the roof. If it were part of the roof, it would have been unnecessary to mention it.

[27] Since Mr Walker has chosen to erect walls and balustrading as features of the deck, rather than to finish the flat roof with a parapet, I take the ‘top of the roof’ to be the upper edge of the slab. The depth of the slab is not stated in the record but to judge by other dimensions on the plans it is about 0,3 m, meaning that the top of the roof is 1,7 m lower than the maximum permitted height of 11 m. Of course, Mr Walker could not have raised his flat roof to the maximum height of 11 m because then the wall plate would have been at 10,7 m rather than at the permitted 9 m; but he could have had a pitched roof going up to 11 m.

[28] The question is whether, since the top of Mr Walker’s flat roof is well below the permitted maximum height of 11 m, there is anything to preclude his

constructing non-roof features on top of the slab. The question can be reformulated thus: Are the height restrictions in the DMS to be construed as meaning that the highest permissible point on a building is the 'top of its roof? For the reasons which follow the answer in my view is yes.

[29] First, throughout the DMS height restrictions are introduced as fixing the 'maximum height of a building'. A 'building' as defined would include features constructed on top of a flat roof. In the case of certain zonings, including residential zonings, two limits are specified – from base level to 'wall plate' and from base level to 'top of the roof'. In certain non-residential zonings the only height limit is from base level to 'top of the roof'. Unless 'top of the roof' were intended to be the highest permissible point of the building, none of these height restrictions would actually specify a 'maximum height of a building'.

[30] Second, if the DMS were not construed in the way I have indicated, there would be no height restriction at all in respect of structures built on top of a flat roof. Mr Walker's counsel took it for granted that structures built on top of a flat roof could not exceed (in this case) 11 m. However, if the 'top of the roof' of any particular building were not its maximum permissible height, one would have to imply a further unstated restriction, namely that if the top of a building's roof is lower than 11 m the maximum height of any further structures may not exceed 11 m. I do not consider that the lawmaker would have left such an important matter to implication. But conversely it could not have been the lawmaker's intention that there would be no limit on the height of such further structures.

[31] Third, if structures could permissibly be erected on top of a roof up to the 11 m limit, it would have been unnecessary for the upper height restriction to have been framed with reference to the 'top of the roof'. The true restriction – both for pitched and flat roofs – would simply have been that the building may not exceed

a specified height. The highest point of the building might be its roof or some other structure.

[32] Fourth, the inclusion of a ‘parapet’ in the definition of ‘top of the roof’ would be superfluous if structures higher than a ‘parapet’ were permitted up to the 11 meter limit.

[33] Fifth, the definition of ‘“height” of a building’ contemplates that certain parts of a building – chimneys, flues, lift shafts, masts and antennas – might be higher than the ‘top of the roof’ because the definition expressly provides that such elements shall not be counted for purposes of height control. If in any given case such elements were lower than the top of a particular building’s roof it would be unnecessary to make an exception for them. (The second dwelling in the present case will have two steel chimneys extending above the roof – see ‘JE4’.) This supports a conclusion that structures other than those excepted by this definition may not exceed the ‘top of the roof’.

[34] Mr Walker’s counsel argued that, if there were a pitched roof to the height of 11 m, the roof space above 9 m could be used for additional structures, as in the case of attic rooms. This showed that there could be structures, other than a roof, higher than 9 m. It was illogical, he submitted, to hold that such structures were impermissible when constructed on top of a flat roof with a height of 9 m. As a matter of interpretation, the answer to this argument is that in the former case the additional structures would be below the ‘top of the roof’ (the roof ridge) whereas in the latter case they would be above of the ‘top of the roof’ (the flat slab). If, as I consider, a building may not be higher than the ‘top of its roof’, the additional structures in the former case would be below the permissible height whereas the latter would not.

[35] I express no definite view as to whether this differentiation is sensible. There is no constitutional attack on the rationality of the DMS. The argument based on unreasonable differentiation is not so powerful as to overcome the other difficulties in the way of Mr Walker's argument. I may mention, in this regard, that in the replying papers Dr Stephen Townsend, a retired architect whose past service includes around 20 years with the CCT, confirmed a statement by Ms Epstein that when the DMS was conceived the intention in providing an extra two metres for roofs was so as not to discourage pitched roofs. This purpose finds some support in the fact that in the case of many non-residential zonings the height restriction is simply framed with reference to the 'top of the roof', on the basis, presumably, that for most business and industrial buildings there was no reason to encourage or make allowance for pitched roofs.

[36] There may also be this relevant distinction between the use of roof space between 9 m and 11 m on the one hand, and the use of space of 2 m above a flat roof with a height of 9 m on the other. In the former case the activities in the roof space are not on public display. Aesthetically, what the public sees is a finished roof. In the latter case such structures would or might involve human activity open to public display. Aesthetically, the structures on top of the roof might present a 'jumble' of shapes and sizes. And importantly, a pitched roof will usually be at wall plate height where it is closest to boundary lines, rising more or less gradually to roof ridge height at the centre of the building. From the perspective of neighbouring properties and adjoining roads, such a roof is far less intrusive than a perpendicular wall constructed to height of 2 m around the perimeter of a roof slab.

[37] I thus conclude that all the features of the deck will be higher than the building's permissible height and that the approval of the building plans was for this reason unlawful.

The single appearance point

[38] The first aspect of this point is whether the second dwelling is ‘contained within the same building’ as the main dwelling house. The applicant’s counsel argued that, if I were to find that the second dwelling was not a separate structure, it would follow as a matter of course that it was contained within the same structure as the main dwelling. The respondent’s counsel, by contrast, submitted that, because the lawmaker, in defining ‘second dwelling’, distinguished attachment to an outbuilding and containment within the same building as the main dwelling, a second dwelling could not be said to be ‘contained within the same building’ as the main dwelling merely because it was ‘attached’ to the main dwelling. A second dwelling attached to the main dwelling without being contained within the same building was not, so the argument went, subject to the ‘single appearance’ requirement laid down in item 53(d).

[39] While the different expressions used by the lawmaker are puzzling, I cannot accept the respondent’s argument. It seems to me that the lawmaker envisaged only three ways in which a second dwelling might notionally be erected on a property: as a separate structure; as an attachment to an outbuilding; or as a dwelling contained in the same structure as the main house. For reasons I have explained, a second dwelling could never be ‘contained within’ the same building as a main dwelling if by this were meant a second dwelling with no exterior features, surrounded entirely by a main dwelling. If this be so, the only way in which the same building could be said to ‘contain’ within itself a main dwelling and a second dwelling is if the one is attached to the other by party walls so that there is a continuous line of exterior walls encompassing both dwellings.

[40] Although the lawmaker could have used the word ‘attached’, the actual expression chosen – ‘contained within the same building’ – may have been influenced by the fact the lawmaker intended to impose, in respect of this form of

attachment, a requirement that the building containing the two dwellings should ‘appear as a single dwelling house’. This requirement does not exist where the second dwelling is attached to an outbuilding. I cannot accept that the lawmaker intended there to be a fourth form of second dwelling, one attached to the main dwelling but not contained within the same building as the main dwelling, with the owner in this fourth situation free from the single appearance requirement imposed by item 53(d). Apart from the difficulty in distinguishing the two situations, there would have been no purpose in imposing the single-appearance requirement in the one case but not the other.

[41] Just as the applicant’s counsel had difficulty in explaining why the two dwellings, though attached, were still ‘separate’, so the respondent’s counsel had difficulty in explaining what additional feature – absent in the present case – was needed to cause two dwellings to be contained within the same building. I may add that the respondent’s counsel’s argument was at odds with the respondent’s opposing papers in which Ms Bell clearly (and I think correctly) took the view that ‘contained within the same structure’ was the obverse of ‘separate’ and that the two dwellings in the present case will be contained within the same structure (paras 24 and 66-70).

[42] The second aspect of the dispute which thus arises is whether the design is such that the building containing the two dwelling units will ‘appear as a single dwelling house’. The parties were agreed that this phrase had reference to external appearance. By definition, two dwelling units would, from the inside, appear to be separate dwellings. The debate was how external appearance was to be assessed.

[43] The applicant’s counsel argued that appearance as a single dwelling involved a cumulative assessment from all exterior perspectives. If a person walked around the building, would such person at the end of the circuit say that

the building appeared to be one dwelling or two? In the present case, a person walking around the building would observe separate entrances from separate streets, separate parking arrangements and separate front doors. The building would thus appear to such person as two dwellings, not one.

[44] The respondent's counsel argued that appearance as a single dwelling was a single snapshot from any exterior point at which the public might realistically view the building. If from any one of those exterior points the building appeared as a single dwelling, the item 53(d) requirement was satisfied, even though – by accumulating knowledge from each of the snapshots – one might learn that the building in fact contained two dwellings.

[45] I prefer the respondent's argument. 'Appearance' is the way something is perceived from a particular perspective. The 'appearance' of an object viewed from one perspective will often differ from its 'appearance' from other perspectives. The lawmaker was not, I think, concerned to conceal from investigative busybodies that two families might be leading separate lives in a particular building. A second dwelling is after all lawful within limits. The lawmaker's concern was one of aesthetics. The lawmaker did not want the public appearance to be one of two dwellings. If from all realistic perspectives the building would, in each of those appearances, seem to be a single dwelling, the lawmaker's purpose would be achieved. One is not concerned with the knowledge of members of the public but with the way the building 'appears'.

[46] In the present case the public would see the building either from Avenue B or from Avenue S. From the former perspective, one would see the vehicular entrance and front door of the main dwelling, the north-east facing facades of the main dwelling's three storeys and the north-east facing facade of the main dwelling's pop-roof roof which slopes gently upward towards the north-east

above the top storey. The second storey and deck of the second dwelling will be higher than the highest point of the main dwelling. It is unclear whether, viewed from any point on Avenue B, a person would be able to see these components of the second dwelling. If a person could see them, such person would not know that they were upper levels of a second dwelling rather than set-back upper levels of the main dwelling.

[47] From the Avenue S perspective, a person would see the driveway off that road into the basement parking of the second dwelling, the dwelling's front door at ground storey level, the south-west facing facades of the second dwelling's ground, first and second storeys, the south-west facing facade of the second dwelling's pop-up roof and the south-west facing facade of the portico. Since the main dwelling is lower than the second dwelling, a person might not see the main dwelling at all. If one caught a glimpse of it, one would not know, just from appearance, that it was not a part of the second dwelling.

[48] The single appearance point thus fails.

The similar style point

[49] The question here is whether the second dwelling will be constructed 'in a style that is similar to the architecture of' the main house. Ms Epstein did not, on this point, offer any expert architectural evidence as part of her founding papers. In her opposing affidavit Ms Bell, who has worked as an architect for more than 30 years, said that in her expert opinion the proposed dwellings are undoubtedly of a similar architectural style. Although some of the timber doors and windows of the main dwelling are to be retained, the new second storey will have aluminium framed doors and windows to match those of the second dwelling. The main dwelling's red-tiled pitched roof will be removed and replaced with a concrete slab roof similar to the roof of the second dwelling. Both dwellings will

feature a pop-up roof. Furthermore ‘the same balustrade details, edges and parapet detail, pergolas and privacy screens, wall finishes and colours have been used to create a seamless structure’.

[50] In the replying papers the applicant offered the evidence of Dr Townsend though this amounted to no more than a bare opinion that ‘the two dwellings are not of similar architectural styles’ (para 116 of the replying affidavit of Ms Epstein read with the short confirmatory affidavit of Dr Townsend). To the extent that the matter is one of a reasonably observant layperson’s impression, I can see some similarities and some differences. The differences are not so striking as to move me to reject Ms Bell’s opinion and the CCT’s own assessment.

[51] I should mention, finally, in this regard that I have dealt with the similar style point on the basis that the two dwellings will be constructed in accordance with the approved plans. Because of the conclusion I have reached on the roof height point, Mr Walker will need to make changes to the plans in respect of the second dwelling. Whether, after those changes have been made, the similar style requirement will still be satisfied is a matter which the CCT will need to reassess.

The non-disclosure point

[52] The final ground of review is that Mr Walker allegedly failed to disclose to the CCT that he had agreed in principle to sell to Mr Spolander the portion of his property containing the main dwelling, to be achieved either by way of subdivision or a sectional title scheme. Ms Epstein contends that such non-disclosure was material because Mr Spolander, who lives behind the main dwelling, has no incentive to see the main dwelling raised in the manner depicted in the plans, given that it would block his view. In short, the complaint is that Mr Walker had and still has a concealed intention to build the second dwelling,

whereafter the main dwelling will be partitioned off to Mr Spolander and remain as is.

[53] Mr Walker has denied having such a concealed intention. On the well-known principles applicable to motion proceedings, I cannot find for Ms Epstein on this point. I need only add that the building plans for the two dwellings were approved by the CCT as a single set of plans. Given the requirements of item 53, it would be unlawful for Mr Walker to build the second dwelling without carrying out the renovations to the main dwelling. If this were to happen, the CCT and quite possibly neighbours like Ms Epstein would have their remedies which might include an order for the demolition of the second dwelling. If subdivision or the opening of a sectional title scheme was sought, there would be further opportunity for objection and official intervention. I may also record that the respondent's counsel tendered an undertaking that his client would complete all the works reflected in the approved plans within the five-year period of the plans' validity and would demolish the second dwelling if he failed to carry out the approved renovations to the main dwelling.

Costs and order

[54] Ms Epstein's success on the roof height point means that the approval of the building plans should be reviewed and set aside. I cannot accede to the request by the respondent's counsel to set aside only those features of the plans which I have found to be unlawful. Although many aspects of the plans are not touched by this judgment, my decision on the roof height point will substantially affect the design of the second dwelling. Depending on how the plans are altered, the CCT may need to reassess the 'similar style' aspect. Furthermore, there are indications that the pop-up roof and portico roof may present height problems relating to their wall plates which were not present to the minds of those who assessed the plans. Although I have not reached a finding on those aspects in the present proceedings,

it is desirable that they should be reconsidered by the CCT when assessing revised plans.

[55] In regard to costs, the roof height point probably occupied about half of the time taken up in argument. Ms Epstein has not only won on this point but succeeded in obtaining the relief sought in her notice of motion, albeit not in all the grounds she advanced. I thus think that she should be entitled to an award of costs in her favour. However, her failure on four out of the five points should be taken into account. I think it would be just to allow her 50% of her costs.

[56] I make the following order:

(a) The decision of the first respondent, taken on 5 July 2018, to approve building plans in respect of the second respondent's property at […] B Avenue, Fresnaye, under approval number 97536758, is reviewed and set aside.

(b) The second respondent must pay 50% of the applicant's party and party costs as taxed or agreed.

Owen Rogers.

Judge O L Rogers

APPEARANCES

For Applicant	D W Baguley Instructed by Slabbert Venter Yanoutsos c/o Norton Rose Fulbright 8 Riebeek Street Cape Town
For Respondent	H J de Waal SC (with him D Lubbe) Instructed by Dirk Coetzee Inc c/o De Klerk & Van Gend Absa Building, 132 Adderley Street Cape Town