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

REPORTABLE

CASE NO: 10753/2018

In the matter between:

THE HABITAT COUNCIL	Applicant
and	
THE CITY OF CAPE TOWN	First Respondent
CORNELIS ANDRONIKUS AUGOUSTIDES N.O	Second Respondent
MICHAEL ANDRONIKUS AUGOUSTIDES N.O	Third Respondent
RAYMOND JAMES WILSON N.O	Fourth Respondent
PANGIOTIS ZITIANELLIS N.O	Fifth Respondent
(Second to Fifth Respondents in their capacities as the trustees for the time being of the **GERA INVESTMENT TRUST, I[...] 3[...]**)	
SOUTH AFRICAN HERITAGE RESOURCES AGENCY	Seventh Respondent
THE EXECUTIVE MAYOR OF THE CITY OF CAPE TOWN	Eighth Respondent

MAYORAL COMMITTEE ("MAYCO") OF THE CITY OF CAPE TOWN. Ninth Respondent

Coram: P.A.L. Gamble, J
Date of Hearing: 9 and 11 March 2022
Date of Judgment: 25 August 2022

This judgment was handed down electronically by circulation to the parties' representatives via email and release to SAFLII. The date and time for hand-down is deemed to be 10h00 on Thursday 25 August 2022.

JUDGMENT DELIVERED ON 25 AUGUST 2022

GAMBLE, J:

INTRODUCTION

1. Martin Melck was a German settler who accumulated considerable wealth as a merchant in Cape Town during the latter part of the 18th century. As an adherent of the Lutheran faith, Melck and fellow worshippers clandestinely attended church at a warehouse which he owned at the top of Strand Street in Cape Town. In 1779 the ruling Dutch East India Company relented in its requirement that all colonists should adhere to the prescripts of the Dutch Reformed Church and granted the right to German, Danish and Scandinavian immigrants to erect a Lutheran Church in the city. Melck made certain of his land available for this purpose.[1]

2. As a result, over the next number of decades four large buildings were erected on that land, three of which enjoy primary heritage status today. The four buildings are constructed immediately adjacent to each other and abut onto Strand Street, a busy thoroughfare running from south to north through Cape Town's CBD, and in the vicinity of its intersection with Buitengracht Street, which carries traffic from west to east around the periphery of the CBD.

[1] See SA History Online (www.sahistory.org.za) *sv* Martin Melck and the founding affidavit of Dirk Willem Van der Zel herein.

3. Viewed from Strand Street, the block between Buitengracht Street and Bree Street (which runs parallel to Buitengracht and is located to the south thereof) contains, firstly, a building formerly known as the "Kostershuis" (also sometimes called "The Sexton's House[2]) which now houses the Netherlands Consulate General. This is on the corner of Strand and Buitengracht Streets.

4. The next building is the Lutheran Church, an ornate building in the Rococo style with a very prominent spire, and adjacent thereto is the Martin Melck House, a grand 18th century mansion built in the Cape-Dutch style, which was formerly the residence of the Melck family, later a parsonage for the church and which now houses a museum.[3] The aforementioned three buildings all enjoy national heritage protection at the highest level.

5. Lastly, on the corner of Strand and Bree Streets, there is a building colloquially known as "the Melck Warehouse". Until fairly recently it was a rather non-descript, single-storey building with a flat roof which housed a variety of retail outlets accessed from both Strand and Bree Streets. The most notorious of these enterprises was "Mike's Sports", evidently a family-owned business run by third respondent located on the corner of Strand and Bree Streets.

6. The Melck Warehouse has a narrow façade onto Strand Street and runs the entire length of the block down Bree Street where it intersects with Waterkant Street – the first street to the east of Strand Street. The Melck Warehouse is the subject of this application for review, which has a long history of litigation. For the sake of convenience I shall refer to the collection of buildings as "the Melck precinct'.

OVERVIEW OF THE REVIEW APPLICATION

7. The Melck Warehouse ("the building") is owned by the Gera Investment Trust ("the Trust" and/or "the developer") of which the second to fourth respondents are the trustees. The Trust resolved to develop the building by improving its facades,

[2] "Koster" is the Afrikaans word for a verger or sexton of a church building. (see Bosman Van der Merwe and Hiemstra, Bilingual Dictionary)
[3] See generally, Wikipedia Online Encyclopedia (www.wikipedia.org) *sv* Martin Melck House

upgrading the commercial premises and locating a residential unit on top of the rear part of the building towards Waterkant Street. This ambitious project, which was endorsed and designed by one of Cape Town's leading architectural heritage firms, Gabriel Fagan Architects, required a series of planning and related approvals from the first respondent ("the City").

8. Rather predictably, the erection of the residential component of the development raised the hackles of many concerned citizens. Annexed to the founding papers herein are a series of newspaper articles and even a cartoon by a well-known local cartoonist pillorying the large glass-enclosed cube which was to be erected on the roof towards the rear of the building. The principal complaint was that the modern addition to the historic warehouse was out of character with the other historic buildings in the Melck precinct.[4] In the result, and given the perceived heritage status of the Melck precinct, the development was destined to be the site of a strand-off between heritage loyalists and commercial property developers.

9. As will appear more fully hereunder, the development of the building was originally rejected by the City's spatial planning committee, SPELUM[5], in April 2011 and again in September 2015. However, in November 2015 the ninth respondent, the City's Mayoral Committee ("MAYCO") did not follow SPELUM's recommendation and granted approval for the development. Thereafter, the applicant lodged an appeal against the MAYCO decision to PLANAP[6], which upheld the MAYCO decision in March 2016.

10. During 2016 the applicant filed a review application in this Division against the PLANAP decision of March 2016. On 20 March 2018, Cloete J upheld the review and set aside PLANAP's approval of the development. In the meanwhile, and during

[4] If I may be permitted to provide an uniformed judicial description for the sake of the record, the glass-enclosed accommodation block appears to be designed to float on top of the roof, resembling the superstructure of a modern cruise liner such as one sees in the nearby Cape Town harbour
[5] "SPELUM" is the acronym for Spatial Planning, Environmental and Land Use Management.
[6] "PLANAP" is the acronym for the Planning and General appeals Committee of the City of Cape Town.

2016, the developer applied to the City for the approval of its building plans under the relevant statute[7]. Such plans were approved on 1 December 2016.

11. Whilst all of this was happening, the heritage status of the building was being considered by the seventh respondent, "SAHRA", a national body[8]. The applicant believed the property should be graded as a provincial heritage site, which would have had restrictive implications for the proposed development but SAHRA contended for a lower level. In March 2018, the sixth respondent, "HWC", a provincial body[9], elected to join the fray and support SAHRA's heritage grading of the property as "Grade III A (local)", which is a lower grading than the remaining buildings in the Melck precinct which, as I have said, have national heritage status.

12. On 5 November 2019, an appeal tribunal constituted by the Western Cape MEC for Cultural Affairs and Sport in terms of the applicable legislation[10] dismissed an appeal by the applicant and confirmed that "Grade III A (local)" was the correct heritage grading of the property.

13. In February 2020, the developer commenced construction work on the building which continued throughout 2020 during the various stages of lockdown implemented by the National Government in response to the Covid-19 pandemic. In July 2020, the developer obtained approval of so-called "rider building plans" and in February 2021 it obtained further approval for its balcony plans which were subsequently implemented. This balcony is on the Waterkant Street side of the building.

14. In April 2021 the developer received a letter of support from SAHRA in respect of the project under construction and throughout 2021 and early 2022

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[7] The National Building Regulations and Building Standards Act, 3 of 1977 ("the Building Act")
[8] "SAHRA" is the South African Heritage Resources Agency established in terms of s11 of the National Heritage Resources Act, 25 of 1999. ("the NHRA")
[9] "HWC" is the provincial heritage resources authority for the Western Cape established by the MEC under s23 of the NHRA.
[10] s49(2) of the NHRA

construction continued apace. The Trust points out that, notwithstanding the Covid-19 lockdown, the building work has taken place openly and in the full view of the public using two major thoroughfares in the CBD. At the time that this application was heard in March 2022, the Trust said that the ground floor part of the development was largely complete and that it had concluded leases for a number of retail outlets whose premises are accessed via either Strand or Bree Streets. 6 tenants have evidently already taken occupancy of their respective premises.

15. The residential "cube", however, is far from complete, with only the base for the first floor having been cast. The Trust says, nevertheless, that it has already concluded 11 sale agreements in respect of sectional title units forming part of the development. It is not clear whether this is in respect of both business and residential units in the building.

16. In short, a significant portion of the project had been completed by the time the Court heard the application for review but the part which appears to have drawn the most public comment is uncompleted and stands forlornly, akin to the weathered hull of a large marine barge awaiting removal to a breaker's yard.

INITIATION OF REVIEW PROCEEDINGS

17. On 13 September 2018 the applicant, The Habitat Council, launched the present application for review. It says in the founding affidavit that it is a voluntary association of persons and organisations not for gain, whose objectives are –

"…to promote consultation, cooperation and, where appropriate, coordinated action amongst its member organizations and State bodies and any other bodies in all matters pertaining to the environment, with a view to ensuring sustainable conservation, utilization and management of the built and natural environment."

Having participated in the hearing before MAYCO and having initiated the review of the PLANAP decision before Cloete J, the *locus standi* of the applicant is not in issue.

18. In its notice of motion herein the applicant sought the following relief.

"1. An order condoning the Applicant's failure to adhere to the 180 day period prescribed in section 7 of the Promotion of Administrative Justice Act, 3 of 2000 ("PAJA") for the institution of these proceedings, insofar as it may be necessary.

2. An order reviewing and setting aside the decision dated 3 November 2015 by the Executive Mayor of the City of Cape Town and the Mayoral Committee ("MayCo") (hereinafter "the decision") to approve the Second to Fifth Respondents' application for the First Respondent's approval in respect of Erf 1[...], Strand Street, Cape Town:

2.1 to develop in a Heritage Protection Overlay Zone, in terms of section 2.3.1 of the first respondent's Zoning Scheme Regulations;

2.2 to permit canopy/balcony projections within a Transport Use Zone, in terms of section 9.1.2 (h) of the Zoning Scheme Regulations; and

2.3 to agree to the development closer than 5m from a metropolitan road, in terms of section 18.1.2 of the Zoning Scheme Regulations (hereinafter 'the decision')(sic).
3. In addition to paragraph 1 (sic), or in the alternative thereto, a declaration that the decision of the Executive Mayor of the City of Cape Town and the Mayoral Committee ("MayCo") is null and void.

4. An order directing the first respondent to pay the costs of this application, *alternatively*, and in the event of any of the other respondents opposing the application, an order that the First Respondent and those other respondents opposing the pay the applicant's costs jointly and severally, the one paying, the other to be absolved.

5…. [F]urther or alternative relief…"

19. A lengthy founding affidavit, containing much inadmissible evidence, was deposed to by Mr. van der Zel in September 2018 – the precise date was omitted by the Commissioner of Oaths. After production of the Rule 53 record, a supplementary founding affidavit was deposed to on 11 September 2020 by Mr. Deon Jacobus

Beukman, the applicant's erstwhile attorney of record. I shall revert to the contents of this affidavit later.

OPPOSITION TO THE REVIEW

20. The application for review was opposed only by the City (i.e. the first, eighth and ninth respondents collectively), with the Trust and the other respondents abiding. As the applicant correctly points out, this is somewhat out of the ordinary in matters of this kind, where the City mostly abides and leaves it up to the developer to defend its planning decisions. But there is a further anomaly here. The answering affidavit filed on behalf of the City was deposed to on 29 October 2020 by its attorney Mr. Christian Louis Faure of MHI Attorneys in Bellville[11].

21. As is apparent from the answering affidavit, much of the evidence to which Mr. Faure deposed did not fall within his personal knowledge and there was a complete absence of confirmatory affidavits by any City officials. The answering affidavit was rather in the form of a narrative enclosing a compendium of correspondence and minutes of decisions taken by the City.

22. The applicant's answering affidavit was deposed to on 16 November 2020 by Mr. van der Zel and it took the City to task for the manner in which it had gone about opposing the matter by way the affidavit by its attorney. The City responded to this criticism by filing a 25-page supplementary affidavit deposed to by its Legal Adviser, Mr. Sibusiso Dlamini, on 27 May 2021.

23. On the same day the second respondent deposed to an affidavit in which he purported to confirm the contents of Mr. Dlamini's affidavit. He further sought to provide the Court with an update regarding the status of the construction work on the property. Mr. Faure deposed to a further affidavit, also on 27 May 2021, confirming the contents of the affidavits of Mr. Dlamini and the second respondent.

[11] The Court was informed that Mr Faure had unfortunately passed away after a long illness on the day before argument herein was finalised. He was a senior practitioner in Cape Town who had a long and distinguished career as a litigation attorney in this Division.

24. I should point out that in the course of this casual yet protracted exchange of affidavits, the City took two interlocutory steps. Firstly, on 28 September 2020, it filed a notice in terms of Rule 30 seeking to set aside the filing of the applicant's founding affidavit as an irregular step in that these had been filed "*hopelessly out of time*" and no application for condonation had been made. It is not clear what became of that application because, as I have already shown, the City's answering affidavit was deposed to just a month later.

25. Secondly, an application by the City to strike out large portions of the founding affidavit was lodged shortly after 16 November 2020, the date the application was signed by Mr. Faure, who also deposed to an affidavit in support of the striking out application on 17 November 2020.

THE ISSUES ARGUED BEFORE THIS COURT

26. It is common cause that the matter was enrolled for hearing twice during 2021. On both occasions the matter did not proceed because the applicant had failed to file a Practice Note and consequently no judge was allocated to hear the case.

27. When the matter finally commenced on 9 March 2022, the applicant was represented by Adv. A. Maher and the City by Adv. M. Schreuder SC. The Court is indebted to counsel for their comprehensive heads of argument and bundle of authorities which have facilitated the preparation of this judgment.

28. It was clear from the outset that Mr. Maher found himself on the horns of a dilemma. He argued that the papers established a clear basis for review of the decisions sought to be impugned but that the building plans had been approved by the City and that pursuant thereto the Trust had commenced construction work, with no interim interdict having been sought to suspend same pending the hearing of the review. In addition, the decision of the heritage appeal tribunal on 5 November 2019 confirming the status of the property as Heritage III A (local), which decision has not been assailed, effectively put paid to any argument that the development should be halted on heritage related grounds.

29. Mr. Maher argued that, in light of the fact that the City had conceded the review in September 2016, a development which should not have been permitted, had nevertheless proceeded because the developer had duly obtained approval of the requisite building plans, the legality whereof had not been attacked. It was further conceded that the developer had built as it was entitled to after the heritage issues had finally been determined by the appeal tribunal. Counsel could not explain why the applicant had taken no steps to halt the project when it became apparent that construction work was being undertaken from early 2020 in a busy urban thoroughfare and in full view of the citizens of the Mother City.

30. Mr. Maher accepted that the current state of the building was such that no meaningful case could be advanced for its demolition. The conundrum, counsel argued, was really a rule of law issue in which the court was being asked to condone an illegality but not to interfere with the consequences thereof.

31. The thrust of Mr. Schreuder's argument was that the application for review was moot and that any constitutional "indiscretions" which the applicant might establish did not afford a basis to refuse the application on the grounds of mootness.

32. Argument proceeded over 2 days – 9 and 11 March 2022 – and when the matter commenced on the second day, Mr. Maher handed up a revised draft order which he asked the Court to consider making. That draft tracked some of the relief sought in prayer 2 of the Notice of Motion and reads as follows.

"1. It is declared that:

1.1. the decision dated 3 November 2015 by the Executive Mayor of the City of Cape Town and the Mayoral Committee ("Mayco") (hereinafter "the decision") to approve the Second to Fifth Respondents' application for the First Respondent's approval in respect of Erf 1[...], Strand Street, Cape Town:

1.1.1 to develop in a Heritage Protection Overlay Zone, in terms of section 2.3.1 of the first respondent's Zoning Scheme Regulations;

1.1.2 to permit canopy/balcony projections within a Transport Use Zone, in terms of section 9.1.2 (h) of the Zoning Scheme Regulations; and

1.1.3 to agree to the development closer than 5m from a metropolitan road, in terms of section 18.1.2 of the Zoning Scheme Regulations (hereinafter 'the decision')
is subject to being reviewed and is constitutionally invalid.

2. Notwithstanding the aforesaid declaration of invalidity, the decision is not set aside.

3. The decision shall accordingly remain of full force and effect and the declaration of invalidity shall have no retrospective effect.

4. The First Respondent shall pay the Applicant's costs on a party and party scale, as taxed or agreed, and the costs shall be paid within fourteen (14) days of the date of agreement or the Taxing Master's allocator without set-off or deduction of any kind."

33. The revised draft order put up by counsel for the applicant suggests that this matter is now limited to three issues – mootness, constitutional delinquency by an organ of local government and costs. I shall thus approach the review on that basis.

MOOTNESS

34. In advancing the argument in favour of mootness, Mr. Schreuder relied heavily on Normandien Farms[12] where the Constitutional Court summarized the approach towards mootness in earlier cases and observed as follows.

"[46] It is clear from the factual circumstances that this matter is moot. However, this is not the end of the inquiry. The central question for consideration is: really it is in the interests of justice to grant leave to appeal, notwithstanding the mootness. A consideration of this Court's approach to mootness is necessary at this juncture, followed by an application of various factors to the current matter.

[12] Normandien Farms (Pty) Ltd v South African Agency for Promotion of Petroleum Exportation and Exploitation (SOC) Ltd and others 2020 (4) SA 409 (CC)

[47] Mootness is when a matter ‘no longer presents an existing or live controversy’. The doctrine is based on the notion that judicial resources ought to be utilized efficiently and should not be dedicated to advisory opinions or abstract propositions of law, and that courts should avoid deciding matters that are ‘abstract, academic or hypothetical’.
[48] This court has held that it is axiomatic that ‘mootness is not an absolute bar to the justiciability of an issue [and that this] Court may entertain an appeal, even if moot, where the interests of justice so require.’ This Court ‘has discretionary power to entertain even admittedly moot issues’.

[49] Where there are two conflicting judgments by different courts, especially where an appeal court’s outcome has binding implications for future matters, it weighs in favor of entertaining a moot matter.

[50] Moreover, this Court has proffered further factors that ought to be considered when determining whether it is in the interests of justice to hear a moot matter. These include:

(a) whether any order which it may make will have some practical effect either on the parties or on others;

(b) the nature and extent of the practical effect that any possible order might have;

(c) the importance of the issue;

(d) the complexity of the issue;

(e) the fullness or otherwise of the arguments advanced; and

(f) resolving the disputes between different courts.” (Internal references omitted.)

35. Mr. Maher did not seriously attack the claim of mootness, as such. Rather, counsel focused on the date when the matter in fact became moot and the costs implications in light thereof. The second string to Mr. Maher's bow was based on the decision in Merafong[13]. It was said that the City had committed reviewable errors in the process of granting the Trust the requisite authority to continue with the development and in so doing had failed to discharge its obligations as a "constitutional citizen".

36. Reliance was placed by the applicant on the following passages in the majority judgment of Cameron J in Merafong.

"[59] Was the Supreme Court of Appeal correct to disbar Merafong from raising a reactive defence because it failed to take the initiative? The answer is No - but the path to that answer must first be cleared. First, as a matter of practice, and good constitutional citizenship, it is undoubtedly so that Merafong should have gone to court to set aside the Minister's ruling. As a state organ, Merafong had the resources, and responsibility, to obtain judicial clarity in its dispute with AngloGold about the ruling. Instead of doing so, it threatened to cut off AngloGold's water. That was not nice. Worse, it was not good constitutional citizenship.

[60] As a good constitutional citizen, Merafong should either have accepted the Minister's ruling as valid, or gone to court to challenge it head-on. AngloGold did what Merafong advised it to do - it appealed to the Minister. On legal advice, Merafong later recanted its view that AngloGold was entitled to appeal. But that didn't give it warrant to bully one of its ratepayers. In enforcing its view of the Minister's disputed ruling, Merafong was resorting to a form of self-help.

[61] This was out of kilter with Merafong's duty as an organ of state and a constitutional citizen. This court has affirmed as a fundamental principle that the state 'should be exemplary in its compliance with the fundamental constitutional

[13] Merafong City v AngloGold Ashanti Ltd 2017 (2) SA 211 (CC). The case involved a decision by a municipality to provide water to a mine at an increased tariff which was later held by the National Minister responsible for water affairs to be excessive. The municipality failed to adhere to the minister's ruling in that regard and the mine applied for review.

principle that proscribes self-help.' What is more, in *Khumalo*[14], this court held that state functionaries are enjoined to uphold and protect the rule of law by, inter alia, seeking the redress of their departments' unlawful decisions. Generally, it is the duty of a state functionary to rectify unlawfulness. The courts have a duty 'to insist that the state, in all its dealings, operate within the confines of the law and, in so doing, remain accountable to those on his behalf it exercises power'. Public functionaries 'must, where faced with an irregularity in the public administration, in the context of employment or otherwise, seek to redress it.' Not to do so may spawn confusion and conflict, to the detriment of the discretion and the public. A vivid instance is where the President himself has sought judicial correction for a process misstep in promulgating legislation." (Internal references otherwise omitted)

37. On the assumption that constitutional delinquency on the part of the City had been established, Mr. Maher argued that the *ratio* of the Constitutional Court in AllPay[15] should be applied in the instant case. Thus, the Court was invited to first make a declaration of invalidity and then apply s172 of the Constitution and make an order that was just and equitable in the circumstances. The approaches suggested by both counsel therefore require a brief overview of the relevant facts.

SYNOPSIS OF RELEVANT FACTS

SPELUM

38. When the proposed development of the Melck Warehouse first became known, there was a vociferous outcry from various individuals and public interest groups regarding its inappropriateness in relation to the Melck precinct. In response thereto, the City appointed a Joint Evaluation Team ("JET") comprising specialists from its Departments of Planning and Building Management, Environmental and Heritage Management and Spatial and Urban Design to report back on the proposal.

39. The JET conducted investigations and on 30 March 2011 it recommended the rejection of the proposal on the grounds of the proposed impact of the development on the heritage value of the buildings in the Melck precinct. The JET report served

[14] Khumalo and another v MEC for Education, KwaZulu – Natal 2014 (5) SA 579 (CC)
[15] AllPay Consolidated Investment Holdings (Pty) Ltd and others v Chief Executive Officer, South African Social Security Agency and others 2014 (1) SA 604 (CC) at [23] –[26]

before SPELUM on 13 April 2011: this was the municipal committee of first instance which was required to evaluate the proposal. It is a non-partisan specialist committee which evaluates the desirability of developments in the city from a spacial planning, environmental and land use management perspective. On that day, SPELUM unanimously refused the Trust's application and directed that SAHRA be requested to address the heritage grading of the building in the context of its position in the particular city block and in light of its potential significance from a national perspective.

40. Thereafter the Trust submitted a fresh application in which it sought to address the grounds upon which the initial application had been refused. This application was placed before SPELUM on 10 June 2015 and after it had conducted its own investigations, including a site inspection, SPELUM once again refused the development proposal on 9 September 2015.

MAYCO

41. On 9 November 2015, the application served before MAYCO which had before it, inter alia, the SPELUM refusal of September 2015. To the applicant's professed astonishment, MAYCO overruled the SPELUM refusal and granted the application there and then. The applicant was concerned that there had been political interference in favour of the development by the erstwhile mayor, Alderman de Lille, and her cohorts in MAYCO, but was unable to point to any irregularity at that stage as the details recorded in the relevant MAYCO minute were scant.

42. The applicant was advised by the City on 12 November 2015 that in the event that it was dissatisfied with the MAYCO decision, it was entitled to lodge an appeal to PLANAP. This it duly did. On 11 March 2016 PLANAP considered the appeal and on 30 March 2016 it advised the applicant that the appeal had been unsuccessful.

PLANAP REVIEW

43. The applicant then resolved to approach this Division for the review of the PLANAP decision. The matter was heard by Cloete J who set aside the PLANAP decision on 20 March 2018. In approaching the court in that matter, the applicant said that it wished to review the MAYCO decision but that the PLANAP decision

stood in its way. It went on to inform the court that it had been informed by the City, subsequent to being informed of its right to appeal the PLANAP decision, that in fact PLANAP was not empowered to hear the appeal under s62 of the Systems Act[16].

44. The response of the City to the PLANAP review application was to oppose the application, notwithstanding the fact that it had advised the applicant that PLANAP did not have the power to hear the appeal. In its opposition it, firstly, attacked the *locus standi* of the applicant and then went on to suggest that the review was unnecessary as the PLANAP decision was a legal nullity.

45. A full-blown opposed application for review followed with the same *drammatis personae* involved. This encompassed an application to strike out objectionable material in the founding affidavit in which the applicant suggested that political skullduggery had led to the MAYCO decision to approve the development. Eventually, on 8 December 2017 Mr. Faure made an open tender on behalf of the City that it would agree to the setting aside of the PLANAP decision with a limited tender of costs up to the stage of the filing of the answering affidavit. The tender was not accepted by the applicant and the review proceeded on 8 February 2018.

46. In making the order of 20 March 2018, Her Ladyship found that the applicant enjoyed *locus standi* and consequently granted the review thereby setting aside the PLANAP decision. The Court further granted the order to strike out and only granted the applicant its costs up to 8 December 2017 – the day that the City conceded the PLANAP review. Already, at this juncture there is evidence of constitutional delinquency on the part of the City. Following Merafong, it should have approached the court *meru motu* for an order setting aside the incorrect decision of its functionary.

THE SUBSTANCE OF THIS APPLICATION

47. In any event, the decks had thus been cleared for the commencement of this review application to set aside the MAYCO decision of 3 November 2015 and the papers herein were issued by the Registrar on 13 September 2018. The founding

[16] Local Government: Municipal Systems Act, 32 of 2000

affidavit again made claims of malfeasance on the part of the City in approving the development and alleged distinct bias on its part.

48. It was said that Ms. De Lille, then a member of the Democratic Alliance ("DA") and her political allies on MAYCO were "pro-developer", with references being made, inter alia, to public utterances in which the former Mayor had said that the City was ready to roll out the red carpet for developers. Predictably, these allegations were denied by the City and a similar application to strike out vexatious matter was filed.

49. In the founding affidavit the applicant demonstrated that the MAYCO minutes for the meeting of 3 November 2015 reflected that the Trust's application was dealt with in a matter of a minute or two. The applicant went on further to state that a closed meeting of the DA caucus had preceded the MAYCO meeting (which is always open to the general public) and it asked the Court to conclude that that was where the Trust's application had actually been approved. The suggestion was that the DA used its majority in MAYCO to rubber stamp the prior decision of its caucus.

THE HERRON AFFIDAVIT

50. The City denied that anything untoward had occurred within MAYCO on 3 November 2015 but much later in the course of these proceedings the applicant claimed to have located the proverbial "smoking gun", as Mr. Maher termed it. In a supplementary affidavit, purportedly filed in terms of Rule 53(3) in September 2020, the applicant's erstwhile attorney, Mr. Beukman, pointed out that the Rule 53 record delivered by the City reflected a complete absence of documents relative to the MAYCO meeting and the decision regarding the development arrived thereat. Mr. Beukman went on to say that after some great difficulty the applicant had managed to procure an affidavit from Mr. Brett Herron, the former member of MAYCO for urban development and transport, and member of the DA[17].

51. Mr. Herron's affidavit attached to Mr. Beukman's affidavit confirmed that there had indeed been a DA caucus meeting before the MAYCO meeting of 3 November

[17] Mr Herron left the DA during November 2018 and subsequently joined the Good Party, headed up by Ms de Lille. See www.mg.co.za/article/2018-12-03-herrons-all-good-former-ct-councillor-joins-de-lilles-party/

2015 at which agenda items for the upcoming meeting were discussed. Mr. Herron goes on to say that he and Alderman D. Smit excused themselves from the MAYCO meeting when the Melck Warehouse application came up for discussion because they both served on PLANAP at the time and were concerned that they may have to entertain an appeal in relation to the application. Mr. Herron notes that he was out of the meeting for a relatively short time when the application was discussed.

52. I am not sure that counsel's exuberance in Court regarding the location of the "smoking gun" was warranted: had I been sitting in a criminal matter I might have required a ballistics test to have been produced. Be that as it may, the Herron affidavit does lend some credence to the claim that the MAYCO decision was preceded by a DA caucus decision.

SETTLEMENT NEGOTIATIONS

53. In the supplementary Rule 53(3) affidavit Mr. Beukman makes reference to a purported settlement of the matter. He states that on 18 October 2018 and 22 January 2019, Mr. Faure made certain written open tenders on behalf of the City in which settlement of the matter was proposed. Mr. Beukman says that the offers were not acceptable to the applicant at that stage, but prefers not to enclose the complete exchange correspondence between the parties to his affidavit.

54. On 3 June 2019, Mr. Beukman says he wrote to Mr. Faure again suggesting the basis of a possible settlement of the review application. On 28 August 2019 he sent a further email in which the City was encouraged to settle the matter. The reference therein to Biowatch[18] suggests that the perennial issue of costs was a problem in concluding a settlement.

55. On 16 September 2019, Mr. Faure wrote to Mr. Beukman proposing a settlement of the matter in terms of a draft order which he enclosed. That draft suggested the setting aside of the MAYCO decision of 3 November 2015 and the referral of the matter back to MAYCO for reconsideration of the development proposal. There was a tender to pay a part of the applicant's costs (on an unopposed basis up to 18 October 2018) and provision for the striking out of the contentious

[18] Biowatch Trust v Registrar, Genetic Resources and others 2009 (6) SA 232 (CC)

paragraphs in the founding affidavit. Mr. Faure's letter expressly recorded that the proposed settlement enjoyed the support of the developer –

"6. The Developer parties have indicated that they are amenable to the review of MAYCO's decision of 3 November 2015 and the referral thereof back to MAYCO for reconsideration."

56. On 18 October 2019 Mr. Beukman replied to the open tender and indicated that the terms thereof were acceptable to the applicant, save that the applicant contended that the tender of costs needed to make provision for the applicant's costs of perusing the Rule 53 record. It later appeared that this was to avoid any issue when the costs were subsequently taxed.

57. There was no immediate reply to Mr. Beukman's last-mentioned letter. However, on 15 November 2019 Mr. Faure wrote to Mr. Beukman in a letter which evidenced a clear *volte face* on the part of the City. I recite the relevant portions thereof.

"1. It has now come to the attention of the City of Cape Town that the Developer proceeded with **and has completed** the proposed development on Erf 1[...] Cape Town, in respect of which approval was sought and confirmed in terms of the MAYCO decision of 3 November 2015.

2. Neither the Developer nor the City are aware or have knowledge of the written undertaking referred to in your client's founding affidavit filed in Cape Town High Court case number 17053/2018.

4. In the present circumstances of this matter a court will not be inclined to exercise its discretion by reviewing and setting MAYCO's aforesaid decision aside and either referring it back to MAYCO for fresh consideration or substituting it with its own decision. Instead, in the light of recent decisions by the Constitutional Court, it is overwhelmingly likely that even if it is found that MAYCO's decision is invalid, it will not be set aside as the Developer's accrued rights ought to be preserved.

5. The Developer, in any event, reject (sic) the proposal that the aforesaid MAYCO decision be reviewed and set aside, by agreement between the parties, by the High Court and referred back to MAYCO for consideration and fresh decision." (Emphasis added)

The letter concluded with a suggestion that the applicant should withdraw the review on the basis that each party was to bear its own costs, failing which it was stated that the City would prepare its answering papers. The applicant was expressly cautioned that the City would take the point in those papers that the review had been filed out of time.

58. The absence of knowledge of the undertaking referred to in para 2 of the letter of 15 November 2019 is referenced as follows in the founding affidavit herein.

"80. Finally, I should point out that there is no prejudice to the owner/developer as I understand that the Trust has given a written undertaking to the City of Cape Town that it will not proceed with the development until such time as the reviews have been finalized, and at all times the Trust and the City of Cape Town have been aware that there would be 2 reviews, including this final review of Mayco's decision."

59. On 25 November 2019, Mr. Beukman replied to the letter of 15 November 2019 as follows.

"In the light thereof that you sent us a draft court order, our client is prepared to accept same as is. We are not going to insist that you place (sic) the words "Rule 53 perusal of the record".

Your letter of 15 November 2019 is in direct contradiction and therefore the contents thereof is (sic) rejected.

Take notice further that unless you confirm that you will proceed to have the draft order made an order of court by no later than Friday, 30 November 2019 at 14h00, we have received instructions to set up a meeting with the JP for the purposes of having it made an order of court and we will notify you of the date."

60. Mr. Faure's reply on 27 November 2019 was as follows.

"2. We note, as indicated in the second paragraph of your letter, that your client is not prepared to accept the draft order which we earlier sent to you. However, you and your client lose sight of the fact that our client's proposal as embodied in that draft court order was explicitly withdrawn as conveyed in our letter of 15 November 2019, before your client accepted such proposal.

3. Our client's proposal as embodied in the said draft court order was accordingly no longer open for acceptance as your client has now belatedly attempted to do.

4. In addition and in any event, the circumstances regarding the vesting of the developer's rights have changed substantially and have only recently come to our client's attention. In the circumstances, neither our client nor the developer is in a position or prepared to consent to an order being taken by agreement as per the terms of the draft order.

5. We accordingly notify you that our instructions are that our client cannot consent to the draft order being made an order of court. There is furthermore no basis for you to set up a meeting with the Honourable Judge President for purposes of having the draft order made an order of court. This draft order has been withdrawn and is not consented to by our client and the other party directly affected thereby, the developer…"

61. Matters went nap for a couple of months until Mr. Beukman took up the cudgels again on 19 February 2020.

"We take note that your client adopted a passive approach and took no steps to either advise us or stop the developer from proceeding with the development notwithstanding that a review application was pending in the High Court. We shall raise this issue at the appropriate time and in the appropriate forum.

Furthermore, the City of Cape Town was aware of the averment in the founding affidavit that there was an undertaking and if this is not the case, as alleged in your correspondence, it was incumbent upon the City of Cape Town to notify the applicant that it was labouring under the misconception (if this is indeed the case) that there was an undertaking or understanding and that, in fact, the City of Cape Town would idly standby and permit the developer to proceed with the development. This, too, will be raised at the appropriate time in the appropriate forum. Your client is well aware that the Melck warehouse is a landmark heritage building and that the development proposal and approval were highly contentious and deposed by a large number of individuals, NGOs and organizations. In fact, SPELUM, a specialist committee of the City of Cape Town, itself advised Mayco not to approve the development. In the circumstances, your client's conduct is to be deprecated.

We disagree with your conclusion that the proposed development has been 'completed' as per the approval granted by Mayco on 3 November 2015. This contention is patently incorrect. The development proposal includes the installation of a large glass dome and the only work that has been done, albeit improperly, is limited to the interior of the warehouse.

In the circumstances, kindly confirm that the City of Cape Town will ensure that all work ceases forthwith, failing which our client will have no choice but to approach the High Court to obtain an urgent interdict to stop any further work continuing until such time as the review application has been finalized…

We place on record our dismay and concern that your client has reneged on the settlement agreement and, again, this will be raised at the appropriate time and in the appropriate forum. The City of Cape Town made a settlement proposal in correspondence dated 16 September 2019, which proposal was accepted, in writing, by our client on 18 October 2019.

We are also concerned by the allegation in your correspondence that the settlement offer was 'withdrawn' on 15 November 2019. We point out that the settlement proposal, as tendered, was accepted in writing prior to November 2019 and on 18

October 2019. It follows that it was never open to your client, in any event, to purportedly 'withdraw' the settlement offer after it had been accepted…

We have grave concerns about the statement in paragraph 4 of your correspondence dated 15 November 2019 to the effect that the developer rejected the proposal that Mayco's decision be reviewed and set aside by agreement between the parties. We point out that you categorically stated exactly the opposite in paragraph 6 of your correspondence dated 16 September 2019 viz. that, 'the Developer parties have indicated that they are amenable to the review of MAYCO's decision of 3 November 2015 and the referral thereof back to MAYCO for reconsideration."

The applicant went on to say that it would proceed with the review, while seeking to hold the City to its settlement proposal.

62. On 6 March 2020 Mr. Faure replied, indicating that the City stood by its view that the matter had not been settled. In regard to the demand that work be ceased, the following was said.

"3. Regarding your demand that we confirm that our client will ensure that all work ceases forthwith, failing which your client will approach the High Court for an urgent interdict, we point out that apart from other insurmountable obstacles that your client will face in such an application, it would be well advised to recognize that our client does not have the statutory power to direct the Developer to halt any work executed in accordance with approved building plans."

63. The battle lines were thus drawn and the application for review proceeded. As I have already noted, the matter was on the roll twice in 2021 but did not proceed due to the applicant's dilatoriness. All the while, the Trust was entitled to proceed with construction. The City says that it refused to issue a "stop-works" order because the construction was taking place in accordance with approved plans and the applicants took no steps to procure an interdict.

THE STATE OF THE BUILDING WORKS

64. In Mr. Faure's abovementioned letter of 15 November 2019, the City alleged that construction work on the development had been completed. That allegation is manifestly false. Not only was the building far from complete when this application was heard in March 2022 but various photographs annexed to a supplementary affidavit deposed to by the second respondent on behalf of the Trust on 27 May 2021 depict the incomplete state of the building works over the years - the photographs were digitally recorded and reflect the respective dates thereof.

65. So, for example, one can see that on 22 November 2019 trucks were still removing rubble from the interior of the warehouse, while some preparatory work was taking place on the roof in the area where the glass accommodation cube was to be built. Then, on 7 February 2020, construction was seen to be taking place on the roof of the building with concrete being piped up from a truck standing in Bree Street. The sides of the building were clad in protective netting and a large sign erected thereon reminded customers that "Mike's Sports" was still in business, with its entrance then located in a different part of the building.

66. On 9 June 2020 the barge-like base for the glass cube can be seen to be in its preparatory stages while an aerial photograph taken in September 2020 reveals that concrete was still being pumped up onto the roof of the building and that the proposed glass cube was mercifully nowhere to be seen. By November 2020, the barge-like base was still under construction, with sundry pieces of steel reinforcing protruding skywards.

67. In this supplementary affidavit, the second respondent explains that the Trust's building plans were approved in December 2016 and that neither the applicant nor any other interested party had challenged these, whether on review or otherwise. Thereafter, he says, construction commenced in December 2016 and has since continued unhindered.

THE AFFIDAVITS FILED IN FEBRUARY 2022

68. For some reason which is not explained in the papers, construction work on the barge-like slab appears to have been suspended. Nevertheless, in a further supplementary affidavit dated 22 February 2022 and filed shortly before the hearing,

the second respondent says that if the Court were to grant the relief sought by the applicant, the Trust would suffer irreparable harm, particularly if the matter was reviewed and sent back to MAYCO. In this regard, the second respondent says that the Trust has at all times acted lawfully and conducted construction work in accordance with plans lawfully passed by the City.

69. The second respondent points out further that the state of the completed construction work on the street level of the building has enabled the Trust to conclude binding long term lease agreements with various retail outlets – 5 such agreements are annexed to the affidavit.

70. The second respondent also says that the applicant omitted to bring to the Court's attention material facts relating to the heritage status of the building. He points out that in March 2018, long before the papers were issued, HWC resolved to support SAHRA's Grade IIIA (Local) grading of the property. Further, the second respondent refers to the finding of the appeal tribunal of 5 November 2019 which confirmed the HWC heritage grading and refused to declare the Melck Warehouse a Provincial Heritage Site (Grade II).

71. The criticism of the second respondent is unfounded: it does not appear from the papers that the applicant had knowledge of either of these decisions before mention was made thereof by the second respondent in the affidavit of May 2021. Further, upon consideration of the finding of the appeal tribunal (annexed to the second respondent's earlier supplementary affidavit of May 2021), the Court notes that the applicant was not a party to those proceedings: the appeal was lodged by "The Association for the Protection of Historic Cape Buildings" with the Lutheran Church as an interested party.

CONCLUDING REMARKS ON MOOTNESS

72. In light of the aforegoing facts, Mr. Schreuder submitted that the only reasonable conclusion to be drawn is that the matter is indeed moot. He pointed out that the heritage status of the building, about which the applicant was so seriously concerned, had been determined at first instance before this review was launched, was confirmed on internal appeal and there has been no judicial challenge thereto.

Further, counsel noted that the building plans for the development of the Melck Warehouse were approved in December 2016, some 22 months prior to the lodging of this application. There was, similarly, no attempt to impugn that decision or to interdict the developer and the building work which has subsequently taken place on the property has, at all material times, been lawful.

73. It seems to me that the case as it now stands falls squarely within the ambit of the judgment of Ackerman J in National Coalition[19] .

"A case is moot and therefore not justiciable if it no longer presents an existing or live controversy which should exist if the Court is to avoid giving advisory opinions on abstract propositions of rights."

74. In Stransham-Ford[20] the Supreme Court of Appeal pointed to the distinction that was to be drawn between the situation where cases were moot before the court of first instance and where mootness ensued thereafter and the matter was nevertheless entertained by the Constitutional Court.

"[22] Since the advent of an enforceable Bill of Rights, many test cases have been brought with a view to establishing some broader principle. But none have been brought in circumstances where the cause of action advanced had been extinguished before judgment at first instance. There have been cases in which, after judgment at first instance, circumstances have altered so that the judgment has become moot. There the Constitutional Court has reserved to itself a discretion, if it is in the interest of justice to do so, to consider and determine matters even though they have become moot. It is a prerequisite for the exercise of the discretion that any order the court may ultimately make will have some practical effect either on the parties or on others. Other factors that may be relevant will include the nature and

[19] National Coalition for Gay and Lesbian Equality v Minister of Home Affairs 2000 (2) SA 1 (CC) at [21] fn 18

[20] Minister of Justice v Estate Stransham-Ford 2017 (3) SA 182 (SCA). The case involved an application to authorize a terminally ill patient's physician to assist in the patient's suicide. The patient had died before the court of first instance heard the application, but the Court was not aware, nor informed, thereof when it granted the applicant relief.

extent of the practical effect that any possible order might have, the importance of the issue, its complexity and the fullness or otherwise of the argument.

[23] The common feature of the cases, where the Constitutional Court has heard matters notwithstanding the fact that the case no longer presented a live issue, was that the order had a practical impact on the future conduct of one or both of the parties to the litigation."

75. In my view, this is the context in which the aforesaid *dictum* in Normandien Farms is to be understood. In that matter the decisions of the court of first instance and the Supreme Court of Appeal were rendered moot when, shortly after an application for leave to appeal to the Constitutional Court was launched, the relevant party withdrew its application for a mining right which had been the subject of the review application at first instance. The Constitutional Court refused to entertain any further appeal as it was of the view that "*an order by this Court in this matter will not have a practical effect."*

76. Mr. Maher could point to no practical effect that an order in this matter might have other than to castigate the City for its constitutional delinquency, as in Merafong. And, as I have said, on the strength of All-Pay, counsel argued further for a just and equitable order under s172 (1)(b) of the Constitution in which this Court sets aside the MAYCO decision without affecting its efficacy. The Court was urged to thus exercise its discretion and remind the City of its duty to conduct itself as a good constitutional citizen and to do what it was statutorily obliged to do.

77. What real purpose would such an order serve? To tell the City that it was wrong and that in future it should do its job properly? I am not sure that that is quite what s172 (1)(b) contemplates. But in any event, it seems to me that, at least as early as September 2019, the City appreciated that a reviewable error had been committed by MAYCO which had so hastily granted the approval sought by the Trust: perhaps because MAYCO's functionaries were biased in favour of the developer, as the affidavit of Mr. Herron could be read to suggest. At that stage the City initially did the right thing and conceded the review. But almost immediately it changed its mind and squirmed its way out of a self-created predicament by

quibbling over the wording of the costs order it had conceded in Mr. Faure's letter of 16 September 2019.

78. In my view the conduct of the City to which the applicant has objected is correctly categorized as lacking in constitutional citizenship in the sense in which that concept was discussed by Cameron J in Merafong. The basis for this criticism of the City's conduct will be dealt with more fully hereunder but it suffices to say that the City's deviation from the norms and standards expected of it under the Constitution can be adequately addressed in an order for costs. In my considered view, the matter does not warrant the granting of an order against the City which will have no practical effect.

79. In the result, I conclude that the application for review is moot in that it raises no live issue between the applicant and the City and that the application thus falls to be dismissed on this basis.

COSTS

80. Ordinarily costs should follow the result. However, an award of costs is always in the discretion of the Court and there are circumstances where, in appropriate cases, a court may exercise that discretion and deprive a successful party of a costs order and even order the successful party to pay the losing party's costs. This is particularly so in circumstances where the conduct of the successful party falls to be deprecated[21]. I consider that in this matter fairness requires that the City should bear part of the applicant's costs on account of the manner in which it conducted itself overall and the resultant costs which the applicant was obliged to incur. I say so for the following reasons.

81. Firstly, the City has expended ratepayers' money in defending a decision which held no benefit for those ratepayers or the public at large - it was only for the benefit of the Trust. In fact the decision might, in a certain sense, be considered to

[21] RAU v Venter's Executor's 1918 AD 482 at 488; Mahomed v Nagdee 1952(1) SA 410 (A) at 420E-421A; Palley v Knight N.O 1961 (4) SA 633 (SR) at 638H-639A; Michael and another v Linksfield Park Clinic (Pty) Ltd and another 2001 (3) SA 1188 (SCA) at [10] – [12]; Pilot Freight (Pty) Ltd v Von Landsberg Trading (Pty) Ltd 2015 (2) SA 550 (GJ) at [76]; De Lille v Democratic Alliance 2018 (4) SA 171(WCC) at [47]

be to the detriment of those members of the public who have Cape Town's heritage spaces at heart and are now saddled with a development which the City's own committee rejected. The City ignored the advice of SPELUM – its own specialist advisory body - and rather than to leave it up to the Trust to defend its rights accrued under the MAYCO decision, the City has actively advanced a case in the interests of the Trust. To date the City has advanced no cognizable reason for MAYCO's rejection of SPELUM's specialist advice nor its decision to grant the application for the development. The MAYCO decision was thus irregular and the applicant was within its rights to seek the review thereof.

82. As I have already observed, the City's conduct in opposing the review was out of the ordinary and was not warranted. Effectively, the Trust was afforded a "free ride" on the back of the ratepayers and this in circumstances where the applicant is a public interest body acting in the public interest by seeking to preserve the heritage of the city's buildings and historic precincts, and which had to rely on its own resources to confront the financial muscle of the City.

83. Further, in opposing the application the City did not put up any evidence by way of affidavits from its officials who had knowledge of the matter. Rather, the City relied on an answering affidavit by its attorney, which affidavit was largely based on hearsay evidence of which Mr. Faure had no personal knowledge. It was only much later (in May 2021), when the applicant took this point, that the City put up the affidavit of Mr. Dlamini in a desperate attempt to shore up the obvious inadequacies in its answering affidavit.

84. Importantly, as the letter of Mr. Faure reflects, the City was prepared to agree that the MAYCO decision be set aside in September 2016 and alleged the Trust's agreement thereto, only to renege on that undertaking a month or so later. And, when it did so, the City relied on grounds that were manifestly false: it told the applicant's attorneys that there was no sense in reviewing the decision as the building work was finished. It is not clear how this deliberate untruth which was designed to mislead the applicant was perpetrated, but at best for the City it must be concluded that it was probably misled by the Trust. And given that the Trust has

decided to abide this application, no costs order can be considered against it in respect of any such misleading allegation.

85. That fact that it may have been misled by the trust does not assist the City in any event. How then does one reconcile the initial allegation by Mr. Faure that the Trust agreed to the review? Did he make an errant assumption that he would be able to persuade the Trust to agree to the review or did the Trust actually mislead the City's attorney by telling him a deliberate lie? The unfortunate demise of the City's attorney leaves this question unresolved as he was unable to file an explanatory affidavit to assist the Court.

86. But there is more. When the allegation was made by Mr. Faure that the work had been completed, the actual extent of the works was readily capable of being established in that the City would have readily had recourse to one of its own to verify the allegation. The City's building inspectors are notorious for their diligence in arriving unannounced at construction sites and stopping unlawful building works, and it would have required no more than a phone call by the City to the building inspector for the area to establish the true state of the affairs. But it did it not do so and offers the Court no explanation for such an obvious oversight.

87. Then there is the issue of the plans. The City would have known, via its office which processes applications for building plans, that these had been approved almost two years before the review was launched. Given that there was correspondence between the parties prior to the launch of the application it would have been prudent for a good constitutional citizen to point out to the applicant that this step had taken place.

88. Yet, when it received the review application, the City failed, as it was duty bound to do, to inform the applicant of the position and of the obstacles which such approval presented for the review of the MAYCO decision. After all, that decision embraced departures from the City's Zoning Scheme Regulations and the plans could not have been passed without such departures having been granted to the Trust. However, the City remained silent when there was an obvious duty on it to speak.

89. Then there is the City's conduct in relation to the PLANAP appeal process. First, the City advised the applicant that it enjoyed a right of appeal to PLANAP against the MAYCO decision. When the appeal went against the applicant and it reviewed the matter, the City initially opposed the review before Cloete J when it should have known that its opposition was baseless. In so doing, it put the applicant to the expense of incurring further costs and the City itself incurred further costs on behalf of its ratepayers which were a complete waste in the circumstances.

90. Then, realising the error in its ways, the City conceded the PLANAP review and tendered to pay the applicant's costs up to the date of that concession. Cloete J's order then mulcted the City with the costs so tendered, but the applicant would still have been left with an attorney-client costs bill which it would have had to foot out of its own resources. A good constitutional citizen would have initiated such a review itself and limited the expenditure of its resources, and that of the applicant, accordingly.

91. The heritage approvals also reflect adversely on the City's duty as a good constitutional citizen. When the review papers in this matter were received the HWC determination had already been made but the City, which was clearly aware thereof as Mr. Dlamini's affidavit shows, did not inform the applicant thereof. So too, when the appeal tribunal upheld the HWC determination in November 2019. In fact, it appears that the decision of this tribunal only came to the attention of the applicant in May 2021 when Mr. Dlamini attached a copy thereof to his supplementary affidavit.

92. On the other hand, it has to be said that the applicant has litigated with a marked degree of tardiness. There are long periods in the progress of the litigation when nothing happened and it took no steps to progress the matter. For instance, the removal of the case from the roll twice in 2021 at the applicant's behest speaks to this.

93. Further, there is the concerning factor that the applicant took no steps to restrict the progress of the building works while these took place in full view of the public and adjacent to busy urban thoroughfares. The applicant appears to have

dropped the ball and it (and the public and those interested in heritage protection in South Africa's oldest city) must bear the consequences thereof: a glass cube that proclaims to all who pass by that the City's approval of the Trust's building favoured development over respect for the heritage of the Melck precinct.

94. Given that the applicant knew by the end May 2021 that it had lost the heritage battle, I am of the view that it should have taken steps to call a truce and bring the proceedings to an end, for by then it ought to have known that the war against the development could not be won. In the circumstances, I am of the view that it should not be entitled to any costs after that date. Given that it is not apparent from the papers when Mr. Dlamini's affidavit was served on the applicant, I am going to assume that the applicant received same shortly after it was deposed to and that it was entitled to a short period of time to assess the contents thereof and consider its positon. I intend to fix the date at 30 June 2021.

95. In the result, I consider that in the peculiar circumstances of the matter, it would fair, just and equitable to order the City to bear the applicant's party and party costs up to 30 June 2021 and that thereafter each party is to bear its own costs of suit.

STRIKING OUT APPLICATION

96. There remains one final issue – the City's application to strike out allegedly vexatious and irrelevant matter in the founding affidavit, filed during November 2020. In light of the fact that the matter is now regarded as moot, no purpose would be served in determining the merits of this application.

ORDER OF COURT

Accordingly it is ordered that:

A. The application is dismissed.

B. No order is made on the first, eighth and ninth respondents' application to strike out.

C. The first respondent, the City of Cape Town, is to pay the applicant's costs of suit herein on the party and party scale up to 30 June 2021.

D. Save as aforesaid, each party is to bear its own costs.

GAMBLE, J

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