CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 104/13

In the matter between:

TREVOR TURNBULL-JACKSON	Applicant
and	
HIBISCUS COAST MUNICIPALITY	First Respondent
PEARL STAR INVESTMENTS 14 CC	Second Respondent
MEMBER OF THE EXECUTIVE COUNCIL FOR AGRICULTURE AND ENVIRONMENTAL AFFAIRS KWAZULU-NATAL	Third Respondent
and	
ETHEKWINI MUNICIPALITY	Amicus Curiae

Neutral citation:	*Turnbull-Jackson v Hibiscus Coast Municipality and Others* [2014] ZACC 24
Coram:	Moseneke ACJ, Skweyiya ADCJ, Cameron J, Dambuza AJ, Froneman J, Jafta J, Khampepe J, Madlanga J, Majiedt AJ, Van der Westhuizen J and Zondo J
Heard on:	4 February 2014
Decided on:	11 September 2014

ORDER

On appeal from the KwaZulu-Natal High Court, Pietermaritzburg (Sishi J):

1. The late filing of the record and written submissions by the applicant is condoned.
2. Leave to appeal is granted.
3. The appeal is dismissed.
4. The applicant must pay the second respondent's costs in this Court.

JUDGMENT

MADLANGA J (Moseneke ACJ, Skweyiya ADCJ, Dambuza AJ, Jafta J, Khampepe J, Majiedt AJ and Zondo J concurring):

Introduction

[1] Not infrequently, applications for approval of building plans by municipalities give rise to legal disputes. This matter, which is characterised by unwelcome longevity, concerns that very subject.[1] Aggrieved by a decision of the Hibiscus Coast Municipality[2] (Municipality) to approve building plans submitted by Pearl Star Investments 14 CC[3] (Pearl Star), Mr Turnbull-Jackson[4] sought an order for the review

[1] The events around which this litigation centres commenced more than a decade ago.

[2] The first respondent.

[3] The second respondent.

[4] The applicant.

and setting aside of the approval.[5] His application was dismissed with costs by Sishi J in the KwaZulu-Natal High Court, Pietermaritzburg (High Court).[6] With his application for leave to appeal having been unsuccessful in both the High Court and Supreme Court of Appeal, he now brings this application for leave to appeal against the judgment of the High Court.

Building approval process and the regulatory matrix

[2] Before setting out the facts, it is important to lay out the building plan approval process as well as the applicable regulatory matrix. The National Building Regulations and Building Standards Act[7] was promulgated to provide for uniformity in the law relating to the erection of buildings within municipal areas.[8]

[3] The starting point is section 4. With the exception of exemptions provided for in the Act,[9] this section proscribes the erection of buildings without the prior approval of building plans.[10] In terms of section 5 it is obligatory for every local authority to appoint a building control officer. This functionary has extensive powers that relate to

[5] The applicant is the registered owner of property described as the remainder of Lot 75 Ramsgate situated at the South Coast in KwaZulu-Natal. The applicant's property has a common boundary with a property described as Lot 3371 owned by Pearl Star. The applicant's property overlooks Lot 3371, with a 180 degree sea view of the Indian Ocean. Both properties are residential. However, Lot 75 is zoned for use as a guest lodge.

[6] Because of concurrent jurisdiction, sometimes litigation between the parties would be in the KwaZulu-Natal High Court, Pietermaritzburg and at other times in the KwaZulu-Natal High Court, Durban. For convenience, hereafter I use "High Court" without drawing any distinction between the two Courts.

[7] 103 of 1977 (Building Standards Act or Act).

[8] Id, long title.

[9] In terms of section 13 minor building work may be exempted from the obligation of submitting plans for approval.

[10] Section 4(1). Section 4(4) criminalises non-compliance.

the process of approving plans and inspection of construction works post approval.[11] Inspections are conducted to ensure that building standards and materials comply with the Building Standards Act.[12] Section 6 of the Act stipulates that the building control officer must make recommendations to the local authority regarding applications for approval submitted in terms of section 4.[13]

[4] The approval process itself is governed by section 7. This section requires to be quoted extensively because much turns on its provisions:

> "(1) If a local authority, having considered a recommendation referred to in section 6(1)(a)—
>
> (a) is satisfied that the application in question complies with the requirements of this Act and any other applicable law, it shall grant its approval in respect thereof;
>
> (b) (i) is not so satisfied; or
>
> (ii) is satisfied that the building to which the application in question relates—

[11] See section 6, titled "Functions of building control officers". Section 15(1) empowers the building control officer to enter any building or land for purposes of the proper performance of his or her functions. Section 15(2) criminalises the obstruction or hindrance of a building control officer in the exercise of this power.

[12] Section 17(1)(b) and (7).

[13] Section 6(1) provides:

> "A building control officer shall—
>
> (a) make recommendations to the local authority in question, regarding any plans, specifications, documents and information submitted to such local authority in accordance with section 4(3);
>
> (b) ensure that any instruction given in terms of this Act by the local authority in question be carried out;
>
> (c) inspect the erection of a building, and any activities or matters connected therewith, in respect of which approval referred to in section 4(1) was granted;
>
> (d) report to the local authority in question, regarding non-compliance with any condition on which approval referred to in section 4(1) was granted."

(aa) is to be erected in such manner or will be of such nature or appearance that—

(aaa) the area in which it is to be erected will probably or in fact be disfigured thereby;

(bbb) it will probably or in fact be unsightly or objectionable;

(ccc) it will probably or in fact derogate from the value of adjoining or neighbouring properties;

(bb) will probably or in fact be dangerous to life or property,

such local authority shall refuse to grant its approval in respect thereof and give written reasons for such refusal".[14]

[5] Another important provision is section 10, which enables the local authority to take action where it considers any building to be objectionable. It reads:

"(1) If any building or earthwork—

(a) in the opinion of the local authority in question is being or is to be erected in such manner that it—

(i) will not be in the interest of good health or hygiene;

(ii) will be unsightly or objectionable;

(iii) will probably or in fact be a nuisance to the occupiers of adjoining or neighbouring properties;

(iv) will probably or in fact derogate from the value of adjoining or neighbouring properties;

(b) is being or is to be erected on a site which is subject to flooding or on a site which or any portion of which in the opinion of the local

[14] For ease of reference I refer to the factors in (aaa), (bbb), (ccc) and (bb) as "disqualifying factors".

> authority in question does not drain properly or is filled up or covered with refuse or material impregnated with matter liable to decomposition,
>
> such local authority may by notice in writing, served by post or delivered, prohibit the person erecting such building or earthwork or causing such building or earthwork to be erected from commencing or proceeding with the erection thereof or from so commencing or proceeding except on such conditions as such local authority may determine from time to time.
>
> (2) Any person who fails to comply with any provision of a notice or condition referred to in subsection (1) shall be guilty of an offence".

[6] Also of relevance and application to the applicant's case is the Margate Transitional Local Council Town Planning Scheme (Planning Scheme). The provisions of the Planning Scheme help shed light on some of the applicant's challenges to the approval of Pearl Star's plans. The Planning Scheme was promulgated in terms of the KwaZulu-Natal Town Planning Ordinance.[15] The purpose of the Planning Scheme is to promote the coordinated and harmonious development of the Margate Transitional Local Council[16] area in such a way as will most effectively tend to promote health, safety, order, amenity convenience and general welfare, as well as efficiency and economy in the process of development, and the improvement of communications.[17] Any proposal or application to develop or use land and/or buildings within a local authority area must have regard to the provisions of the Planning Scheme.[18]

[15] 27 of 1949.

[16] Now the Hibiscus Coast Municipality.

[17] Planning Scheme at clause 1.2.

[18] Id at clause 1.7.

[7] The provisions relevant to this case relate to: zoning; what constitutes a basement and related issues; and the regulation of the use of side spaces. In terms of zoning, clause 3.1.2 states that a land use zone is a portion of land located within the local authority area in terms of which certain uses of land, buildings and structures are imposed and regulations pertaining to their use and development specified. Clause 4.2.6 provides that in the Margate section of the Planning Scheme buildings are permitted to have a height of six storeys, except certain specified lots where height is restricted to two storeys. The Planning Scheme permits six-storey developments on general residential land use zones without any form of special consent or other permission.[19] If a proposed development on this type of zone consists of more than three storeys, the building must be recessed away from the normal building lines and side spaces on the lot by a specified distance for each additional storey.[20] This must be meant to lessen the intrusive effects of overlooking.

[8] The Planning Scheme defines a basement in clause 2.20. It is the "lowest part of any structure where such part is constructed with a basement ceiling level not more than one metre above the lesser of either the finished ground level or the natural ground level immediately surrounding the building, at any point (excluding entrance and exit ramps)". Further, clause 2.160 in relevant part defines a storey as—

> "a room or set of rooms at any level, including any room the floor of which is split into two or more levels, and shall have the following implications:

[19] Id at Table 1a read with clause 4.2.6.

[20] Id.

(a) any basement not used for residential or work place purposes but used solely for the purpose of parking vehicles, service installations, such as transformer and metre rooms, or storage shall not count as a storey for the purpose of calculating permissible height provided such an area or areas constitutes a basement in terms this Scheme".

[9] Regarding side space regulation, the Planning Scheme imposes the following restrictions:

"9.2 Side and rear space

(i) Except as otherwise stated no building shall be erected nearer than 2.5 metres to any side or rear boundary.

. . .

(iv) The Local Authority may, by special consent, permit in any zone any building to be erected closer to any boundary than the distances specified in this clause if on account of the siting of existing buildings or the shape, size or levels of the lot, the enforcement of this clause will, in the opinion of the Local Authority, render the development of the lot unreasonably difficult. In considering any application under this sub-clause the Local Authority shall have due regard to any possible detrimental effect on adjoining properties.

(v) Notwithstanding the aforegoing provisions, the Local Authority may, if special circumstances exist, exempt an applicant from applying for special consent if it is satisfied that no interference with the amenities of the neighbourhood, existing, or as contemplated by this scheme, will result; provided that the prior written consent of the registered owner of each adjoining property, and such other properties as the Town Clerk may direct, has first been obtained. Where any such written consent is not forthcoming, the applicant shall, in seeking the relaxations, be required to apply for the Local Authority's Special Consent."

Factual background

[10] The history is long and perplexing. During late 2003 Pearl Star submitted plans to the Municipality to construct a six-storey apartment block on its property.[21] In February 2004 the Municipality, acting through its employee, Mr Van der Walt,[22] approved Pearl Star's building plans (2004 approval). This approval was set aside by the Municipality's Appeal Board (Appeal Board) at the instance of the applicant, who lodged an appeal against the approval.[23]

[11] In 2005 Pearl Star submitted revised plans (2005 plans) to erect two apartment blocks, each comprising three storeys and a basement. The Municipality approved Pearl Star's revised plans (2005 approval). Yet again, the applicant appealed against this approval under the Systems Act on the grounds, amongst others, that—

(a) whereas the plans designated the lowest levels of the buildings as "basements", each of which should not count as a storey for planning purposes,[24] this designation was erroneous as the proposed basements

[21] The regulatory matrix at [7] shows that the Planning Scheme allows the construction of buildings up to six storeys high (see clause 4.26). Buildings over three storeys must be recessed away from the normal side spaces by a specified distance for each additional storey, subject to relaxation or special consent. See Table 1a of the Planning Scheme.

[22] Mr Van der Walt is the Municipal Director for Development and Planning. He was the decision-maker in respect of all plans submitted for approval by Pearl Star. Unlike the building control officer, a decision-maker is not specifically provided for in the Building Standards Act. Rather, he or she is an official to whom the municipal power to take decisions on applications for approval of building plans is delegated by a municipality; and this delegation is made in terms of section 28(4) of the Building Standards Act.

[23] The applicant launched an appeal in terms of section 62(1) of the Local Government: Municipal Systems Act 32 of 2000 (Systems Act). Section 62(1) provides:

> "A person whose rights are affected by a decision taken by a political structure, political office bearer, councillor or staff member of a municipality in terms of a power or duty delegated or sub-delegated by a delegating authority to the political structure, political office bearer, councillor or staff member, may appeal against that decision by giving written notice of the appeal and reasons to the municipal manager within 21 days of the date of the notification of the decision."

[24] For the definitions of basement and storey, see [8].

did not meet the requisite test; and thus the proposed buildings in fact exceeded the three-storey limit beyond which there were certain requirements on how far each storey beyond the limit should be recessed from the normal building line and side spaces;[25]

(b) the proposed development encroached into the side spaces and no special consent had been obtained for this encroachment;[26] and

(c) erecting the apartment blocks would substantially reduce the market value of the applicant's property, and indeed of the entire neighbourhood; and be unsightly and affect the views as well as the applicant's privacy.[27]

[12] The 2005 approval was also set aside by the Appeal Board on the basis of (b). The Municipality saw no need to consider the other grounds of appeal.

[13] After the 2004 approval, construction had commenced. The applicant's reaction was to launch urgent proceedings in the High Court to interdict continued construction. The applicant also sought a declarator that the lowest levels on the 2005 plans did not constitute "basements" for purposes of the Planning Scheme. The litigation was adjourned *sine die* (indefinitely) on the understanding between the applicant and Pearl Star that further affidavits would need to be filed to resolve the basement issue.

[25] See [7].

[26] See clause 9.2 of the Planning Scheme quoted at [9].

[27] The applicant had furnished Mr Van der Walt and Pearl Star with an opinion from a property valuer that construction of the proposed blocks of flats would diminish the value of his property by 20 to 30 per cent.

[14] By agreement Pearl Star ceased construction. The applicant asserts that Pearl Star undertook that it would not lodge any fresh plans with the Municipality until the "basement issue" had been determined by the High Court. The Municipality refused to be party to this agreement. The agreement notwithstanding, in 2006 Pearl Star lodged another set of plans (2006 plans), again for the construction of two apartment blocks of three storeys each. The plans were approved by Mr Van der Walt in February 2007 (2007 approval). This time an appeal to the Appeal Board was unsuccessful.

[15] The applicant approached the High Court to review and set aside the decision of the Appeal Board. The High Court held that, on the authority of *Walele*[28] and *Reader*,[29] he had no standing to lodge an appeal in terms of section 62 of the Systems Act.[30] This rendered his appeal of no force and effect. However, in line with *Oudekraal*,[31] the High Court saw it fit to set aside the Appeal Board's decision to refuse the applicant's appeal; this in order to avert any possible confusion about the continuing effect of the decision. With the leave of the High Court the applicant

[28] *Walele v City of Cape Town and Others* [2008] ZACC 11; 2008 (6) SA 129 (CC); 2008 (11) BCLR 1067 (CC) (*Walele*) at para 19.

[29] *City of Cape Town v Reader and Others* [2008] ZASCA 130; 2009 (1) SA 555 (SCA) (*Reader*) at paras 30-1.

[30] Above n 23.

[31] *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* [2004] ZASCA 48; 2004 (6) SA 222 (SCA) (*Oudekraal*) at para 26. The Supreme Court of Appeal held:

> "Until the Administrator's approval (and thus also the consequences of the approval) is set aside by a court in proceedings for judicial review it exists in fact and it has legal consequences that cannot simply be overlooked. The proper functioning of a modern State would be considerably compromised if all administrative acts could be given effect to or ignored depending upon the view the subject takes of the validity of the act in question. No doubt it is for this reason that our law has always recognised that even an unlawful administrative act is capable of producing legally valid consequences for so long as the unlawful act is not set aside."

launched fresh proceedings for a review of the 2007 approval.[32] Furthermore, in this litigation the applicant alleged the existence of an improper and corrupt relationship between members of Pearl Star and Mr Van der Walt. The multi-pronged review application was unsuccessful. It is against the judgment in those proceedings that the applicant appeals to us.[33]

In this Court

[16] Before us, the applicant: complains of bias against Mr Van der Walt; argues that the 2007 approval was based on personal knowledge and information possessed by Mr Van der Walt and not contained in the rule 53 record; asserts that, in making the 2007 approval whilst the basement issue raised in the 2005 High Court review application – an application that remains adjourned *sine die* – was yet to be resolved, the Municipality usurped the power of the High Court to determine that issue; contends that what the building control officer furnished to the decision-maker purportedly in terms of section 6 of the Building Standards Act fell short of the recommendation envisaged in that section; and submits that the level of compliance with section 7(1)(b)(ii) of the Building Standards Act set out in *Walele* was not met. Therefore, contends the applicant, the 2007 approval ought not to have been made. These, plus the questions whether condonation for the late filing of the record and

[32] At the hearing of the application to review the decision to refuse the appeal counsel for the Municipality told the High Court that, because all the parties were under the mistaken belief that it was open to the applicant to appeal, the Municipality would not take the point that proceedings for the review of the decision to approve the 2006 plans were out of time. It was in this context that the High Court granted the applicant leave to launch proceedings for the review of the 2007 approval.

[33] An application to the Supreme Court of Appeal for leave to appeal was unsuccessful.

written submissions by the applicant and whether leave to appeal should be granted, make up the sum total of issues to be determined by us.

Leave to appeal

[17] What the applicant raised as constitutional issues has been pleaded rather inelegantly.[34] But for the issue on the interpretation of section 7(1)(b)(ii) of the Building Standards Act,[35] the application for leave to appeal would have been stillborn. I demonstrate why this is so when I deal with the issues. That leaves only the issue of compliance with section 7(1)(b)(ii), a matter on which the interpretation of the section is key. It is on this that the question whether leave to appeal should be granted hinges.

[18] At the centre of this issue is a juristic controversy arising from a holding by the Supreme Court of Appeal in *True Motives*[36] that the interpretation of

[34] Rendering them as intelligibly as possible, they are the issue of bias (see section 6(2)(a)(iii) of the Promotion of Administrative Justice Act 3 of 2000 (PAJA)); the usurpation argument which, in a sense, seems to raise a *vires* (power) issue; and a challenge – apparently based on PAJA – questioning the 2007 approval perceived to have been granted contrary to the provisions of applicable law (see section 6(2)(f)(i) of PAJA). Section 6(2)(a)(iii) and (f)(i) of PAJA provides:

> "(2) A court or tribunal has the power to judicially review an administrative action if—
>
> (a) the administrator who took it—
>
> . . .
>
> (iii) was biased or reasonably suspected of bias;
>
> . . .
>
> (f) the action itself—
>
> (i) contravenes a law or is not authorised by the empowering provision".

[35] Quoted in full at [4].

[36] *True Motives 84 (Pty) Ltd v Mahdi and Another* [2009] ZASCA 4; 2009 (4) SA 153 (SCA); 2009 (7) BCLR 712 (SCA) (*True Motives*) at para 35.

section 7(1)(b)(ii) of the Building Standards Act adopted by this Court in *Walele*[37] was *obiter*, wrong and ought not to be followed.[38] In essence the applicant advances an argument that section 7(1)(b)(ii) must be interpreted in a manner that is consonant with section 39(2) of the Constitution;[39] this being what greatly influenced this Court's interpretation in *Walele*. The contention is that the Supreme Court of Appeal's interpretation of the section in *True Motives* is at odds with what section 39(2) decrees. The Municipality contends for the *True Motives* interpretation. An argument that the one interpretation promotes the spirit, purport and objects of the Bill of Rights and the other does not, raises a constitutional issue. It is about an injunction by the Constitution itself to all courts engaged in statutory interpretation. And section 7(1) of the Building Standards Act "concerns the exercise of an important public power, and the interpretation of that section plainly raises matters of constitutional import".[40]

[19] Is it in the interests of justice to grant leave? Countrywide local authorities receive applications for approval of building plans in their thousands.[41] Determinations of applications in terms of section 7(1)(b)(ii) of the Building Standards Act must be taking place virtually on a daily basis. It is manifest that clarity on an issue so central to the proper exercise of this approval power is

[37] Above n 28.

[38] The interpretation of this section by this Court and the Supreme Court of Appeal is dealt with later.

[39] Section 39(2) of the Constitution provides that "[w]hen interpreting any legislation . . . every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights."

[40] *Camps Bay Ratepayers' and Residents' Association and Another v Harrison and Another* [2010] ZACC 19; 2011 (4) SA 42 (CC); 2011 (2) BCLR 121 (CC) (*Camps Bay Ratepayers*) at para 27.

[41] I make a deduction from evidence – in *True Motives* above n 36 at para 45 – which revealed that the City of Johannesburg alone received 1 500 new applications per month in 2004.

necessary.[42] I am persuaded that it is in the interests of justice to grant leave to appeal.

[20] Before dealing with this interpretive issue, let me first deal with the others.

Condonation

[21] The applicant filed both the record and his written submissions out of time.[43] He seeks condonation. The application for condonation of the late filing of the record was not opposed. The explanation for the delay is satisfactory. I need say nothing more in that regard. Pearl Star indicated – in writing – that it had suffered no prejudice. On balance,[44] I am of the view that the late filing of the record must be condoned.

[22] The applicant's counsel takes the blame for the late lodgment of written submissions. She told the Court that she forgot to diarise the due date and was only reminded – after the fact – when the applicant asked for a copy. The Municipality opposed this application asserting that it had suffered prejudice. It pointed out that it had to file its argument without the benefit of seeing the applicant's. The upshot was that the Municipality's argument did not address that of the applicant. In particular,

[42] In *Camps Bay Ratepayers* above n 40 at para 27 this Court said that "the difference in interpretation attributed to section 7(1)(b)(ii) by this Court, on the one hand, and the Supreme Court of Appeal, on the other, could very well give rise to uncertainty and inconsistency in the application of an important regulatory provision at the level of local government" and that "[t]his could hardly promote sound and uniform public administration."

[43] In terms of this Court's directions, the applicant was required to file the record not later than 29 October 2013 and to lodge written argument by 12 November 2013. The record was filed on 7 November 2013. The written submissions were filed on 25 November 2013, a day before the respondents' written submissions were due to be filed.

[44] See relevant factors itemised at [23].

the Municipality was in the dark as to the exact nature of the constitutional issue the applicant was relying on.

[23] In this Court the test for determining whether condonation should be granted or refused is the interests of justice. Factors that the Court weighs in that enquiry include: the length of the delay; the explanation for, or cause of, the delay; the prospects of success for the party seeking condonation; the importance of the issues that the matter raises; the prejudice to the other party or parties; and the effect of the delay on the administration of justice.[45] It should be noted that although the existence of prospects of success in favour of the party seeking condonation is not decisive, it is a weighty factor in favour of granting condonation.[46]

[24] This Court has in the past cautioned against non-compliance with its rules and directions. The words of Bosielo AJ bear repetition:

> "I need to remind practitioners and litigants that the rules and courts' directions serve a necessary purpose. Their primary aim is to ensure that the business of our courts is run effectively and efficiently. Invariably this will lead to the orderly management of our courts' rolls, which in turn will bring about the expeditious disposal of cases in the most cost-effective manner. This is particularly important given the ever-increasing costs of litigation, which if left unchecked will make access to justice too expensive."[47]

[45] *Van Wyk v Unitas Hospital and Another* [2007] ZACC 24; 2008 (2) SA 472 (CC); 2008 (4) BCLR 442 (CC) at para 20 and *Brummer v Gorfil Brothers Investments (Pty) Ltd and Others* [2000] ZACC 3; 2000 (2) SA 837 (CC); 2000 (5) BCLR 465 (CC) (*Brummer*) at para 3.

[46] *Brummer* id.

[47] *Grootboom v National Prosecuting Authority and Another* [2013] ZACC 37; 2014 (2) SA 68 (CC); 2014 (1) BCLR 65 (CC) at para 32.

[25] The explanation given by the applicant's counsel is unsatisfactory. Where non-compliance with the rules or directions is as a result of the fault of a litigant's legal representative, certain considerations come into the equation. Before I deal with them, let me emphasise that an application for condonation is not a mere formality.[48] This is true whether it is the litigant, the legal representative or both who are at fault. The test remains the same: is it in the interests of justice to grant condonation?

[26] Courts are reluctant to penalise litigants for the tardiness of their legal representatives.[49] I do not read this Court's pronouncement in *Ferris* to say that this long-standing principle no longer avails.[50] It is more a question of what the facts of a given case dictate. Courts have made it clear though that in a fitting case the fault of a legal representative will be imputed to the litigant. In the oft-cited decision in *Saloojee* the Appellate Division said:

> "There is a limit beyond which a litigant cannot escape the results of his attorney's lack of diligence or the insufficiency of the explanation tendered. To hold otherwise might have a disastrous effect upon the observance of the Rules of this Court. . . . The attorney, after all, is the representative whom the litigant has chosen for himself, and there is little reason why, in regard to condonation of failure to comply with a Rule of Court, the litigant should be absolved from the normal consequences of such a relationship".[51]

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[48] Id at para 23 and *Saloojee and Another, NNO v Minister of Community Development* 1965 (2) SA 135 (A) at 138E.

[49] *Saloojee* id at 140H-141B. See also *Reinecke v Incorporated General Insurances Ltd* 1974 (2) SA 84 (A) at 92F where the Appellate Division held that "[t]his Court is understandably loath to penalise a blameless litigant on account of his attorney's negligence".

[50] *Ferris and Another v Firstrand Bank Limited and Another* [2013] ZACC 46; 2014 (3) SA 39 (CC), 2014 (3) BCLR 321 (CC) at para 11. There the applicants "blame[d] their late filing of the application on their correspondent attorney", this Court said that "this explanation is less than satisfactory."

[51] *Saloojee* above n 48 at 141C-E. See also *Universal Product Network (Pty) Ltd v Mabaso and Others* [2003] ZALC 12; (2006) 27 ILJ 991 (LAC) at para 18.

[27] In this instance, soon after the written submissions ought to have been filed, the applicant requested a copy. It was this request that galvanised counsel into action. If anything, the applicant was vigilant. Counsel's unsatisfactory explanation cannot be imputed to him.

[28] The prejudice that the Municipality suffered was not incurable. Although its written submissions did not address the contentions raised in the applicant's written argument, it had ample time to prepare for and be in a position to address these contentions in oral argument. Indeed, I did not understand the Municipality to suggest otherwise. Also, it could have sought leave to file further written submissions in response.

[29] Upon a consideration of the relevant factors, condonation of the late filing of the written argument must also be granted.

Bias

[30] The Constitution guarantees everyone the right to administrative action that is procedurally fair.[52] Section 6(2)(a)(iii) of PAJA, which is legislation enacted in terms of section 33(3) of the Constitution to give effect to, *inter alia*, the right contained in section 33(1) of the Constitution, makes administrative action taken by an administrator who was "biased or reasonably suspected of bias" susceptible to review.

[52] Section 33(1) of the Constitution provides that "[e]veryone has the right to administrative action that is lawful, reasonable and procedurally fair."

Whether an administrator was biased is a question of fact. On the other hand, a reasonable suspicion of bias is tested against the perception of a reasonable, objective and informed person.[53] To substantiate, borrowing from *S v Roberts*:[54]

(a) There must be a suspicion that the administrator might – not would – be biased.

(b) The suspicion must be that of a reasonable person in the position of the person affected.

(c) The suspicion must be based on reasonable grounds.

(d) The suspicion must be one which the reasonable person would – not might – have.

[31] The applicant bears the onus to prove its charge against Mr Van der Walt.[55] He relies on a number of grounds for his claim. The first is rather peculiar. Counsel for the applicant gives it the tag "reactive bias". It is articulated thus. Throughout Mr Van der Walt's involvement in the approval process, the applicant has levelled insults at him that were calculated to impugn his integrity. He accused him of bias, corruption and incompetence. From this, the applicant sought to convince this Court that the natural human reaction to repeated insults of this nature is to be biased against the person hurling them.[56] And, because the applicant insulted Mr Van der Walt

[53] *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* [1999] ZACC 9; 1999 (4) SA 147 (CC); 1999 (7) BCLR 725 (CC) (*SARFU*) at para 45. Although this was said in respect of complaints against judges, it is apposite in the context of administrators as well.

[54] *S v Roberts* 1999 (4) SA 915 (SCA) at paras 32-4. This case too concerned a claim of bias against a judicial officer. Yet again, I find the test suitable to administrators.

[55] *De Lacy and Another v South African Post Office* [2011] ZACC 17; 2011 (9) BCLR 905 (CC) (*De Lacy*) at paras 67 and 72.

[56] I understand this to be a suggestion of actual, albeit "reactive", bias.

beyond some threshold, the exact location of which I have no idea, it is reasonable to believe that Mr Van der Walt was not impartial.[57] The conclusion is that Mr Van der Walt ought to have recused himself as the decision-maker. That he did not do so vitiates the 2007 approval.

[32] This would be the easiest stratagem for the unscrupulous to get rid of unwanted decision-makers: if I insult you enough – whatever enough may be – you are out. This is without substance. It proceeds from an assumption that officials with decision-making power would respond the same way to insults. It ignores the following: the training of the officials; their experience; possibly even their exposure to abuse and insults – from time to time – and the development of coping skills; and other personal attributes, all of which may render them impervious to, or tolerant of, insults. A finding of bias cannot be had for the asking. There must be proof; and it is the person asserting the existence of bias who must tender the proof.[58] The applicant has failed dismally in discharging the onus on the so-called reactive bias.

[33] The applicant's second basis for bias is this. He submits that the fact that Mr Van der Walt was undeterred in continuing to grant the approvals, despite the upsets by the Appeal Board,[59] is an indication of his bias in favour of Pearl Star. This disregards the fact that on each occasion the plans had been materially revised and were different at each stage of approval. Therefore, Mr Van der Walt did not persist

[57] This, of course, being a reliance on "reactive" perceived bias.

[58] *De Lacy* above n 55 at para 72 and *SARFU* above n 53 at para 48.

[59] See [10]-[15].

in approving the exact same plans that had failed previously. In any event, Mr Van der Walt was closely acquainted with the history of the plans, the applicant's previous complaints against the plans and Pearl Star's attempts at making the plans legally compliant. This made Mr Van der Walt better placed to make an informed decision on the revised plans. Also, knowing all the history, he was more likely to be expeditious in the execution of the task.

[34] These are the main bases of complaint. The applicant raises a number of others. They are so baseless as to warrant rejection out of hand and need not unduly burden this judgment.[60]

[35] Before I conclude, I am moved to caution against wanton, gratuitous allegations of bias – actual or perceived – against public officials. Allegations of bias, the antithesis of fairness, are serious. If made with a sufficient degree of regularity, they have the potential to be deleterious to the confidence reposed by the public in administrators. The reactive bias claim stems from unsubstantiated allegations of corruption and incompetence. These are serious allegations, especially the one of corruption. Yes, if public officials are corrupt, they must be exposed for what they

[60] Here are the additional bases. First, the applicant contended that the decisions arrived at by Mr Van der Walt to approve the building plans were so wrong that he had to have been biased to make them. Second, it so happened that the Municipality had made a patent error in its affidavits regarding who had approved the 2006 plans. The affidavits initially said it was a Mr Naidoo who had made the approval (the 2007 approval). The reality was that Mr Van der Walt had made the approval. The Municipality corrected this error by means of evidence on affidavit. The applicant claimed that this evinced an "intent to cover up" on the part of the Municipality which, in context, supported the contention that Mr Van der Walt was biased against the applicant. Third, bias can be grounded on Mr Van der Walt allegedly entertaining a visit from Pearl Star to nullify concerns that an updated environmental report was necessary for purposes of the revised 2006 plans. Fourth, the applicant contended that the existing structure was not taken into account for purposes of determining the plan submission fee; thus the fact that Pearl Star was charged a plan submission fee that was less than what it ought to have paid is an apparent indication of a favourable disposition towards Pearl Star. What substantiation there is of these claims to demonstrate bias is baseless. As I say, all must fail.

are: an unwelcome, cancerous scourge in the public administration.[61] But accusations of corruption against the innocent may visit them with the most debilitating public opprobrium. Gratuitous claims of bias like the present are deserving of the strongest possible censure.

Approval on personal knowledge and information

[36] The applicant complains that when making the 2007 approval, the decision-maker had regard to information not contained in the rule 53 record.[62] As it turns out, the information complained of is undocumented knowledge Mr Van der Walt has as a result of his familiarity with the subject matter. The applicant argues that reliance on this information undermines transparency, accountability and integrity of any verification process; and that this is inconsonant with just administrative decision-making.

[61] In *Glenister v President of the Republic of South Africa and Others* [2011] ZACC 6; 2011 (3) SA 347 (CC); 2011 (7) BCLR 651 (CC) at para 57, this Court stated:

> "Corruption has become a scourge in our country and it poses a real danger to our developing democracy. It undermines the ability of the government to meet its commitment to fight poverty and to deliver on other social and economic rights guaranteed in our Bill of Rights."

[62] The rule 53 record contained documents the decision-maker considered to pass or fail the building plans. It was produced in terms of rule 53 of the Uniform Rules of Court by the Municipality in the review proceedings that are the subject of this appeal. In relevant part, rule 53(1)(b) provides:

> "Save where any law otherwise provides, all proceedings to bring under review the decision or proceedings of any inferior court and of any tribunal, board or officer performing judicial, quasi-judicial or administrative functions shall be by way of notice of motion directed and delivered by the party seeking to review such decision or proceedings to the magistrate, presiding officer or chairman of the court, tribunal or board or to the officer, as the case may be, and to all other parties affected . . . calling upon the magistrate, presiding officer, chairman or officer, as the case may be, to despatch, within fifteen days after receipt of the notice of motion, to the registrar the record of such proceedings sought to be corrected or set aside, together with such reasons as he is by law required or desires to give or make, and to notify the applicant that he has done so."

[37] Undeniably, a rule 53 record is an invaluable tool in the review process. It may help: shed light on what happened and why; give a lie to unfounded *ex post facto* (after the fact) justification of the decision under review; in the substantiation of as yet not fully substantiated grounds of review; in giving support to the decision-maker's stance; and in the performance of the reviewing court's function. But it is absurd to suggest that a decision-maker must wipe her mind clean of all knowledge of, and experience in, the subject matter. Just how does one do that; and for what rational purpose? The very decision by the local authority to appoint the decision-maker would invariably have been informed by her knowledge and experience. Not surprisingly, both *Camps Bay Ratepayers*[63] and *True Motives*[64] accept that a decision-maker is required to rely on personal knowledge and experience to make an informed decision. That can only enhance the decision-making process. This is as true of other decision-makers as it is of Mr Van der Walt. The applicant's contention falls to be rejected.

[38] Lest I be misunderstood, in certain instances fairness may dictate that, where the knowledge of an administrative functionary is likely to play a crucial role in the decision to be taken, the functionary may have to request comment on it from the affected person before taking the decision. It is not necessary to indicate what those circumstances may be. The instant matter proceeded on the basis that – on the authority of *Walele* – the applicant was not entitled to any hearing at all before approval by the decision-maker.

[63] Above n 40 at para 34.

[64] Above n 36 at para 31.

Usurpation of High Court's role

[39] To recapitulate, the 2005 High Court application was never determined. Instead it was postponed *sine die*. What was at issue in it included the question whether the lower level of the proposed development was in fact a basement. The essence of the applicant's usurpation contention is that, because the basement issue raised in that application was never resolved, it remained pending for resolution by the High Court. In making the 2007 approval in respect of plans that also had a "basements" the Municipality usurped the High Court's power to decide the basement dispute.[65] This is a curious argument. Once Pearl Star was intent on having new plans approved and developing its property in accordance with them, anything relating to the earlier plans would effectively have become moot.

[40] In the High Court, Mr Van der Walt deposed to an affidavit averring that the 2005 and 2006 plans were materially different. The High Court accepted this. It dealt with the issue extensively – and correctly:

(a) In the 2006 plans "[t]he encroachment into the side space next to block 'A' had been moved. This was the feature of the 2005 plans that had led to the approval being overturned on appeal".[66]

(b) "The section to the front of block 'A' is now an open porch and so excluded from calculations to determine whether the lowest level was a basement."[67]

[65] See [16].

[66] High Court judgment at para 69.

(c) "Block 'B' was moved 12 metres down the slope, significantly impacting the basement calculation and the issue of the view."[68]

[41] In any event, the High Court's power had not been usurped as the applicant was at liberty to set down the 2005 application, although that course would have been foolhardy in the face of the 2006 plans. It would most likely have been successfully met with the defence of mootness.

Sufficiency of recommendation

[42] A recommendation by a building control officer to a municipality in terms of section 6 of the Building Standards Act is a necessary jurisdictional fact for the proper exercise of power in terms of section 7(1) of that Act.[69] The applicant submits that, based on *Walele*, what was furnished to the decision-maker was not a recommendation at all. In *Walele* Jafta AJ stated: the recommendation "is the proper means by which information on disqualifying factors can be placed before the decision-maker";[70] "[t]he Building Control Officers must ensure that adequate information is placed before decision-makers so that they can consider applications for approval of building plans properly and in a balanced way";[71] "[t]he recommendations they make must serve this purpose";[72] the document containing the

[67] Id.

[68] Id.

[69] *Camps Bay Ratepayers* above n 40 at paras 14 and 34 and *Walele* above n 28 at paras 66, 70 and 72.

[70] *Walele* id at para 71.

[71] Id at para 72.

[72] Id.

recommendation must provide the municipality with sufficient information so that the ultimate decision-maker can "assess and be satisfied of [the section 7(1)] issues himself or herself";[73] and the building control officer's recommendation is the municipality's "primary source of information".[74] In short, absent adequate information in recommendations, there can be no proper consideration of applications in terms of section 7(1). Is there substance in the applicant's complaint?

[43] The recommendation to Mr Van der Walt was set out in an internal pro-forma document which had a list of items to which the building control officer was required to apply his mind. The applicant contends that the pro-forma is partly factually incorrect, internally contradictory and in part meaningless and confusing. He cites the example of the item that says "neighbour's consent – sect 7 view", against which is a tick. He asserts that his consent was neither sought nor obtained and yet, by means of the tick, the recommendation appears positively to suggest the contrary. Another example is a tick against "[t]itle deeds not attached". Does the tick mean it is in order if the title deeds are not attached? Were they not attached; or were they in fact attached? It is not clear. Inexplicably, the document also says "[p]lease be advised that your plans have *not* been approved for one or more of the following" reasons (emphasis added), whereas it contains a stamp recommending that the plans be approved. At first glance, there does appear to be substance in the applicant's complaints: on the whole, and without the proper context, the document is incomprehensible.

[73] Id at para 69.

[74] Id at para 70.

[44] The Municipality's affidavits gave an adequate explanation. The building control officer checks the plans against each of the items listed on the pro-forma. A tick in the relevant space on the form denotes that the item concerned is in order. One that is not in order is marked with a cross. I understand the evidence to mean that one should not attempt to make sense of what a tick would ordinarily mean in the context of the wording of the item in issue. Rather, one should read a tick to mean that the legal requirements relating to the item have been satisfied. That is how the pro-forma is filled in; and that is how it is understood by all concerned within the Municipality, including the decision-maker. In the case of the 2006 plans all the items had been ticked. This was an indication that in the view of the building control officer, all was in order. That is how the decision-maker would also have understood the document.

[45] Also of significance, a number of documents accompanied the contested recommendation.[75] When all these documents, including the pro-forma, are looked at together, the nature of the recommendation becomes clear. Yet again, the applicant's argument must fail.

[75] The checklist or pro-forma was accompanied by: Pearl Star's application for approval of building plans; architectural compliance certificate; appointment form for professional engineer; deed of transfer; record of plans distribution; circulation comment sheet: Building Control; circulation comment sheet: Traffic Department; letter from Dippenaar and Lapage to Pearl Star regarding traffic impact assessment of development; letter from Dippenaar and Lapage to Evening Star Trading 10 regarding assessment of internal roads of proposed development on Lot 3371 Margate; circulation comment sheet: Building Inspection; circulation comment sheet: Health Department; circulation comment sheet: Fire and Rescue Department; Municipal Protection Services Fire Department: Plan Evaluation Report; circulation comment sheet: Maintenance; circulation comment sheet: Town Planning; circulation comment sheet: Environmental Department; letter from KZN Agriculture and Environmental Affairs to Pearl Star regarding opinion for applicability of environmental impact assessment regulations to Erf 3371; Environmental Management plan for Erf 3371; Ugu District Municipality plans approval form; Tax Invoice Statement from Ugu District Municipality to Pearl Star; Original Plan for Erf 3371 indicating area of encroachment; letter from Hudson Naude and Kirby to Susal Construction regarding extract from cut and fill calculation from Mr K McDonagh of Modelmaker Systems; and a letter from Hudson Naude and Kirby to Pearl Star enclosing copy of contour plan, and Pearl Star plans.

Interpretation of section 7(1)(b)(ii)

[46] This is a subject of much contention. At the heart of the controversy is the majority view of the Supreme Court of Appeal in *True Motives*[76] that what this Court held in *Walele*[77] on the interpretation of section 7(1)(b)(ii) of the Building Standards Act was *obiter* and wrong. This view made it possible for the Supreme Court of Appeal not to follow this Court's interpretation of the section. This is a controversy that must be dealt with head-on. I have had the pleasure of reading the judgment of my colleague, Froneman J (the separate judgment). He takes the view that it is not necessary to grapple with this controversy. To summarise, that is because of the true reach of section 7(1)(b)(ii) as interpreted in *Walele* and viewed in the light of the further unanimous clarification of what is meant by "derogation of value" in *Camps Bay Ratepayers*.[78] The separate judgment puts significant emphasis on paragraphs 38-40 of *Camps Bay Ratepayers*. I am adamant that the controversy must be resolved.

[47] *Camps Bay Ratepayers* reached a crucial and categorical conclusion. It is this:

> "(a) Though the application of section 7(1)(a) of the Building [Standards] Act arose in this matter, section 7(1)(b)(ii) did not.
>
> (b) Since the difference between *Walele* and *True Motives* is strictly confined to section 7(1)(b)(ii), that difference does not arise in this case."[79]

[76] Above n 36.

[77] Above n 28.

[78] Above n 40.

[79] Id at para 47.

[48] This means *Camps Bay Ratepayers* is authority on the interpretation of section 7(1)(a) of the Building Standards Act, including the meaning of "derogation of value" insofar as it relates to that section. It is not authority on the interpretation of section 7(1)(b)(ii). The relevance of "derogation of value" in section 7(1)(a), a concept not referred to in that section, is to be found in *Camps Bay Ratepayers*.[80] In the words of Brand AJ:

> "Derogation from market value . . . only commences: (a) when the negative influence of the new building on the subject property contravenes the restrictions imposed by law; or (b) because the new building, though in accordance with legally imposed restrictions, is, for example, so unattractive or intrusive that it exceeds the legitimate expectations of the parties to the hypothetical sale. In (a) the cause of the depreciation will flow from a non-compliance with section 7(1)(a). It is only in the event of (b) that section 7(1)(b)(ii) comes into play."[81]

[49] What this means is that, if the derogation of value the applicant attributes to Pearl Star's development falls under (b) of the quotation in the preceding paragraph, then section 7(1)(b)(ii) is implicated and the interpretation of the section is squarely before this Court. And that is an issue with which *Camps Bay Ratepayers* never dealt. Does the asserted derogation of value fall under (b)? If the alleged derogation flows from negative influences that arise despite the fact that the new development accords with legally imposed restrictions, then it does.[82]

[80] Id at paras 38-40.

[81] Id at para 40.

[82] Id.

[50] In what the applicant's case refers to as a "basket of amenities" that will be negatively affected by the construction of Pearl Star's building, reference is made, amongst others, to the following: the proposed buildings will eliminate privacy on the applicant's property because of the overlooking effect of one of Pearl Star's buildings; despite the fact that in suburban terms one of the buildings cannot be said to be too close to the applicant's property, it is directly at the centre of the sea views enjoyed from the applicant's property and is thus "'in your face' and overbearing"; because of the narrow shape of Pearl Star's property, developments on it have to be very close to the building lines and the effect of this, when viewed from the applicant's property, will be most oppressive and overbearing; the proximity of one of Pearl Star's buildings could have the effect of radiating heat towards the applicant's property; one of the buildings will restrict the access of natural light to the applicant's property; as Pearl Star's buildings are to house numerous people on a permanent or temporary basis, these people and staff will generate a certain degree of noise; and likewise, because Pearl Star's property is steep, cars accessing it will generate considerable noise.

[51] All of this is said in the context of the legally permissible height of six storeys. Pearl Star's buildings are only three storeys, well within the prescribed maximum height. Also, none of these complaints flows from allegations of contraventions of any legal prescripts. On the authority of *Camps Bay Ratepayers*, these are allegations of derogation of value that fall under section 7(1)(b)(ii) of the Building Standards

Act,[83] an issue that never formed part of the applicants' case in *Camps Bay Ratepayers*.[84] As derogation of value – in the context of section 7(1)(b)(ii) – has been raised in the instant matter, the *Walele – True Motives* controversy must be resolved by this Court.

[52] In *Walele*, this Court held that a local authority cannot approve plans – that are otherwise compliant with the requirements of the Building Standards Act – unless it satisfies itself that the proposed building will not trigger any of the disqualifying factors referred to in section 7(1)(b)(ii).[85] It said:

> "[T]he decision-maker must be satisfied of two things before granting approval. The first is that he or she must be satisfied that there is compliance with the necessary legal requirements. Secondly, he or she must also be satisfied that none of the disqualifying factors in section 7(1)(b)(ii) will be triggered by the erection of the building concerned. . . . This interpretation is consistent with the obligation to promote the spirit, purport and objects of the Bill of Rights. It demonstrates that it is not only the landowner's right of ownership which must be taken into account, but also the rights of owners of neighbouring properties which may be adversely affected by the erection of a building authorised by the approval of the plans in circumstances where they were not afforded a hearing. The section, if construed in this way, strikes the right balance between the landowner's entitlement to exercise his or her right of ownership over property and the right of owners of neighbouring properties. The

[83] Id. To illustrate the distinction in practical terms, in *Camps Bay Ratepayers* the derogation of value complained of was said to flow from an "alleged contravention of legally imposed restrictions", which, in accordance with what this Court held at para 40, was a section 7(1)(a) issue. In para 41 the essence of the complaint is explained thus: "the planned building would contravene the height restrictions of the Zoning Scheme Regulations and the setback requirements of the title deed conditions." For a fuller picture, see paras 41-3.

[84] Id at para 44.

[85] Quoted in full at [4].

> interpretation promotes the property rights of the landowner and those of its neighbours."[86]

[53] On the other hand, in *True Motives* the Supreme Court of Appeal held that a local authority is bound to approve plans, unless it is positively satisfied that the proposed building will probably, or in fact, trigger one of the disqualifying factors referred to in section 7(1)(b)(ii). If there is doubt, the building authority must approve the plans:

> "The use of the conjunction 'or' after section 7(1)(b)(i) makes it plain that the enquiry postulated by subparas (aa) and (bb) of section 7(1)(b)(ii) only arises if and when the local authority is satisfied that the application in question complies with the requirements of the Building Standards Act and any other applicable law. Clearly, the legislature did not have the factors set out in those subparagraphs in mind when it spoke, in subsection 7(1)(a), of compliance 'with the requirements of this Act'. In other words, the application may otherwise comply with the requirements of the Act and any applicable law but nevertheless not be susceptible to approval. . . . The refusal mandated by section 7(1)(b)(ii) follows when the local authority is satisfied that the building will probably or in fact cause one of the undesirable outcomes. *Section 7(1)(b)(ii) does not authorise a local authority to refuse to grant its approval upon the strength of a mere possibility that one of those outcomes may eventuate. Such an outcome must at the least be 'probable'. The Act is not to the effect that the local authority may withhold approval because it is not satisfied that the building will not cause one of those outcomes*."[87] (Emphasis added.)

[86] *Walele* above n 28 at para 55. The ellipsis relates to what, in context, is based on an earlier holding regarding the effect of the judgment in *Paola v Jeeva and Others* [2003] ZASCA 100; 2004 (1) SA 396 (SCA) (*Paola*). For present purposes, I choose to eschew an indication of whether or not I support this Court's reliance on *Paola* in its interpretation of section 7(1)(b)(ii). I do not find it necessary to make a pronouncement either way on the matter. Support similar to that found by the Supreme Court of Appeal in *Paola* is to be found in section 10 of the Building Standards Act. See the discussion in this regard in [91]-[93].

[87] *True Motives* above n 36 at paras 20-1.

[54] The *Walele – True Motives* controversy brings to the fore the important doctrine of precedent, a core component of the rule of law,[88] without which deciding legal issues would be directionless and hazardous. Deviation from it is to invite legal chaos.[89] The doctrine is a means to an end. This Court has previously endorsed the important purpose it serves:

> "[The doctrine of precedent] is widely recognized in developed legal systems. Hahlo and Kahn describe this deference of law for precedent as a manifestation of the general human tendency to have respect for experience. They explain why the doctrine of *stare decisis* is so important, saying:
>
> > 'In the legal system the calls of justice are paramount. The maintenance of certainty of the law and of equality before it, the satisfaction of legitimate expectations, entail a general duty of judges to follow the legal rules in previous judicial decisions. The individual litigant would feel himself unjustly treated if a past ruling applicable to his case were not followed where the material facts were the same. This authority given to past judgments is called the doctrine of precedent.
> >
> > . . .
> >
> > It enables the citizen, if necessary with the aid of practising lawyers, to plan his private and professional activities with some degree of assurance as to their legal effects; it prevents the dislocation of rights, particularly contractual and proprietary ones, created in the belief of an existing rule of law; it cuts down the prospect of litigation; it keeps the weaker judge along right and rational paths, drastically limiting the play allowed to partiality, caprice or prejudice, thereby not only securing justice in the instance but also retaining public confidence in the judicial machine through like being dealt with

[88] The rule of law is a founding value of the Constitution. Section 1 provides that the Republic of South Africa is founded on values that include the supremacy of the Constitution and the rule of law. This Court's judgment in *Camps Bay Ratepayers* confirms that the doctrine of precedent is a component of the rule of law. Above n 40 at para 28.

[89] *Camps Bay Ratepayers* id.

> alike. . . . Certainty, predictability, reliability, equality, uniformity, convenience: these are the principal advantages to be gained by a legal system from the principle of *stare decisis*.'"[90] (Footnotes omitted.)

[55] I cannot but also borrow from the eloquence of Cameron JA:

> "The doctrine of precedent, which requires courts to follow the decisions of coordinate and higher courts in the judicial hierarchy, is an intrinsic feature of the rule of law, which is in turn foundational to our Constitution. Without precedent there would be no certainty, no predictability and no coherence. The courts would operate in a tangle of unknowable considerations, which all too soon would become vulnerable to whim and fancy. Law would not rule. The operation of precedent, and its proper implementation, are therefore vital constitutional questions."[91] (Footnote omitted.)

[56] The doctrine of precedent decrees that only the *ratio decidendi*[92] of a judgment, and not *obiter dicta*, have binding effect.[93] The fact that *obiter dicta* are not binding does not make it open to courts to free themselves from the shackles of what they consider to be unwelcome authority by artificially characterising as *obiter* what is otherwise binding precedent.[94] Only that which is truly *obiter* may not be followed.

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[90] *Ex Parte Minister of Safety and Security and Others: In re S v Walters and Another* [2002] ZACC 6; 2002 (4) SA 613 (CC); 2002 (7) BCLR 663 (CC) (*Walters*) at para 57, quoting Hahlo and Khan *The South African Legal System and its Background* (Juta and Co Ltd, Cape Town 1968).

[91] *True Motives* above n 36 at para 100.

[92] Defined as the "[r]ationale or basis of deciding" in *Camps Bay Ratepayers* above n 40 at para 30.

[93] See *Jafta v Minister of Law and Order and Others* [1991] ZASCA 1; 1991 (2) SA 286 (A) (*Jafta*) at 292-3 and *R v Crause* 1959 (1) SA 272 (A) at 281C-D.

[94] *Camps Bay Ratepayers* above n 40 at para 30.

But, depending on the source, even *obiter dicta* may be of potent persuasive force and only departed from after due and careful consideration.[95]

[57] The *Walele – True Motives* controversy raises a few issues. The first is whether the interpretation given by this Court in *Walele* is *obiter*.[96] Even if it is, it is highly persuasive, coming – as it does – from the highest court in the hierarchy of courts.[97] But it is not binding.[98] The second is whether, if it is not *obiter*, it is clearly wrong. If it is not clearly wrong, this Court and all others are bound by it:[99] *stare decisis*.[100] If it is clearly wrong but not *obiter*, this Court – and it alone – is at liberty to depart from it.[101] If a statement of the law was part of the *ratio decidendi*, the question whether it was wrong does not arise insofar as courts lower in the hierarchy to the court that pronounced it are concerned.[102] Right or wrong, courts lower in the hierarchy are bound by it. The words of Kriegler J, said in the context of interpretation of legislation and the development of common law in accordance with the spirit, purport and objects of the Bill of Rights, are quite instructive and find application here:

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[95] *Durban City Council v Kempton Park (Pty) Ltd* 1956 (1) SA 54 (N) (*Kempton Park*) at 59D-F and *Rood v Wallach* 1904 TS 187 (*Rood*) at 195-6.

[96] What is said *obiter* and *obiter dicta* in a judgment are dealt with more fully in [61]-[71].

[97] See *Kempton Park* above n 95 at 59D-F; *Smith and Another v Mathey and Another* 1926 OPD 31 at 36-7; and *Rood* above n 95 at 195-6. In *Kempton Park* it was stated by Broome JP at 59D-F that:

> "I am prepared to regard the passage as having no *status* other than that of an expression of opinion by one Judge of Appeal concurred in by four others. Even so, its persuasive value would be irresistible. I am not prepared to dissent from it." (Emphasis in original.)

[98] *Pretoria City Council v Levinson* 1949 (3) SA 305 (A) at 317 (*Levinson*). See also *Jafta* above n 93 at 292-3; *R v Kaukakani* 1947 (2) SA 807 (A) at 813; and *Petersen v Jajbhay* 1940 TPD 182 at 190.

[99] *Camps Bay Ratepayers* above n 40 at para 28.

[100] In full the Latin maxim says *stare decisis et non quieta movere*, meaning "one stands by decisions and does not disturb settled points". *Walters* above n 90 at para 57. See also *Media 24 Ltd and Others v SA Taxi Securitisation (Pty) Ltd* [2011] ZASCA 117; 2011 (5) SA 329 (SCA) (*Media 24*) at paras 33-4.

[101] *Camps Bay Ratepayers* above n 40 at para 28 and *Walters* above n 90 at paras 60-1.

[102] *Camps Bay Ratepayers* id at para 30 and *Walters* id at para 61.

> "[C]ourts are bound to accept the authority and the binding force of applicable decisions of higher tribunals. . . . The [trial] judge was obliged to approach the case before him on the basis that [the Supreme Court of Appeal's] interpretation was correct, however much he may personally have had misgivings about it. High Courts are obliged to follow legal interpretations of the Supreme Court of Appeal, whether they relate to constitutional issues or to other issues, and remain so obliged unless and until the Supreme Court of Appeal itself decides otherwise or this Court does so in respect of a constitutional issue."[103]

[58] This statement applied equally to the Supreme Court of Appeal in respect of this Court's decisions on constitutional matters. Now that this Court is the highest court on all matters,[104] the statement applies to all its decisions.

[59] The third issue, which is closely linked to the second, is: what is the proper interpretation to be given to section 7(1)(b)(ii)? One cannot reach a conclusion on the

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[103] *Walters* id at paras 60-1.

[104] Section 167(3)(a) of the Constitution introduced by the Constitution Seventeenth Amendment Act of 2012 which came into effect on 23 August 2013. The section reads:

> "The Constitutional Court—
>
> (a) is the highest court of the Republic; and
>
> (b) may decide—
>
> (i) constitutional matters; and
>
> (ii) any other matter, if the Constitutional Court grants leave to appeal on the grounds that the matter raises an arguable point of law of general public importance which ought to be considered by that Court; and
>
> (c) makes the final decision whether a matter is within its jurisdiction."

Before the amendment, the section read:

> "The Constitutional Court—
>
> (a) is the highest court in all constitutional matters;
>
> (b) may decide only constitutional matters, and issues connected with decisions on constitutional matters; and
>
> (c) makes the final decision whether a matter is a constitutional matter or whether an issue is connected with a decision on a constitutional matter."

second issue without dealing with the third. Thus the second and third issues will be dealt with as one.

[60] In order to deal with these questions properly, after the hearing this Court sought further written submissions from the parties and written submissions from all metropolitan municipalities. The eThekwini Municipality answered this call, and the Court is indebted to it.[105]

[105] In paragraph 16 of its written submission, the eThekwini Municipality submits:

> (a) If a municipality must be satisfied that none of the "undesirable outcomes" will be triggered by the proposed building that will result in a significant increase in the number of refusals. Moreover, this is not the test envisaged in section 7(1)(b), which is whether the municipality is satisfied that the undesirable outcome will probably or in fact arise.
>
> (b) In the context of section 7 the word "satisfied" means just that, not "reasonably satisfied". The municipality must make the enquiry, at the end of which it is either satisfied or not. That this is what the legislature contemplated is borne out by the way in which it changed the test when dealing with the more esoteric concepts of disfigurement, unsightliness or objectionableness of buildings, and derogation from their value.
>
> (c) A high level of certainty or confidence is required in order to be "satisfied" both with respect to the material canvassed in subsection (1)(a) and that canvassed in subsection (1)(b).
>
> (d) It would be extremely difficult in many cases for a municipality to be "satisfied" that, for instance, the erection of a building *would not* derogate from the value of neighbouring properties (or even that this would probably not occur).
>
> (e) If an approval can be set aside by a court merely on the ground that as a matter of fact the proposed building will devalue neighbouring properties, then the decision on the "merits" of the plans is ultimately that of the court, and not of the municipality. This creates a situation where appeal (as opposed to review) is available as a remedy for someone who objects to the approval of building plans. It would embroil municipalities in numerous and expensive lawsuits involving, presumably, expert evidence on the merits of its decisions on the esoteric factors of section 7(1)(b)(ii). The price to be paid, insofar as the efficient performance of a municipality's duties is concerned, will be particularly high.

Was the interpretation of section 7(1)(b)(ii) in Walele obiter?

[61] Literally, *obiter dicta* are things said by the way or in passing by a court.[106] They are not pivotal to the determination of the issue or issues at hand and are not binding precedent. They are to be contrasted with the *ratio decidendi* of a judgment, which is binding. Regarding this concept Schreiner JA in *Levinson*[107] said:

> "It may be that the contrast between a reason and the ratio depends mainly on the meaning attached to those words in their context by the users. . . . [W]here a single judgment is in question, the reasons given in the judgment, properly interpreted, do constitute the *ratio decidendi*, originating or following a legal rule, provided (a) that they do not appear from the judgment itself to have been merely subsidiary reasons for following the main principle or principles, (b) that they were not merely a course of reasoning on the facts . . . and (c) (which may cover (a)) that they were necessary for the decision, not in the sense that it could not have been reached along other lines, but in the sense that along the lines actually followed in the judgment the result would have been different but for the reasons."[108]

[62] I read *Walele* to have given two reasons for its conclusion that the provisions of section 7(1) of the Building Standards Act had not been met. The first is that, based on the majority interpretation of section 7(1)(b)(ii), the information[109] furnished to the decision-maker in terms of section 6 could not have placed the decision-maker in a position to reach the level of satisfaction required by section 7(1)(b)(ii). The second is that the information placed before the decision-maker in terms of section 6 did not

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[106] *Camps Bay Ratepayers* above n 40 at para 30. See also Hahlo and Kahn *The South African Legal System and its Background* 6 ed (Juta & Co Ltd, Cape Town 1991) at 260 and *De Kock NO and Others v Van Rooyen* [2004] ZASCA 136; 2006 (6) BCLR 714 (SCA) at para 17.

[107] Above n 98 at 317.

[108] Id. This was referred to with approval in *MEC for Education, Gauteng Province, and Other v Governing Body, Rivonia Primary School and Others* [2013] ZACC 34; 2013 (6) SA 582 (CC); 2013 (12) BCLR 1365 (CC) at para 112.

[109] At this stage of its reasoning the *Walele* majority had not pronounced on whether this information constitutes a recommendation for purposes of section 6.

constitute a recommendation, which is a jurisdictional fact for the exercise of the section 7(1) power. *Levinson* does not appear to have been concerned with multiple,[110] but central bases, for determining a dispute or an issue in a dispute. Therefore, one must be careful not to regard its authority as fitting all scenarios. It happens fairly frequently that a court will give more than one basis for determining an issue, each of which bases is dispositive. Do the second and subsequent bases become *obiter* purely because the first – standing all by itself – is dispositive of the dispute; or vice versa? I think not. The answer must still lie in whether each of the many prongs of the court's reasoning is central to the resolution of the issue under consideration.[111] If the additional bases are central to the reasoning, not subsidiary and not mere reasoning on the facts, they are as much part of the *ratio decidendi* as the first basis. Not surprisingly, this Court has held that "the fact that a higher court decides more than one issue, in arriving at its ultimate disposition of the matter before it, does not render the reasoning leading to any one of these decisions *obiter*, leaving lower courts free to elect whichever reasoning they prefer to follow".[112]

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[110] "Multiple" is used to mean upwards of one.

[111] See *Kempton Park* above n 95 at 59D-E where Broome JP stated:

> "The proposition which Mr Milne regards as *obiter* thus represents the learned Judge of Appeal's reason for his decision of an issue raised on the appeal. It may be, as Mr Milne says, that the decision of the appeal itself would have been the same even if that particular issue had been decided differently, but I doubt whether that fact (if it is a fact) would entitle us to regard the relevant portion of the judgment as *obiter*."

See also Hahlo and Kahn above n 106 at 267-8:

> "For all the attempts at definition, however, the conclusion is unavoidable that it 'is impossible to draw a rigid line, *a priori*, between *rationes decidendi* and *obiter dicta*'. Say A claims relief on alleged legal rules X and Y, and the court holds that there is no rule X but that there is a rule Y. Now the decision was founded on the upholding of rule Y." (Footnote omitted.)

The authors then conclude with what to me appears to be a rhetorical question: "But should not the finding that there is no rule X also be held to be part of the *ratio decidendi*?"

[112] *Camps Bay Ratepayers* above n 40 at para 30.

[63] Brand AJ added:

> "It is tempting to avoid a decision by higher authority when one believes it to be plainly wrong. Judges who embark upon this exercise of avoidance are invariably convinced that they are 'doing the right thing'. Yet, they must bear in mind that unwarranted evasion of a binding decision undermines the doctrine of precedent and eventually may lead to the breakdown of the rule of law itself. If judges believe that there are good reasons why a decision binding on them should be changed, the way to go about it is to formulate those reasons and urge the court of higher authority to effect the change. Needless to say this should be done in a manner which shows courtesy and respect, not only because it relates to a higher court, but because collegiality and mutual respect is owed to all judicial officers, whatever their standing in the judicial hierarchy."[113]

[64] Coming to the issue at hand, the majority judgment in *Walele* first renders an interpretation of section 7(1)(b)(ii) of the Building Standards Act. Thereafter it deals with the facts in the light of its interpretation of the section, and it does the latter in paragraphs 59 to 63. At issue in the discussion of the facts are: the information[114] that was placed before the decision-maker; and its sufficiency (or lack of it) for purposes of the proper exercise of the section 7(1)(b)(ii) power by the decision-maker – obviously, that exercise of power having to be in accordance with the majority's interpretation of section 7(1)(b)(ii). On this the majority comes to the clear, categorical conclusion that "it cannot be said that the information, which the City admitted had been placed before the decision-maker, constituted reasonable grounds

[113] Id.

[114] Again, "information" is used in a generic sense, and not in the sense of information sufficient to constitute a recommendation as envisaged in section 6 of the Building Standards Act.

for the latter to be satisfied [that the disqualifying factors were not triggered]".[115] At the beginning of the same paragraph the majority judgment says:

> "There can be no doubt that [the documents that had been placed before the decision-maker] could not reasonably have satisfied [him] that none of the disqualifying factors would be triggered. None of these documents refer to those factors. If indeed the decision-maker was so satisfied on the basis of these three documents, his satisfaction was not based on reasonable grounds. The documents fall far short as a basis for forming a rational opinion."

[65] And then in paragraph 63:

> "[T]he reasonableness of the decision-maker's satisfaction can be determined with reference only to the information he had before him at the time he considered the building plans in question. An evaluation of such information reveals that it was inadequate. It follows that the decision-maker had failed to properly determine that none of the disqualifying factors would be triggered by the erection of the block of flats."

[66] The majority's approach was this. It first considered the import and requisites of section 7(1)(b)(ii). It then looked at the information that was before the decision-maker and concluded that, on that information, the decision-maker could not have been in a position to determine whether the requisites had been met. To me it does seem to have been necessary for the Court to consider what the requisites were to be able to conclude whether they had been met. That could only be done by interpreting the section. In short, the interpretation of section 7(1)(b)(ii) was central to the conclusion that the majority reaches: in light of the majority's interpretation, there

[115] *Walele* above n 28 at para 60.

was no proper exercise of the power conferred by the section. That had to lead to one outcome – the success of the appeal – which, in the event, happened, albeit with the additional ground of lack of a recommendation.[116]

[67] Surely, the additional ground does not detract from the centrality of the interpretation to the reasoning (read *ratio*) and outcome that the majority reached; nor does the fact that this additional reasoning could – individually – equally be dispositive of the appeal. Whatever the legal niceties on what constitutes *obiter dicta* may be, I find it rather difficult to comprehend how something so central, not only to the reasoning, but to the outcome, can be said to be *obiter*.

[68] Crucially, the *Walele* majority says:

> "[I]t was submitted that section 7(1)(b)(ii) . . . enjoins the decision-maker to be satisfied, prior to approving the plans, that the erection of the building to which the plans apply will not disfigure the area; be unsightly or objectionable; be dangerous to life or property; or derogate from the value of adjoining properties. The existence of any one of these factors, it was contended, disqualifies the plans concerned from approval. As the consideration of these issues requires *a proper interpretation of the relevant sections of the Building Standards Act*, it is convenient to commence with an overview of those provisions".[117] (Emphasis added.)

[69] Surely, this evinces the centrality of the interpretive exercise. This exercise related to an issue that was argued before this Court. In fact, upon a close look the issue was itemised as one of the issues that fell to be determined. The issues are

[116] On the lack of a recommendation see [42]-[45].

[117] At para 46.

itemised in paragraph 22 of *Walele*. One of them is that "the City failed to comply with mandatory procedural requirements prescribed by the Building Standards Act". Substantiating on this issue in paragraph 46, the judgment says that two arguments were advanced, one of them being the one I have quoted in the preceding paragraph. In the circumstances, the simple point is, in paragraph 46 the issue concerning the need for the interpretation of section 7(1)(b)(ii) is captured pertinently. The interpretive process was not only central to this; it constituted the issue. How that issue fizzles out to a non-issue with the result that a pronouncement on it becomes *obiter* is not easy to comprehend.

[70] What would the answer be if, after its interpretation of section 7(1)(b)(ii) and application of the interpretation to the facts, the *Walele* majority had not gone on to decide the question of the recommendation? Would the reasoning on the interpretation still have been considered to be *obiter*? I think not. For the Court to be in a position to pronounce on the sufficiency of the information, it would have had to know what exactly section 7(1)(b)(ii) requires. The additional reason for determining the appeal, namely, the lack of a recommendation, cannot alter this position.

[71] In sum, the Court's interpretation of section 7(1)(b)(ii) in *Walele* was not *obiter*; and *True Motives* erred in not following that interpretation. This conclusion has significant consequences. That interpretation is binding on this Court unless it was clearly wrong. Was it?

Was the Walele interpretation of section 7(1)(b)(ii) "clearly wrong"?

[72] Whether the reasoning of a court was wrong is not a matter of personal preference, mere disagreement, misgivings, doubt, let alone whim. A court with authority to depart from precedent may only do so if it is convinced that the previous decision was clearly wrong.[118] The test is a stringent one. And "mere lip service to the doctrine of precedent is not enough; . . . deviation from previous decisions should not be undertaken lightly."[119]

[73] The starting point, as correctly explained in *Walele*, is understanding the context in which section 7(1)(b)(ii) operates. The long title of the Building Standards Act reads: "[t]o provide for the promotion of uniformity in the law relating to the erection of buildings in the areas of jurisdiction of local authorities; for the prescribing of building standards; and for matters connected therewith." Property development may, depending on scale, have multifarious effects. It may pose health hazards; it may expose people to the risk of physical harm, including loss of life and limb; it may create a nuisance to occupiers of neighbouring properties; it may affect the aesthetics of the area; and it may devalue neighbouring properties. It must be because of all this and possibly more that approval of plans and supervision of construction are key to the realisation of what the Building Standards Act is about.

[74] What one gleans from the preceding paragraph is that, in addition to the possibility of harm to the owner and occupants of the property to be developed, a

[118] *Camps Bay Ratepayers* above n 40 at para 28.

[119] *Media 24* above n 100 at para 34.

development may have adverse effects on the rights[120] of owners of neighbouring properties. It is for this reason that in *Walele* this Court decided that section 7 of the Building Standards Act, which is at the heart of the approval process, should be construed in a manner that promotes the implicated rights consistently with the obligation imposed on courts by section 39(2) of the Constitution.[121]

[75] The majority in *Walele* correctly identifies key principles relating to the process of exercising the power to approve building plans. First, the decision-maker must consider the building control officer's recommendation made in terms of section 6. Secondly, if she is satisfied that the application for approval complies with the requirements of the Building Standards Act and other applicable law, she must grant the approval. Section 7(1)(b) provides that if the decision-maker is not satisfied that the application complies with the necessary requirements, she shall refuse to grant approval. If the decision-maker is satisfied that the disqualifying factors will in fact or probably be triggered, she "shall refuse to grant [her] approval in respect thereof and give written reasons for such refusal".

[76] Whether this Court's interpretation of section 7(1)(b)(ii) in *Walele* is clearly wrong concerns the level of satisfaction that a local authority must reach in exercising its power in terms of this section. It does not concern onus, that is, who it is that bears

[120] The possible exposure to danger to life and limb is a threat to the right to life and the right to security of the person (sections 11 and 12 of the Constitution respectively). The other possible negative effects implicate the right to property (section 25 of the Constitution).

[121] *Walele* above n 28 at para 52. I must add that it will be clear later that this does not relegate the rights of the owner of the property sought to be developed.

the duty to satisfy the local authority on the disqualifying factors. The latter issue is not before us.

[77] Shorn of detail, the substance of the criticism against the majority interpretation in *Walele* is two-fold. First, this interpretation is considered burdensome to municipalities and impractical, in particular on the showing of derogation from the market value of neighbouring properties.[122] The view is that, because *Walele* insists that the decision-maker must be positively satisfied that the disqualifying factors do not exist before approving plans, this will entail the engagement of, for example, valuers by the municipality once there is a dispute on the relevant issue. And this is something municipalities can ill afford. Second, the *Walele* majority is said to ignore the plain wording of section 7(1)(b)(ii). That plain wording – continues the criticism - is to the effect that a local authority must only refuse to grant approval of plans if satisfied that the disqualifying factors will in fact or probably eventuate. This is different from requiring the local authority to approve plans only if it is satisfied that the disqualifying factors will not eventuate.[123] I next deal with these bases of criticism, one after the other.

Burdensomeness

[78] The notion that *Walele* causes an undue burden on local authorities is exaggerated. Starting with derogation of value, what *Camps Bay Ratepayers* said is instructive:

[122] *True Motives* above n 36 at paras 31 and 120-1.

[123] Id at paras 20-36.

> "One of the unrealised risks that the hypothetical parties will contemplate is that a neighbouring property, unimproved at the time of valuation, might be built upon, or even, when built upon, might be replaced by a new building which may, for example, be more obstructive to the view enjoyed from the subject property. This will be of particular relevance in a case where the view from the subject property is of special import. That is why a property fronting directly on the ocean is generally worth substantially more than the property behind it, even when neither has been developed. While the latter bears the risk of being deprived of its view, the former does not.
>
> As a counterbalance to the risk that a new building may be more intrusive or render the subject property less attractive, the hypothetical buyer will have regard to the consideration that the new building will be constrained by the restrictions imposed by the Town Planning Scheme, the Zoning Scheme Regulations, the title deed conditions and so forth. The realisation of a risk already discounted will generally not have an influence on the market price. In consequence, the fact that a new building is then erected on the neighbouring property which interferes with previously existing attributes of the subject property will not, in itself, be regarded as derogating from the value of the latter. This is so long as the new building complies with the restrictions imposed by law."[124]

[79] This tells us that the determination of derogation of value should be a matter of relative ease. It gives a lie to the notion that whenever a dispute on derogation of value has been raised, the decision-maker must engage a valuer in order to meet the *Walele* threshold of satisfaction in terms of section 7(1)(b)(ii) of the Building Standards Act.[125] If derogation of value is raised in the context of an acceptance that there has been compliance with restrictions imposed by law, there will be derogation of value as envisaged in section 7(1)(b)(ii) only if "the new building . . . is, for example, so unattractive or intrusive that it exceeds the legitimate expectations of the

[124] *Camps Bay Ratepayers* above n 40 at paras 38-9.

[125] This notion comes from the judgment of Scott JA in *True Motives* above n 36 at para 120.

parties to the hypothetical sale".[126] This must be easy to determine for any decision-maker worth their salt. Unattractiveness and intrusiveness are matters of fact on which it should not be difficult to make a judgment call. This is equally true of the other disqualifying factors, such as disfigurement of an area,[127] unsightliness or objectionableness,[128] and danger to life or property.[129]

[80] The Building Standards Act requires a building control officer to have a certain level of qualification. Section 5(2) provides that, unless the Minister approves otherwise in writing, a person may be appointed as a building control officer only if she has the qualifications prescribed by the national building regulations.[130] Of the qualifications and what a building control officer is required to do, Heher JA said, correctly:

> "The building control officer for which the Act provides is a [person] likely to possess professional and practical experience in at least civil engineering, structural engineering, architecture, building management, building science, building surveying or quantity surveying. [She] will also have access to advice in relation to by-laws and town-planning legislation applicable within [her] local authority area. The primary facts of the proposed erection will be apparent from the documents submitted under section 4, and, if they are not, [she] will seek clarification in writing, by discussion with the applicant or his representative or on the ground by physical inspection. If the evidence available to [her] justifies such investigations [she] may consider it appropriate to draw a potentially affected neighbour into the process. Thereafter [she] will make a value judgment based on the established facts and probabilities,

[126] *Camps Bay Ratepayers* above n 40 at para 40.

[127] Section 7(1)(b)(ii)(aaa).

[128] Section 7(1)(b)(ii)(bbb).

[129] Section 7(1)(b)(ii)(bb).

[130] In terms of section 1 of the Building Standards Act, these are regulations made under section 17(1), and not those made under section 20.

> applying [her] experience, as to whether any disadvantage will result to a neighbouring property which would not be known to or expected by informed parties in the purchase and sale of that property."[131]

[81] Based on the value judgment,[132] the building control officer will make a recommendation to the local authority in terms of section 6(1) of the Building Standards Act. The decision-maker, who – needless to say – must not simply rubber-stamp the building control officer's recommendation, must either approve or reject the plans. On any interpretation, the level of scrutiny by the decision-maker will depend on the facts of each case. A proposed development may – depending on, for example, the bulk, height, general aesthetic character and other characteristics – compare so favourably with existing developments as to warrant approval of its plans without much effort. Even in that instance, there must still be a proper application of the mind to the issues at hand. On the other extreme, a proposed development may be so out of character in relation to what exists in the area that the level of scrutiny may have to be heightened.

[82] In instances where the decision-maker is not in a position to determine an application for approval with relative ease, she is at liberty to interact with the suitably qualified functionary within the local authority; namely, the building control officer.[133] There are no Chinese walls separating the two functionaries. As it was said in *Walele*, "[a]s a specialist the building control officer is best suited to advise the

[131] *True Motives* above n 36 at para 31.

[132] Id.

[133] The Building Standards Act does not insist on any specific qualifications in the case of a decision-maker.

decision-maker about disqualifying factors".[134] The building control officer may shed light on whatever issues on which the decision-maker may require clarity. Input from a building control officer may, depending on the circumstances, satisfy the decision-maker that none of the disqualifying factors exists. Should it be warranted, an expert, like a valuer, may have to be engaged. This is a far cry from the suggestion that an expert may have to be appointed at every turn.[135] And contrary to some of the criticism, *Walele* makes no such suggestion.

[83] Satisfaction that the disqualifying features do not exist is determined on the standard of preponderance of probabilities.[136] This is not about the mere *possibility* of the existence of these features. Where there is a dispute, the decision-maker must weigh the information placed before her. If satisfied that the disqualifying features do not exist, she must approve the plans. In the case of derogation of value, the clarification in *Camps Bay Ratepayers* is of tremendous assistance.[137]

[84] The short point: the circumstances of each case predominate. And what *Camps Bay Ratepayers* says further dispels any notion that municipalities must determine the market value of adjoining properties each time they consider building plans. Regarding the other disqualifying factors, it cannot be all that difficult for a decision-maker to make a determination. On these, and on derogation of value, clarification may be sought from the building control officer where that becomes

[134] Above n 28 at para 70.

[135] This suggestion comes from *True Motives* above n 36 at para 120.

[136] See the reference to "probably" in section 7(1)(b)(ii).

[137] Above n 40 at paras 30-40.

necessary. An expert may have to be appointed if, after it all, that is still considered necessary; and there is nothing the matter with that. Surely, this will be in rare instances.

[85] One assumes that municipalities will play their part and appoint as decision-makers only people with an aptitude to apply their minds to applications properly and, where necessary, engage building control officers meaningfully and be capable of assimilating feedback from them. If municipalities appoint people who are not suitably qualified, practical difficulties are likely to arise. But then, those difficulties will most likely be the result of the unsuitability of the incumbents, and not the function of the *Walele* interpretation. With an unsuitable decision-maker in office, even the *True Motives* approach is not immune from practical difficulties.

Disregard of plain wording of section 7(1)(b)(ii)

[86] Adverting to the second basis of criticism of the *Walele* majority,[138] I do not propose to render the "plain meaning" of the section. Suffice it to say that what I set out above as the *True Motives* approach captures the essence of that meaning. For me the question is whether *Walele* is clearly wrong in not having adopted that meaning. I simply cannot say so.

[87] Undeniably, the interpretation of statutory provisions is about establishing their meaning. This Court has stressed that the purpose of a statute is central to the

[138] That is, the *Walele* majority ignores the plain wording of section 7(1)(b)(ii).

interpretive process and that, in considering the purpose, we must strive to promote the spirit, purport and objects of the Bill of Rights. In *Goedgelegen* Moseneke DCJ opined that, when interpreting legislation—

> "we are obliged to scrutinise its purpose. As we do so, we must seek to promote the spirit, purport and objects of the Bill of Rights. We must prefer a generous construction over a merely textual or legalistic one in order to afford claimants the fullest possible protection of their constitutional guarantees."[139]

[88] We will recall that the Building Standards Act aims to prescribe building standards.[140] Prescribing building standards is not an end in itself. As much as it is about the rights of people seeking to develop their properties, it is also about the protection of the rights of owners of neighbouring properties.[141]

[89] The *Walele* approach is less susceptible – if at all – to an overly relaxed level of scrutiny insofar as the rights of owners of neighbouring properties are concerned. It better protects the rights of these owners. It is more consonant with the provisions of section 39(2) of the Constitution. Of course, the rights of prospective property developers are also deserving of protection. On the weighing up exercise proposed above, informed as it is by *Camps Bay Ratepayers* where derogation of value is in issue,[142] I do not see any likelihood of harm in this regard. The discussion of

[139] *Department of Land Affairs and Others v Goedgelegen Tropical Fruits (Pty) Ltd* [2007] ZACC 12; 2007 (6) SA 199 (CC); 2007 (10) BCLR 1027 (CC) (*Goedgelegen*) at para 53.

[140] See [73] setting out the long title of the Building Standards Act.

[141] In [74] in particular n 120, I indicated that rights that may be implicated are the right to life, the right to security of the person and the right to property.

[142] See [78]-[79].

section 10 below bolsters the view that this interpretation in fact does protect the rights of property developers as well.

[90] The overemphasis of the apparent meaning of particular words in a statutory provision may overlook, not only the need to interpret the words in the light of the Constitution, but also the overall context presented by the statute. In *Bato Star* Ngcobo J said:

> "I am troubled therefore by an interpretative approach that pays too much attention to the ordinary language of the words 'have regard to'. That approach tends to isolate section 2(j) and determine its meaning in the ordinary meaning of the words 'have regard to'. It 'ignores the colour given to the language by the context'. That context is the constitutional commitment to achieving equality, the foundational policy of the Act to transform the industry consistent with the Constitution and the Act read as a whole. The process of interpreting the Act must recognise that its policy is founded on the need both to preserve marine resources and to transform the fishing industry, and the Constitution's goal of creating a society based on equality in which all people have equal access to economic opportunities."[143] (Footnote omitted.)

[91] The provisions of section 10 of the Building Standards Act[144] buttress the *Walele* approach. I read this section to apply to an opinion formed by the local authority after approval of plans. In the face of these provisions, it makes sense that at the stage of approval a municipality should, as far as possible, satisfy itself that, post approval, it will not find itself having to invoke the provisions of section 10. To say

[143] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others* [2004] ZACC 15; 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC) at para 92. In *S v Mhlungu and Others* [1995] ZACC 4; 1995 (3) SA 867 (CC); 1995 (7) BCLR 793 (CC) at paras 9, 15 and 45-6, this Court stressed the importance of a contextual – as opposed to a literal – interpretation of the Constitution. The views it expressed are equally true when it comes to the need to interpret Acts of Parliament with due regard to context.

[144] At [5].

otherwise would amount to a compartmentalised – as opposed to a contextualised – interpretive process. In fact, it is absurd that a local authority may not positively satisfy itself of the non-existence of the disqualifying factors in section 7(1)(b)(ii) when approving plans, only to take the stringent measures provided for in section 10 when it later becomes satisfied of the existence of the corresponding factors set out in section 10.[145] The stringent measures include the outright halting of construction that may have commenced already. This would be financially ruinous to the person developing the property concerned. If the municipality satisfies itself of the non-existence of the disqualifying factors at the stage of approval, the risk of financial harm and other possible adverse effects is minimised. On this approach, section 10 may be invoked only in the rare instances where, despite best efforts undertaken in terms of section 7(1)(b)(ii) and in accordance with the *Walele* approach, the negative factors contained in section 10 still manifest themselves.

[92] On the contrary, interpreting section 7(1)(b)(ii) in the context of section 10 does not give rise to any absurdity. An interpretation of the section that says plans should be approved without the relatively higher level of scrutiny that the *Walele* majority insists on, only to expose the property developer to the possible halting of construction and all the other stringent measures that may be taken in terms of section 10, does not necessarily trump one that is more likely to avert these possible negative

[145] See [93] on the corresponding factors. As noted in *SATAWU and Another v Garvas and Others* [2012] ZACC 13; 2013 (1) SA 83 (CC); 2012 (8) BCLR 840 (CC) at para 3, our jurisprudence discourages statutory interpretation that gives rise to absurdity:

> "This Court has previously held that an interpretation of a statutory provision that gives rise to an absurdity or irrationality should be avoided where there is another reasonable construction which may be given to that provision."

consequences. The *True Motives* interpretation, which puts developers at a greater risk of the stringent measures, can hardly be said to demonstrate sufficiently that the *Walele* interpretation is clearly wrong.

[93] The significance of section 10 is that some of the factors it itemises correspond with those contained in section 7(1)(b)(ii). Section 10(1)(a)(ii) corresponds with section 7(1)(b)(ii)(aa)(bbb). And section 10(1)(a)(iv) corresponds with section 7(1)(b)(ii)(aa)(ccc). The fact that the sections do not correspond 100 per cent cannot detract from the view I take.

[94] It is true that this Court has cautioned against straining the language of a statutory provision in the quest to interpret it in a manner consonant with the Constitution.[146] Yes, where that caution finds application, it must be heeded. But that caution was never intended to drive courts to cower timorously into a corner and not do that which the Constitution in section 39(2) enjoins them to do in deserving cases. Viewed in the context of section 10, this Court's interpretation of section 7(1)(b)(ii) in *Walele* cannot appropriately be said to be unduly strained. On the contrary, there is more than sufficient reason to say that the *Walele* meaning can be reasonably ascribed to the section.

[146] *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: In re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* [2000] ZACC 12; 2001 (1) SA 545 (CC); 2000 (10) BCLR 1079 (CC) at para 24.

[95] I remain unconvinced that the interpretation of section 7(1)(b)(ii) in the majority judgment in *Walele* is clearly wrong. That there is something to be said for the other interpretation is not enough. In the event, this Court is bound by *Walele*. The interpretation contended for by the applicant must prevail. But must he succeed on the claim that there was an improper exercise of the section 7(1)(b)(ii) power?

Must the applicant succeed on the facts?

[96] I think not. First, the applicant's valuation evidence was based on the 2005 plans. Relying on those he sought to prove derogation from the market value of his property. The 2005 plans differ materially from the 2006 ones, and they do so on features that matter. The 2006 plans addressed a previous complaint relating to encroachment onto the side spaces: one apartment block was moved 12 metres down the slope. This had a significant, positive impact on the view that the applicant, whose property is up the slope, enjoys and – possibly – the market value of his property, if it would have been affected at all.[147] Second, there is nothing to indicate that, based on what was before the decision-maker, there was not enough to satisfy him that the proposed construction would not in fact or probably derogate from the market value of the applicant's property. Third, it is necessary to view issues relevant to derogation from market value in the light of what this Court said in *Camps Bay Ratepayers*.[148]

[147] The construction of a building that obstructs the views enjoyed from existing properties does not necessarily derogate from the market value of the existing properties. See *Camps Bay Ratepayers* above n 40 at paras 38-40 quoted at [48]. See also *True Motives* above n 36 at para 30.

[148] Above n 40.

[97] Yet again, I do not see enough material to fault the decision of Mr Van der Walt. In the result, the applicant must fail on all his contentions.

Costs

[98] The applicant has failed on all counts in his bid to review the decision of the Municipality. He also made unsubstantiated allegations of bias against the Municipality which this Court views in a serious light. This Court in *Affordable Medicines* articulated the following rule:

> "The award of costs is a matter which is within the discretion of the court considering the issue of costs. It is a discretion that must be exercised judicially having regard to all the relevant considerations. One such consideration is the general rule in constitutional litigation that an unsuccessful litigant ought not to be ordered to pay costs. . . . There may be circumstances that justify departure from this rule such as where the litigation is frivolous or vexatious. There may be conduct on the part of the litigant that deserves censure by the court which may influence the court to order an unsuccessful litigant to pay costs. The ultimate goal is to do that which is just having regard to the facts and circumstances of the case."[149]

[99] The applicant comes very close to deserving a costs order against him insofar as the Municipality's costs are concerned. Although, as the judgment shows amply, his

[149] *Affordable Medicines Trust and Others v Minister of Health and Another* [2005] ZACC 3; 2006 (3) SA 247 (CC); 2005 (6) BCLR 529 (CC) at para 138.

conduct warrants censure, I stop just shy of making that order. What swayed me the other way was that a significant part of the judgment deals with a subject on which – on the law – his contentions were meritorious; and that is the interpretation of section 7(1)(b)(ii) of the Building Standards Act. There should be no costs order in favour of the Municipality. None of these considerations apply to Pearl Star, a private entity.

Order

[100] The following order is made:

1. The late filing of the record and written submissions by the applicant is condoned.
2. Leave to appeal is granted.
3. The appeal is dismissed.
4. The applicant must pay the second respondent's costs in this Court.

FRONEMAN J (Cameron J and Van der Westhuizen J concurring):

[101] I agree with the reasoning and outcome of the judgment of my brother, Madlanga J (main judgment), except for one issue. The main judgment characterises that issue as a conflict between this Court's decision in *Walele* and that of the Supreme Court of Appeal in *True Motives*, which must be dealt with head-on.[150] I disagree with that characterisation. There is certainly contestation concerning *Walele*'s true import, but it is not primarily about the extent of the doctrine of

[150] At [46].

precedent or the parts of an appellate court's judgment that are binding. To characterise the issue as a *Walele – True Motives* conflict is potentially divisive and unnecessarily so.

[102] Its potential for divisiveness is obvious. Members of this Court have expressed different views on the conflict whilst serving in the Supreme Court of Appeal.[151] Nobody can doubt that they did so on reasonably held and genuinely contested views. Judges reasonably differ from time to time. Unless there is a pressing need to resolve the conflict, it is time to move on. There is no pressing need to resolve this conflict other than by determining the proper reach of *Walele*. This Court, in *Camps Bay Ratepayers*, made important findings about underlying aspects of the reasoning in *Walele*.[152] These have a major bearing on the extent of *Walele*'s findings on section 7(1)(b)(ii) of the Building Standards Act. The High Court did not give adequate recognition to this. In addition, the questions of precedent and what parts of a judgment are binding were not only adequately dealt with in *Camps Bay Ratepayers*, but also provide no assistance in deciding the real issue before us, namely the true import of *Walele* in the light of this Court's subsequent unanimous decision in *Camps Bay Ratepayers*.

[151] There is no reference in the majority judgment in *Walele* to any *positive* satisfaction of the requirements in section 7(1)(b)(ii) of the Building Standards Act. The dispute about *positive* or *negative* satisfaction first arose in *True Motives* above n 36. For example, see paras 21 (majority judgment), 64, 69, 70 (minority judgment), 93 and 94 (concurring majority judgment).

[152] The main judgment, at [47]-[48], is correct that *Camps Bay Ratepayers* did not directly decide the issue before it in terms of the application of section 7(1)(b)(ii), but nevertheless acknowledges that its explanation of "derogation of value" at [78] and [84] clarifies *Walele*. In the main judgment's substantive findings on the reach of *Walele* I find little difference with the views expressed in this judgment.

[103] The supposed *Walele – True Motives* conflict should never have arisen in this case. The High Court decided the matter on the basis that this Court did not pronounce on the *True Motives – Walele* controversy in *Camps Bay Ratepayers* and that it could follow the Supreme Court of Appeal's approach in *True Motives*. This is wrong. *Camps Bay Ratepayers* is no authority for the proposition that *True Motives* is still good law. Although, on the facts, Brand AJ came to the conclusion that the applicants did not bring their case within the ambit of section 7(1)(b) of the Building Standards Act,[153] in the course of coming to that conclusion he dealt with important aspects that clarified *Walele*'s impact. *True Motives* was decided before *Camps Bay Ratepayers*. The High Court was thus bound to follow this Court's later clarification of *Walele*.

[104] The real issue before us is the true reach of section 7(1)(b)(ii) as interpreted in *Walele*, given *Camps Bay Ratepayers*' clarification of what is meant by "derogation from market value" in section 7(1)(b)(ii). Once that is done, the further contentious issue arises whether we should re-examine the correctness of that outcome and depart from it or further clarify it.[154] This enquiry does not, however, depend on an examination of the doctrine of precedent and the distinction between the binding and non-binding parts of *Walele*. The legal position in relation to those issues was dealt with fully in *Camps Bay Ratepayers* and is not necessary to revisit.

[153] *Camps Bay Ratepayers* above n 40 at para 47.

[154] As was done in another context in *Kubyana v Standard Bank of South Africa Ltd* [2014] ZACC 1; 2014 (3) SA 56 (CC); 2014 (4) BCLR 400 (CC).

[105] The judgment in *Walele*[155] relied in part on the Supreme Court of Appeal decision in *Paola* in finding that section 7(1)(b)(ii) requires that the decision-maker must be satisfied that none of the section's disqualifying factors will be triggered before approving plans:

> "Accordingly the decision-maker must be satisfied of two things before granting approval. The first is that he or she *must be satisfied* that there is compliance with the necessary legal requirements. Secondly, he or she *must also be satisfied* that none of the disqualifying factors in section 7(1)(b)(ii) will be triggered by the erection of the building concerned. *This is so because any approval of plans facilitating the erection of a building which devalues neighbouring properties, for example, is liable to be set aside on review. An approval can be set aside on this ground irrespective of whether or not the decision-maker was satisfied that none of the disqualifying factors would be triggered. All that is needed for an applicant to succeed is to prove to the satisfaction of the reviewing court that the erection of the building will reduce the value of his or her property. The legislature could not have intended to authorise an invalid exercise of power. In order to avoid this consequence, the decision-maker must at least be satisfied that none of the invalidating factors exist before he or she grants approval.*"[156] (Footnotes omitted and emphasis added.)

[106] This also buttressed the finding that neighbours had no right to a hearing before approval:

> "On this interpretation section 7 creates an adequate self-contained protection which safeguards the rights of owners of neighbouring properties. As a result it becomes unnecessary for such owners to be heard before the approval is granted."[157]

[155] *Walele* above n 28 at para 55 fn 68.

[156] Id at para 55.

[157] Id at para 56.

[107] In *Camps Bay Ratepayers* the applicants sought to rely on precisely this ground – the derogation of value of their properties – as a review ground under section 7(1)(b)(ii). Their contention was rejected:

> "I do not agree with this line of reasoning. The flaw lies in the assumption that derogation of value of neighbouring property is always a section 7(1)(b)(ii) issue. This is not so. 'Value' must, in the context of section 7(1)(b)(ii), be understood as 'market value'. Traditionally, market value is said to be the price that an informed buyer will pay an informed seller, both of them having regard to all the potential risks – both realised and unrealised – pertaining to the subject property. One of the unrealised risks that the hypothetical parties will contemplate is that a neighbouring property, unimproved at the time of valuation, might be built upon, or even, when built upon, might be replaced by a new building which may, for example, be more obstructive to the view enjoyed from the subject property . . . .
>
> As a counterbalance to the risk that a new building may be more intrusive or render the subject property less attractive, the hypothetical buyer will have regard to the consideration that the new building will be constrained by the restrictions imposed by the Town Planning Scheme, the Zoning Scheme Regulations, the title deed conditions, and so forth. The realisation of a risk already discounted will generally not have an influence on the market price. In consequence, the fact that a new building is then erected on the neighbouring property which interferes with previously existing attributes of the subject property will not, in itself, be regarded as derogating from the value of the latter. This is so long as the new building complies with the restrictions imposed by law.
>
> *Derogation from market value, therefore, only commences: (a) when the negative influence of the new building on the subject property contravenes the restrictions imposed by law; or (b) because the new building, though in accordance with legally imposed restrictions, is, for example, so unattractive or intrusive that it exceeds the legitimate expectations of the parties to the hypothetical sale. In (a) the cause of the depreciation will flow from a non-compliance with section 7(1)(a). It is only in the event of (b) that section 7(1)(b)(ii) comes into play.*"[158] (Footnotes omitted and emphasis added.)

[158] *Camps Bay Ratepayers* above n 40 at paras 38-40.

[108] It must also be remembered that all the disqualifying factors in section 7(1)(b)(ii) – disfigurement, unsightliness, objectionability, derogation of value and danger to life and property – must "probably or in fact" be present before the decision-maker may refuse to grant her approval.[159]

[109] *Camps Bay Ratepayers* makes it clear that it is not necessary for a local authority to assess the possible derogation of value of neighbouring properties each time before it approves building plans. Only where the building will *probably or in fact* disfigure the area, be unsightly or objectionable, or present a danger to life and property, to the extent that the legitimate expectations of parties to a hypothetical sale will be exceeded, will the possibility of a derogation of value of a neighbouring property come to the fore. It requires little imagination to see that these will be rare occurrences.

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[159] Section 7(1)(b)(ii) of the Building Standards Act provides:

> "If a local authority, having considered a recommendation referred to in section 6(1)(a)—
>
> . . .
>
> (b) . . .
>
> (ii) is satisfied that the building to which the application in question relates—
>
> (aa) is to be erected in such manner or will be of such nature or appearance that—
>
> (aaa) the area in which it is to be erected will probably or in fact be disfigured thereby;
>
> (bbb) it will probably or in fact be unsightly or objectionable;
>
> (ccc) it will probably or in fact derogate from the value of adjoining or neighbouring properties;
>
> (bb) will probably or in fact be dangerous to life or property,
>
> such local authority shall refuse to grant its approval in respect thereof and give written reasons for such refusal."

[110] Even where derogation of value is not the relevant disqualifying factor, determining the probable or factual existence of disfigurement to areas, unsightliness and objectionability of buildings and danger to life and property is a relatively simple task. These involve value judgments that can easily be made on reasonable grounds and will normally be difficult to challenge as being unreasonable. And the effect of the *Walele* approach, namely that it is the obligation of the local authority to ensure the absence of the disqualifying factors,[160] would, as clarified in *Camps Bay Ratepayers*, rarely lead to an inability to assess their probable or factual absence or presence.

[111] Section 7(1)(b)(ii) obliges a decision-maker to make a finding whether each of the triggering factors in the section probably or in fact exists.[161] If she finds that they do probably or in fact exist, then she must refuse to grant the application. If she finds that they do not probably or in fact exist, she must grant the application. The section must not be construed to mean that if the decision-maker is in doubt on whether there was compliance with each of the subsections, she must decline an application. Instead, it must be interpreted to mean that if the decision-maker is uncertain, she must herself investigate the matter so as to be satisfied that there was compliance or that there was no compliance.[162]

[160] *Camps Bay Ratepayers* above n 40 at para 33.

[161] *Walele* above n 28 at para 55: "[T]he decision-maker must at least be satisfied that none of the invalidating factors exists before he or she grants approval."

[162] See also [83]. As noted in *Camps Bay Ratepayers* above n 40 at para 33, *Walele* imposes an obligation on the local authority to ensure the absence of the disqualifying factors. *Walele* says nothing more than this. The other implications ascribed to it in that paragraph need to be qualified to that extent.

[112] Having determined the reach of *Walele*, as clarified in *Camps Bay Ratepayers*, it becomes necessary to determine whether we should reconsider and depart from or further clarify these earlier decisions. We stated in *Camps Bay Ratepayers* that "[t]he doctrine of precedent not only binds lower courts, but also binds courts of final jurisdiction to their own decisions. These courts can depart from a previous decision of their own only when satisfied that that decision is clearly wrong."[163] It can be argued that the paragraphs quoted above[164] from this Court's unanimous judgment in *Camps Bay Ratepayers* show that an important underlying reason for the interpretation of section 7(1)(b)(ii) adopted in *Walele* – "any approval of plans facilitating the erection of a building which devalues neighbouring properties, for example, is liable to be set aside on review"[165] – was overstated and thus requires reconsideration. Aligned to that is the fact that the *Walele* interpretation is also alleged to run contrary to the plain meaning of the section in its structured context. I would not go that route.

[113] Read together with the important clarification of its ambit in *Camps Bay Ratepayers*, the decision in *Walele* does not have to lead to any great difficulty or disruption in the practical application by local authorities of the provisions of section 7(1)(b)(ii). This was one of the major concerns, expressed in *True Motives*, about the effect of the original decision in *Walele*. The other main concern was the alleged disregard of the plain meaning of language. I agree that we should be cautious

[163] *Camps Bay Ratepayers* id at para 28.

[164] At [107].

[165] *Walele* above n 28 at para 55.

not to depart from the plain meaning of language, but I am less confident that *Walele* itself[166] departed from the plain meaning. This Court should not shy away from correcting its mistakes if they lead to injustice, but, given the clarification of *Walele* in *Camps Bay Ratepayers*, this does not arise here.

[166] In contrast to the meanings ascribed to it by the majority and minority judgments in *True Motives*.

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