THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 112/2019

In the matter between:

BO-KAAP CIVIC AND RATEPAYERS ASSOCIATION	**FIRST APPELLANT**
35 ON ROSE BODY CORPORATE	**SECOND APPELLANT**
THE EXECUTORS OF THE ESTATE OF THE LATE FABIO TODESCHINI	**THIRD APPELLANT**

and

CITY OF CAPE TOWN	**FIRST RESPONDENT**
MUNICIPAL PLANNING TRIBUNAL OF THE CITY OF CAPE TOWN	**SECOND RESPONDENT**
MAYOR OF CAPE TOWN	**THIRD RESONDENT**
BUITENGRACHT PROPERTIES (PTY) LTD	**FOURTH RESPONDENT**
HERITAGE WESTERN CAPE	**FIFTH RESPONDENT**

Neutral citation: *Bo-Kaap Civic and Ratepayers Association and Others v City of Cape Town and Others* (case no 112/2019) [2020] ZASCA 15 (24 March 2020)

Coram: Navsa, Saldulker, Makgoka and Plasket JJA and Eksteen AJA

Heard: 21 February 2020

Delivered: 24 March 2020

Summary: Approval by local authority and Mayor of land use application – challenged on the basis of unreasonableness, irrationality and error of law – nature of judicial review discussed – deference to expertise of decision makers – no reviewable irregularity – costs in relation to asserted constitutional litigation discussed.

ORDER

On appeal from: Western Cape Division of the High Court, Cape Town (Le Grange J sitting as court of first instance):

1. The application to lead further evidence on appeal is dismissed with costs, including the costs of two counsel.
2. The appeal is dismissed with costs, including the costs of two counsel.

JUDGMENT

Navsa JA (Saldulker, Makgoka and Plasket JJA and Eksteen AJA concurring):

[1] In this case the record comprises 16 volumes and extends to 2715 pages. The core issue to be addressed is rather more compact. It is, simply, whether the first respondent, the City of Cape Town (the City), a metropolitan municipality established in terms of the Municipal Structures Act 117 of 1998, through its Municipal Planning Tribunal, the second respondent and, ultimately, through its Mayor, the third respondent, by way of an internal appeal process, lawfully approved land use applications by the fourth respondent, Buitengracht Properties (Pty) Ltd (the Developer). The land use applications were in relation to the construction of an eighteen-storey building, 60 metres tall, in the immediate vicinity of a well-known international and local tourist destination, which is also a heritage sensitive area, the Bo-Kaap. Put differently, the question for adjudication is whether the City and the

Mayor had due regard to heritage concerns, as provided for in applicable legislation and policies, and whether they complied with administrative law principles. There are, of course, allied questions concerning the propriety of simultaneous associated approvals by the City, such as the consolidation of the two erven on which the construction is envisaged to take place, the approval of 310 parking bays, with attendant traffic consequences, etc but these are inextricably linked to the core issue. Also linked is a title deed condition relating to the Bo-Kaap attached to one of the erven, which will be dealt with in due course.

[2] The Western Cape Division of the High Court, Cape Town (Le Grange J), adjudicating an application by the three appellants, for the review and setting aside of the approvals and of the Mayor's decision on appeal, held that they were all lawful and dismissed the application with costs, including the costs of two counsel. Heritage Western Cape (HWC), a provincial heritage agency established in terms of s 23 of the National Heritage Resources Act 25 of 1999 (the NHRA), had intervened in the proceedings in the high court and supported the review application. In addition, HWC had sought an order declaring that the intended development could not proceed without a permit issued in terms of s 27(18) of the NHRA[1]. The application for that order was also dismissed. It is against those findings that the present appeal is directed. The appeal is before us with the leave of the court below. HWC, however, did not participate in this appeal.

[3] At the outset it is necessary to have regard to the history of the Bo-Kaap. A brief history, extracted in the main from what was provided by the appellants, is set out hereafter.

The Bo Kaap was built largely by and for the artisans of Cape Town between 1790 and 1825. It extends over 34 hectares and is bounded by Buitengracht, Rose, Carisbrook and Strand Streets, and the slopes of Signal Hill.

Although the Bo-Kaap has over centuries been home to people of various origins and from different regions, the area is closely associated with the traditionally Malay community of the Cape, which is predominantly Muslim. The ancestors of the majority

[1] Section 27(18) provides: 'No person may destroy, damage, deface, excavate, alter, remove from its original position, subdivide or change the planning status of any heritage site without a permit issued by the heritage resources authority responsible for the protection of such site'.

of Muslim people in the Cape arrived from 1658 onwards as slaves, or political exiles from East Africa and South East Asia (India, Indonesia, Java, Malaysia and Sri Lanka). Many of them were brought by the Dutch and were skilled craftsmen, artisans, famous scholars and religious leaders.

The first mosque at the Cape, the Auwal Mosque, was built in the Bo-Kaap neighbourhood in 1804 and is still in use.

The history of the Bo-Kaap reflects the political processes in South Africa during the apartheid years. It was declared a residential area exclusive for Cape Malays under the Group Areas Act 41 of 1950 and people of other racial classifications were forced to leave.

The neighbourhood has been described as being atypical. In the mid-twentieth century, most working class people in South Africa were moved to the periphery of the cities under the Slums Act 53 of 1934 and neighbourhood improvement programmes. Housing in the Bo-Kaap is made up of long continuous rows of small, mostly single-storeyed, flat roofed, parapetted houses; staggered to step down the slopes of Signal Hill. All of the houses face onto the street, with access to the front door immediately off the pavement via the narrow ‘stoeps’ which often have low brick walls and stoep-seats at each end. The parapets are decorated with mouldings.

Virtually no houses in the Bo-Kaap have garages and people utilise street parking to park their vehicles from early evening until the next morning. Rose Street is one of the roads that is particularly affected by this. Street parking in the Bo-Kaap, and particularly Rose Street, is not in any event limited to the period after the close of the working day. Many people who work in the area of the Central Business District (CBD) bordering the Bo-Kaap utilise available street parking in the Bo-Kaap to park their vehicles during the working day instead of having to pay for parking.

[4] I now turn to have regard to two other areas of heritage significance in the vicinity of the proposed development of the Bo-Kaap, namely, Riebeeck Square and Heritage Square. Riebeeck Square lies between Buitengracht and Breë Streets and is also bounded by Shortmarket and Church Streets. It is of historical significance in that it is a square around which Cape Town developed and was an area where farmers, during our colonial past, used to outspan their wagons and offload their products. It is common cause that the square has deteriorated over the last few decades and is now used as a parking lot. Heritage Square is in the immediate vicinity

of Riebeeck Square. It consists of a block of preserved heritage buildings which have been restored and renovated. In short, this has resulted in a recognised city block with established heritage values.

[5] The sequence of events that led to the land use approvals for a development on the doorstep of the Bo-Kaap and which culminated in the present appeal is set out hereafter. During 2015 Tommy Brümmer Town Planners, who represented the Developer, held two pre-submission consultations with City officials. The first took place in May and the second on 24 August. During October of that year, the Developer made the following applications:

(a) In terms of section 42(b) of the By-law,[2] for departures from the City's Development Management Scheme (DMS) to allow portions of the building above 38m to be closer to the street boundary than is permitted by item 60(e) of the DMS;

(b) In terms of section 42(f) of the By-law, for the consolidation of two erven;

(c) in terms of section 42(i) of the By-law, for approval in terms of Item 64(e)(ii) of the DMS to have parking on the ground floor level for Block B at 0m in lieu of 10m to the street;

(d) In terms of section 42(i) of the By-law, for approval in terms of Item 162 of the DMS to develop a new building in the Heritage Protection Overlay Zone (HPOZ);

(e) In terms of section 42(i) of the By-law, to have a 0m building line on the Buitengracht Street boundary in lieu of 5m as required by Item 121(2) of the DMS for a metropolitan road.

These are the applications, the approvals of which are at the centre of this appeal.

[6] The applications referred to in para 5 above relate to erven 144698 (2505 square metres) and 8210 (645 square metres) in Cape Town, which are owned by the Developer. The two erven are adjacent, hence the application for consolidation. The properties are bounded by Buitengracht, Rose, Longmarket and Shortmarket Streets. The erven in question, and a number of developed properties alongside them, are separated from the Bo-Kaap by Rose Street.

[2] The applicable City of Cape Town: Municipal Planning By-Law is contained in PN 206 in PGE 7414 of 29-06-2015.

[7] I pause to record the Title Deed condition in relation to Erf 144698. The special condition for the benefit of the City reads as follows:

'Subject to the following special condition contained in Deed of Transfer No. 17550/1953 imposed by and for the benefit of the Municipality of Cape Town, namely:

The Transferor shall have the right to refuse permission to build or rebuild any building or structures on the said land unless the architecture of that portion of such buildings or structure which fronts on Rose Street is in conformity with the general design and architecture of buildings situate in such area or areas of the City of Cape Town which is known and/or classified as the Malay Quarter.'

[8] The applications were motivated and supported by:

(i) an Urban Design Report prepared by Bluegreen Planning and Design;

(ii) a report by Fabian Architects; and

(iii) a Traffic Impact Assessment by Kantey and Templer.

On behalf of the Developer it was stated that the applications seeking approval for the proposed development were compliant with the City's policy framework in relation to such proposals, more particularly: (a) the Cape Town Spatial Development Framework; (b) the Table Bay District Plan; (c) the Tall Building Policy; and (d) the Urban Design Policy.

[9] On 7 December 2015 the City's Directorate of Energy, Environment and Spatial Planning in the Department of Spacial Planing and Urban Design, submitted an internal report in relation to the applications by the Developer. The following remarks were made:

'In our opinion, due consideration has been given to the context that the site is located within which is demonstrated through the urban design report attached to the application.

Support was given for a building that [utilises] allowable building height but with massing sensitive to the Bo-Kaap and Riebeeck Square context. The utilisation of basement parking also minimises the impact in street activity which was a key design requirement.

We thank the developer and design/planning team for a clear and participated process with our and other line [department] and [a] well-motivated application clearly unpacking the key design principles and responses. This made the process of assessment a pleasure.'

[10] Two days later, on 9 December 2015, the City's Directorate of Asset Management and Maintenance Transport recommended the approval of the proposal subject to certain conditions.

[11] On 14 December 2015 the District Head: Environmental and Heritage Management Resources (the EHM) within the City's Environmental Management Department made the following three comments:

'• The identified heritage resources are the HPOZ urban streetscape interface, the Bo-Kaap residences along Rose Street, views of vistas of the mountain from various points in the City and archaeological discovery during excavation.

- The Buitengracht Street edge of the building requires a larger setback and canopy on street level and one storey to improve the pedestrian experience. There must be direct access to the building at various points along an active edge.
- The Rose Street building interface is too high and should emulate the development one block north. An appropriate edge and interface with Bo-Kaap should be 2 storeys with setbacks for subsequent storeys. . . .'

[12] Following on what is set out above the Developer's application was advertised. It attracted 1017 objections, more than 600 of which were prompted by a website created and maintained by the first appellant, the Bo-Kaap Civic and Ratepayers' Association, a voluntary association that claimed it represented the interests of residents and ratepayers of the Bo-Kaap. The second appellant, the Body Corporate of 35 on Rose Residents' Association and, as the name suggests, is the body corporate responsible for that property, which is located on Rose Street, close to the erven in question. The body corporate was among those who objected to the Developer's proposal. The third applicant in the court below was Professor Fabio Todeschini, an architect, city planner, urban designer and heritage practitioner who also owned property in the Bo-Kaap. He passed away and has been substituted as a litigant in this appeal by the executors of his estate, the third appellant.

[13] On 8 March 2016 the EHM commented on the Developer's applications. The comments are pertinent. The EHM noted that there were 'several significant heritage resources' and areas that would be impacted by the proposed development, namely, (a) Riebeeck Square; (b) erven 1299 and 1300; (c) the Bo-Kaap precinct; (d) the City

Centre; and (e) Heritage Square. Continuing, the EHM recorded that Riebeeck Square is a significant link between the City and the Bo-Kaap. It went on to state the following:

'The massing of the proposed building is such that the greater bulk and sheerness of the design imposes onto Riebeeck Square which serves to further "contain" the square's breathing space, boxing it in, which is counterproductive to the historic nature of the space. This is not seen as a positive impact on the open space.

The historic character of Riebeeck Square is one of openness with important views to Table Mountain and Signal Hill. These views should not be discarded but should be considered when impacted on. The proposed building impacts on views from Riebeeck Square and these impacts should be investigated further.'

(my emphasis).

[14] In respect of the Bo-Kaap it said:

'The Bo-Kaap is of very high heritage value with many levels of significance which forms part of the extremely important history of not only Cape Town but of South Africa. The Bo-Kaap is intricately woven into the early beginnings of Cape Town and has continued to play an important role in the heritage and history of our city.

On the City's heritage database Bo-Kaap is listed as a Provincial Heritage Site, a SAHRA Grade 1 Area and a Proposed HPOZ.

Bo-Kaap can be described on many levels of heritage significance one of which is the historic fabric and corresponding three dimensional scale and density of the area. This low impact, architecturally rich and unique area has always had a relationship with town to its south, a relationship of proximity that has struggled for sustainability due to the continued impact of new, large and bulky buildings that have served to erode that relationship. Larger, newer buildings which replaced early structures have resulted in a lineated barrier along both edges of Buitengracht and Rose Streets. These multi-storey buildings have formed a vertical barrier between town and the Bo-Kaap which removes the historic connection that has always existed between the two.

A contextual linking of the Bo-Kaap and town on a physical level is important from a heritage perspective and is rooted deep in the history of Cape Town. The proposed development compounds the ongoing separation by means of the design's bulk and height. The large visual mass of the proposed building is seen as a physical and visual barrier which erodes the fragile relationship between the differing built environments of town and the Bo-Kaap. The loss of historic connection and association of Bo-Kaap with town impacts negatively on the heritage value of the Bo-Kaap.

The proposed development has opted for setting the massing and bulk back as the building gets higher which indicates an acknowledgement by the designers of the sensitive nature of the site and its relationship with Bo-Kaap. This impact should be investigated further with the aim of design revision that reduces negative influences.' (My emphasis.)

[15] The EHM stated that a portion of the site fell within the City's HPOZ and that an analysis was required as to the proposed development's impact on the significance and character of the precinct. Significantly, it went on to state:

'HPOZ's are very important tools set in place for the protection, preservation and management of certain areas which have been investigated, studied and analysed. *Those areas have been recognised to contain sufficient heritage value in terms of heritage resources, significance and character so as to be protected and managed. Proposed interventions in these areas should not impact negatively on any of the recognised positive heritage values but should seek to be informed by those exact values and to achieve a sensitive and welcome balance when placed in such an environment.*

. . .

The proposal introduces a contemporary design approach to its interface at ground and street level. Further investigation is recommended as to the appropriateness of this approach.

The architectural language is fashionable and does not reference any obvious design indicators, the incorporation of which would serve to better place the new building in its sensitive position.

The overall height, bulk and visual mass of the proposed development has a pronounced impact on the existing built form and character of the immediate area and this is difficult to mitigate.' (My emphasis.)

[16] In relation to Heritage Square, the sheer size of the development was a cause for concern on the part of the EHM. It was not opposed to the addition of built form on the site, but made its suggestions in order to see if there was a way of limiting the impact on heritage resources.

[17] I now turn to the heritage statement prepared by the Developer in April 2016. At the beginning of the executive summary it is stated that the design had responded positively to urban and heritage related design indicators and that mitigating measures, such as the stepping back of the upper levels from the Rose Street edge, without reducing the overall height, would lessen potential negative impacts on the

street and townscape and in relation to Riebeeck Square and the Bo-Kaap. The Developer's heritage statement asserted that since the proposed development involved no listed activities in terms of s 38(1) of the NHRA[3] no Heritage Impact Assessment was required. The Developer drew attention to the base zoning for the erven in question, namely, 'Mixed Use MU3'. In terms of the Municipal Planning By-law, permissible coverage for all buildings within this zone is 100%. It is that base zoning on which the Developer relied for the applications for approval that it submitted to the city. The base zoning, and the reliance thereon by the Developer as well as the City's insistence that it was an important factor, is a theme that permeates the complaints and objections by the appellants.

[18] On the 29th of April the EHM wrote to Mr Paul Heydenrych of the City's Land Use Management Division stating, inter alia, the following:

'EHM is still not opposed to the idea of adding built form to the site but is not supportive of the current proposal.

Our suggestions are aimed at lessening the negative impact that the proposal has on the heritage resources in the area.

All of the heritage resources identified above will be impacted on in a negative manner to a certain degree by the proposed development because of the design's sheer size and magnitude. The proposed design seeks to mitigate this impact by introducing setbacks and stepping the building. These setbacks and stepping measures are not significant enough as mitigation for the impact of the proposal's size.

The overall height is still seen as being problematic in achieving an appropriate intervention of a new building into the area. Our recommendation is for a reduction in height whereby a revised design relates more appropriately to the heritage resources which are impacted on. The effect of reducing the overall height and subsequent manipulation of proposal might be more manageable in how the development relates to and impacts on the surrounding heritage resources.

EHM still recommends that comment be requested by the applicant from Heritage Western Cape. We request that such comment be forwarded to us please.

EHM acknowledges the substantial Heritage Statement provided by the applicant.'

[3] Section 38(2) provides that when a heritage society receives a notice from a person intending to undertake a development listed in s 38(1), and has reason to believe that heritage resources will be affected, it must require such person to submit an impact assessment report. It is common cause that no notice was issued by either the Developer or to responsible heritage authority.

[19] On 11 May 2016, HWC responded to the Developer's proposals. The following are the essentials of the response:

'We note the following three design principles listed in the Heritage Statement, which have been proposed in an attempt to reduce impacts on townscape and streetscape:

(a) The 'stepped massing' from a height of 60m on Buitengracht Street towards a lower massing on the Rose Street edge;
(b) The incorporation of horizontal and vertical articulation and datum lines, and
(c) The proposed height "counter-balancing" the mass of the City-Park building diagonally across Riebeeck Square.

With regard to (a), the proposed cascading of the 18-storey building down to a height of approximately five storeys on Rose Street attempts to make a gradual transition between the very tall façade on Buitengracht and the Bo-Kaap. *The stepping effect alone is however inadequate to mitigate the substantial heritage impacts on the Bo-Kaap, which is a fine-grained, predominantly one- and two storey environment with a unique character.*

. . .

With regard to (b) above, HWC disputes the datum lines that have been used to establish the heights and set-backs. Whilst the base zoning and its associated development rules are recognised, the Heritage Protection Overlay Zone, which is a lawful deprivation, takes precedence over these underlying "development rights" and was specifically promulgated to allow for context to inform development and, where necessary, to limit it. We are of the view that a height of 60m above this section of Buitengracht Street is inappropriate, as it will dominate both the Bo-Kaap and Riebeeck Square and exacerbate the separation of the Bo-Kaap from the West City.

As far as design principle (c) above is concerned, HWC does not agree that the Netcare ("City-Park") Hospital, diagonally opposite Riebeeck Square, can be used as justification for the construction of another insensitively-scaled ziggurat building or that "counter-balancing" the mass of the hospital would be successful mitigation for the negative effects of a new building, which does not dominate Riebeeck Square, serving as an enclosing element to the square.

. . .

It is HWC's view that the development proposal in its current form is inappropriate in this heritage context and that it will have a detrimental effect on the heritage significance of both Riebeek Square and the Bo-Kaap. As noted in the CoCT Densification Policy, development that will be compromising the surrounding built environment should not be supported. We therefore strongly object to the current planning application.

> The proposed mitigation measures, such as stepping down in height are inadequate to address the substantial impacts of an over-scaled building. The applicants should be encouraged to re-conceptualise the development proposal, based on comprehensive heritage indicators and not to merely maximise development, with mitigation as an afterthought. . . .' (My emphasis.)

[20] Under the heading 'Heritage Evaluation', the following appears in the report, dated 24 May 2016, by the City's Land Use Management to the MPT:

'Various commenting and objecting parties (as indicated above) have cited how the proposed building will impact on the surrounding heritage resources. Their main points relate to the proposed building's height, massing and position.

Despite the legislated heritage resources within the surrounding area (ie PHS), these resources do not have a legal standing to impose on the subject property.

The various objecting parties' calls for the reduction in the height of the building due to its impact on the various heritage resources in the area have not been quantified. The calls for a reduction in order to limit [the] impact or to allow for a "bridge" between the city and Bo- Kaap cannot override the primary rights allowable on the property as well as the applicable legislative context, as previously explained.

With respect to further arguments to limit the height of the portion of the building in the HPOZ, it is noted that:

If the permissible development rights of the portion outside of the HPOZ were to be accessed it would serve to "create a backdrop" to a development of the portion within the HPOZ. Despite this and to mitigate any impacts on the Bo-Kaap area, the bulking of the building is towards Buitengracht and the CBD. This is some 65m from the Bo-Kaap.

The massing is designated to "bulk" the building towards the central city to "abut" other tall buildings in the city centre which is the economic hub of the City of Cape Town.

It is noted that other than the development rules for the development site, no development rules exist within the HPOZ as mentioned in Item 161 of the development management scheme.

In the absence of the qualification [set out above], my Department considers the above and following comments. . . relevant to evaluation of this application.

From a statutory point of view, this department reaffirms that no mechanism or legal basis exists to circumscribe the permissible development rights of the portion of the site outside the HPOZ, despite objections and the comments from HWC arguing for limiting development rights.' (My emphasis.)

[21] On 7 June 2016 a hearing took place before the MPT. I pause to record that the members of the MPT are technical specialists and a number of them are independent and not employed by the City. At the MPT meeting Councillor Bryant emphasised the growth in the CBD and that the amazing growth was something to be proud of. Extensive discussions ensued, including discussions concerning the scale of the development and its impact on heritage resources. The following are the noted reasons for the MPT's decision to approve the proposal:

'• The proposal complies with the City of Cape Town Planning Policies (e.g. Table Bay District Plan Densification Policy, Urban Design policy and Tall Building Policy).

- The proposal takes cognizance of the heritage resources within the area and has the potential to exhibit good urban design when the relevant conditions have been complied with, while sacrificing primary development rights.
- The proposal will provide an adequate transition between the City and Bo-Kaap at street level, while reinforcing and defining Riebeeck Square, provided appropriate urban design and landscaping is implemented.
- The massing and height of the building is located away from the Bo-Kaap.
- The interface and facades are considered to be acceptable and positive, especially when relevant conditions are complied with.
- The proposal will activate and improve the surrounding streetscapes.
- The proposal is considered desirable in terms of Section 99(3) of the City of Cape Town Municipal Planning By-Law.'

On 21 July 2016 the appellants were notified of that decision.

[22] Twelve appeals were lodged against the approvals by the MPT, including those of the first two appellants and Professor Todeschini. I pause to record that at the time that the appeals were lodged the Bo-Kaap had not formally been proclaimed an HPOZ but that the City did consider that it should be done as a matter of priority.

[23] It is significant that in a report of the City in relation to the appeals, dated 19 October 2016, the following appears:

'However, the existence of base rights in itself cannot be the sole reason for granting the City's approval under the general provisions of a HPOZ. In this regard, the department has applied its mind and made recommendations to the MPT who, in turn, applied its collective mind in making specific decisions. As a result, condition 3.2 of the Amended Annexure A was imposed in order to further mitigate aspects of the proposal. Again, these are reflected in the minutes and transcripts of the MPT meeting.'

[24] The first stage of the appeals were conducted at a meeting of the Mayoral Advisory Panel (MAP) on 30 November 2016 and oral representations from some of the appellants ensued. The MAP then sent a report to the Mayor containing its reasons for approving the applications. The reasons, in addition to endorsing those of the MPT, were as follows:

'In addition to the proposal complying with the City of Cape Town Planning Policies i.e. Table bay District Plan, Densification policy, Urban Design Policy and Tall Building Policy as mentioned by the Municipal Planning Tribunal the proposal also complies with the City of Cape Town Spatial Development Framework, the Integrated Development Plan, Economic Growth Strategy, and the Transit Orientated Development Strategy.

Where there were errors in the notification process extra time was allowed and agreed to by the applicant for people to submit comments on, or objections to the application.

Although only a portion of the property was affected by the HPOZ the department had treated the application as if the whole property was affected by the HPOZ.

The panel was of the view that the application was desirable in terms of section (2)(d), as contemplated in subsection (3), of section 99 of the MPBL.

In addition to the desirability of the application in terms of section 2(d) as contemplated in subsection 3(i) related to traffic impacts, parking access and other transport related considerations, the panel added that the application was desirable in that it bordered on Buitengracht which is a high order road and is thus an ideal location for land use intensification and increase density.

In terms of the transit development strategy more residential uses have to be encouraged in the City centre to address inefficiencies in the City.

The application was sensitive to the Bo-Kaap area.

The massing and height of the building's façade along Rose Street responds to the neighbouring buildings' on each side of the building.' (My emphasis.)

[25] The second stage of the appeal process comprised of the Mayor considering the MAP's report as well as all the other information put before her and then making a decision. She decided to accept the recommendation of the MAP and agreed with its report. She stated that she took into account heritage concerns. Her reasons will be further explored later in this judgment. The appellants had many complaints about the City and the Mayor's decisions, including many that were based on 'procedural irregularities', such as the lack of time and opportunity to object, irregular pre-submission consultations with the City's officials, defective notifications, and not making available material information to objectors. Before us these were advisedly, not persisted in.

[26] On the substantive level the appellants were aggrieved, first, at the City's attitude in relation to how an overlay zoning that attached to one of the erven had to be construed and applied. Overlay zonings are provided for in the DMS, which is incorporated into the City's By-law. Among the matters that have to be taken into account in relation to an overlay zone are environmental, heritage and conservations concerns. In the present case the overlay zone is an HPOZ, which emphatically elevates heritage concerns, so it was contended. The appellants submitted that the base zoning, which in the present case was mixed use, did not detract from the HPOZ. Item 162 of the DMS provides that the following requires the approval of the city:

'Any development, including any physical intervention, excavating or other action other than those caused by natural forces, which may in any way result in a change to the appearance or physical nature of a heritage place or influence its stability or future wellbeing including: (a) the construction, alteration, demolition, removal or change of use of a heritage place or a structure at a heritage place; (b) carrying out any works at a heritage place; and (c) consolidation of land comprising a heritage place.'

The City is of course empowered to afford an exemption, but must do so consciously. It did not, according to the appellants, apply its mind to this requirement. .

[27] The appellants were adamant that s 24 of the Constitution,[4] as well as the NHRA obliged the City to have regard to the implications of the development on the heritage values of the area. That obligation, they insisted, had not been met.

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[4] 'Everyone has the right -
(a) to an environment that is not harmful to their health or wellbeing; and

[28] It was contended on behalf of the appellants that Riebeeck Square was a significant link between the City and the Bo-Kaap and that the proposed development would disturb that connection because of its sheer height and mass. In respect of Heritage Square, it was submitted that the development, because of its size, would impact on it for obvious reasons of proximity.

[29] The appellants made common cause with HWC in asserting that the stepped massing, that is the proposed cascading of the eighteen-storey building down to a height of approximately five stories on Rose Street, so as to attempt a gradual transition between the tall façade on Buitengracht Street was an inadequate step to mitigate the impact on the heritage value. The appellants accused the City and the Developer of being deceptive, by providing photomontages of the proposed development which inaccurately downplayed the height of the building.

[30] The bases of the objections by the appellants grew exponentially. The appellants incorporated into their growing list of objections and complaints the City and the Mayor's failure to abide by the City's Scenic Drive Policy, which they said was implicated by the sheer height of the building. Simply put, on this score, the complaint was that views would be affected, especially in relation to a drive along Buitengracht Street, which the Scenic Drive Policy sought to prevent. In this regard they stated that Buitengracht Street is protected as an S2 scenic drive from the bottom of Kloof Nek Road to Coen Steytler Avenue. The appellants contended that the development would affect the visual quality from the Bo-Kaap.

[31] In submissions before us reliance was primarily placed on s 99 of the By-law. More about s 99 and the appellants' stance in relation thereto, later. The appellants also submitted that the City had ignored its own policies including those set out at the end of para 8 above. The appellants accused the City of having failed to have proper

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(b) to have the environment protected, for the benefit of present and future generations, through easonable legislative and other measures that -
(i) prevent pollution and ecological degradation;
(ii) promote conservation; and
(iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.'

regard to its own Tall Building Policy. That policy requires the City to have regard to the impact of proposed tall buildings. Moreover the appellants contended that the photomontages of what a completed building would look like, presented by the Developer as part of its application and for the public to comment upon, were deceptive and underplayed the visual impact of the building the Developer intended to erect. The appellants asserted that what was required, especially in the light of the reservations of the EHM, was a visual impact study. This had not been called for by the City.

[32] Furthermore, the appellants stated that the City completely ignored its own context sensitive Densification Policy, more particularly, that the scale and character – bulk, height and architectural styling – of high density areas must be appropriate to the context. In the present case, so it was contended, the proposed development was contextually inappropriate.

[33] Moreover, the appellants went on to rely on the City's Urban Design Policy (UDP). This policy, so it was asserted, was to ensure that the design process and formulation of development did not further contribute to the segregated nature of Cape Town, inherited from apartheid. The appellants took the view that the approval of the development effectively cut the Bo-Kaap off from the rest of the city.

[34] The appellants continued growing their grounds of objection by placing reliance on the Cultural Heritage Strategy for the City which, as the name suggests, recognises the rich cultural history of Cape Town. This is another nuance of the repeated accusation that heritage concerns were ignored by the City and the Mayor.

[35] The appellants alleged further that the City had failed to enforce the special condition attached to the Title Deed in relation to Erf 144698, referred to in para 7 above. They pointed out that the Developer had not made any application to the City for the relaxation of the condition. Thus, so it was contended, the City ought not to have approved the applications by the Developer.

[36] In its answering affidavit opposing the relief sought by the appellants, the City pointed out, at the outset, that the subject properties are not located within the Bo-Kaap. It provided a three-dimensional depiction of the building and its surrounds,

which it contended provided a better understanding of the photomontages supplied by the Developer. The City contended that the three-dimensional analysis showed that the development would blend in with the surrounding area.

[37] According to the City, the heritage statement presented by the Developer provided an accurate description of the history of the area immediately surrounding the proposed development. The City and the Mayor emphasised that the properties in question lie within a band of commercial properties between Rose and Buitengracht Streets and, further, that commercial properties had already intruded and later come to dominate the block from the early part of the twentieth century. Over time, residential areas were replaced with commercial properties, such as car salesrooms and car service centres, parking areas, wholesale and light manufacturing. In this regard, the City placed reliance on aerial photographs, which show the stark contrast between the block related to the proposed development and the Bo-Kaap. In essence the City contended that extensive residential and commercial developments already existed within the block in which the development was located, as well as within its immediate vicinity, as opposed to the Bo-Kaap and its unique architecture and character. The site itself, the City and the Mayor pointed out, has no inherent heritage value.

[38] According to the City, the site in question was already earmarked for development from the late 1940s. New buildings in the CBD were allowed up to a maximum height of 37m on streets wider than 18.5m, such as Buitengracht Street, and up to a height of 25m on streets wider than 12.5m. This was followed by a period of economic decline and inner-city decay. In 2003 this was reversed when residential units such as the Studios, adjacent to the subject properties, were developed. These developments were a form of city living, which now appears to be a growing trend throughout the world. More recent developments in the area include the Hilton Hotel, on the corner of Buitengracht and Wale Streets, and 35 on Rose, mentioned in para 12 above.

[39] The latest development on which construction had already started at the time of commencement of litigation in the court below is called ‘117 on Strand’, and is situated between Rose, Strand, Ciappini and Castle Streets, adjacent to the Bo-Kaap. It is 150m away from the subject properties and indeed very similar to the development

under discussion. 117 on Strand is a 17 storey building, comprising 117 apartments, with underground parking, 5 200m^2 of retail outlets and 6 600m^2 of office space. Moreover, 117 on Strand is staggered away from the Bo-Kaap. That development was not challenged by HWC or the appellants.

[40] The City pointed out that Rose Street is a minor two-way street, providing a dividing line between the CBD and residential Bo-Kaap. As stated earlier, each side of the street has a very distinct character. On the western (Bo-Kaap) side, the residential buildings are typically single to two storeys, set on the advancing slope of Signal Hill. On the eastern (CBD) side of Rose Street the buildings are mostly three storeys and higher, currently up to nine storeys. For instance, immediately to the south of the proposed development is the nine storey high Studios building, on erf 148791, containing flats and some business premises. Immediately to the north of the development is 35 on Rose, a six-storey block of flats and offices, situated on erf 166963.

[41] Riebeeck Square, a Provincial Heritage Site (PHS), which is on the eastern side of the proposed development, as described above, is a large open area currently used for parking. It is designated as a public open space, and is bounded by the treed avenues of the surrounding streets. St Stephan's Dutch Reformed Church is also a declared PHS and is situated along the Bree Street edge of the square. It is uncontested that Riebeeck Square has deteriorated over the last few decades. The City adopted the view that developments such as the one in question should be supported as they will breathe new life into the square. Surrounding Riebeeck Square are offices and businesses, the old Christiaan Barnard Hospital (Netcare) as well as Heritage Square. A positive change has been the renovation and restoration of Heritage Square, with restaurants that are open in the evenings. The City is adamant that introducing residential areas, such as the proposed development around Riebeeck Square, may be a catalyst to develop a more human orientated facility, rather than a vehicle orientated facility.

[42] The City's position in relation to the base zoning and overlay zoning is set out hereafter. Both categories depict a land use prescribed by the DMS regulating the use of and development of land and setting out the purposes for which land may be used

and the development rules applicable to that land use category. In its answering affidavit, the City accepted that the approval for use of property under the DMS had to take into account various policies and principles, as well as environmental and land use considerations. The City was adamant, however, that designations under the DMS remained the starting point. It pointed out that base zoning meant the zoning before the application of any overlay zoning and may include a subzoning as contemplated in the DMS. Overlay zoning is a zoning, in addition to the base zoning, stipulating the purposes for which land may be used and the development rules, which may be more or less restrictive than the base zoning. The City explained that the MU3 base zoning which attaches to the property in question, applies to all properties in the area between Buitengracht and Rose Streets. The City's position was that the base zoning confers various primary permitted uses for which approval is not required. The base zoning in question allows for a range of uses, including business purposes and flats. The overlay zoning in question requires that environmental, heritage protection, and conservation concerns be taken into account.

[43] According to the City there are three relevant overlay zones designated by the City. First, is the Cape Town CBD Local Area Overlay Zoning. This is referred to as the CBD LAO. The second is the Central City Heritage Protection Overlay Zoning. This is known as the Central City HPOZ. The third is the Table Bay Scenic Drives Overlay Zone, which it is to be noted, does not include Buitengracht Street. According to the City the development proposal makes use of the maximum height allowed by the MU3 base zoning.

[44] The City's position was that the height and the scale of the proposed development is within all of the rights that attached to properties in that zoning and the CBD LAO. The City emphasised that the proposed development will, in fact, not utilise the full extent of conferred developmental rights.

[45] The City pointed out that the properties in question also fall within an urban development zone. This was introduced in 2003 and is a tax incentive, aimed at revitalising inner city areas by attracting capital investments in commercial and residential property through a tax rebate. The idea, so the City said, was to bring

people back to the central city to live, play and work, through appropriate residential and business densification, affordable housing and mixed usage buildings.

[46] The City also insisted that it applied its own density priority zone policy and that the CBD was an urban civic upgrade area into which the proposed development fitted snugly.

[47] In dealing with the appellant's criticisms against the approval process, the City referred to the expert knowledge and experience of members of the MPT. They all have impressive academic and practical credentials. So, too, the members of the MAP. The same applied to the Mayor's technical advisor. It was pointed out that all of these experts agreed that the applications for the development proposal should be approved.

[48] According to the principal deponent on behalf of the City, the comments made by interested parties when the proposal was advertised caused the City's Land Use Management Department to obtain further input on historical aspects of the area from the EHM. It acknowledged that the EHM was concerned about the height and scale of the proposed development and recommended a reduction in height, with a revised design that related more appropriately to heritage concerns. The EHM suggested that comment be solicited from HWC. The latter accepted that a permit was not required in terms of s 27(18) of the NHRA. HWC did not consider the stepping down effect to Rose Street to be adequate in mitigating heritage impact. It considered the proposed development's 60m height to be inappropriate. HWC did not, however, in principal, object to the erection of the new building.

[49] The City was impressed by the fact that, after receipt of the aforementioned heritage concerns, the Developer sought to address them by making significant changes. The Developer, according to the City, did reduce the scale of the proposal and set the building back further from street boundaries. The part of the building immediately adjacent to Rose Street was reduced in height, from 5 to 3 storeys, and the Developer also procured the heritage statement referred to earlier. That statement accepted that the proposed development would have to be sensitive to the heritage

resources surrounding it. The Developer also contended that the impact on the townscape and streetscape was positive.

[50] The report to the MPT reiterated that the bulk of the proposed development was towards the centre of the CBD, to abut other tall buildings. The CBD is the economic hub of Cape Town. It also indicated that the bulk of the building is at the lower levels, 9 storeys and below, which is at a height similar to the adjacent building on erf 148791. Significantly, the following appears in the report:

'Based on the existing rights applicable to the property, this department prefers the current proposal over a proposal solely based on the primary rights allowable to the property given the building setbacks, massing and heights proposed. The proposal provides an effective transition between the City and Bo-Kaap, while being mindful of the heritage resources in the area.'

[51] In relation to the title deed condition, the following was stated:

'[T]he condition points in a design direction. It suggests that, in order to fully clarify the interface along Rose Street and to create the best possible street interface and transition, a condition should be imposed to allow for further consideration of this façade. As I shall explain below, the City will take a decision on whether it will exercise the discretion conferred by the title deed condition, during the building plan stage.'

[52] The transcript of the MPT hearing shows that there was extensive discussion of development rights and heritage concerns. There was also a discussion about the application of s 99 of the By-law, which dictates that when applications of the kind under consideration are decided the social and economic impact should be taken into account. As far as the City was concerned the unanimous approval of the applications was reached in balanced fashion, as required by s 99.

[53] In relation to the MAP meeting, the City explained that the appellants addressed the meeting as did the Developer's representatives and that this was followed by extensive discussion. The MAP's recommendations and reasons are contained in the minutes of that meeting. The MAP recommended, unanimously, that the appeal be dismissed. In respect of the Mayor's decision, the City recorded that she had been provided with all the documents and materials that were provided to the MAP. In

addition, she had been supplied with the appeals themselves and a report prepared by the Acting District Manager. She was also placed in possession of the minutes of the MAP meeting, of 30 November 2016, as well as the report prepared by the Chairperson of the MAP, Dr Johan van der Merwe.

[54] The City and the Mayor were adamant that she had carefully considered all of the information placed before her. She engaged in several consultations and discussions with her technical advisor and with her principal legal advisor. It is uncontested that she conducted an inspection of the site of the proposed development and the surrounding areas, accompanied by her technical and legal advisors. She was aware of the HPOZ attaching to one of the subject erven and was careful to observe the position of the proposed development in relation to the Bo-Kaap and to make an assessment of its impact on nearby heritage resources, Riebeeck Square and Rose and Buitengracht Streets.

[55] The Mayor was aware of the base zoning and the other buildings in the immediate vicinity of the proposed development. The City and the Mayor insisted that they had regard to heritage considerations and balanced that against the other necessary factors. It was only after the Mayor had done so that she reached a decision to dismiss the appeals.

[56] It is necessary to have regard to the Mayor's written reasons for accepting the recommendation of the MAP:

'I accept the recommendation of the Advisory Panel and agree with its Report to me. I considered, in particular, the view of the City's Environment and Heritage Department that the surrounding heritage resources will be impacted on in a negative manner to a certain degree by the proposed development due to the design's sheer size, height and magnitude. However, I agree with the MPT and the Advisory Panel that the proposed development responds appropriately to the neighbouring buildings and the environment.'

[57] Significantly, the Mayor stated the following in her affidavit opposing the relief sought by the appellants:

'Finally, it should be apparent from the appeals process and record of decision that I did not decide the appeals on the basis that the City is not entitled to limit primary rights conferred by

the development management scheme when considering an application for development falling within a heritage protection overlay zone. My belief was, and remains, that it was not necessary to do so because the proposed development responds appropriately to surrounds and that sufficient mitigating measures and conditions were put in place to address the heritage concerns raised.'

[58] The high court, in adjudicating the dispute between the appellants and the respondents, had regard to the provisions of s 99 of the By-law and the prescribed criteria in terms of which applications for approvals of the kind in question are to be decided. Le Grange J considered the sequence of events and the documentation referred to earlier in this judgement. The court below took into account the comments by the City's EHM, the objections by the appellants and all the other information available to the City and the Mayor. The court held that both s 99 of the By-law and Item 162 of the DMS required the decision- makers, the City and the Mayor, to take into account heritage concerns. Le Grange J concluded that whether one was dealing with the provisions of s 99 or with the relevant provisions of the DMS, heritage concerns could not be considered to be the pre-eminent or sole criteria in deciding applications such as those in the present case. The court found that it is but one of a basket of factors to be balanced in order to arrive at a decision.

[59] The court below dealt with the appellants' complaint that the City and the Mayor did not engage with the views expressed by HWC and the EHM and thus failed to have any real regard to the development's impact on heritage. It is necessary to set out, in some detail, the court's reasoning on this aspect. In this regard, paragraph 88 – 93 of Le Grange J's judgment are of particular relevance:

'It needs to be mentioned that the MPT and the Mayor were not only obliged to consider heritage but a far broader range of issues, including heritage. It is difficult to accept that the City had no regard or failed to have appropriate regard to heritage impact when it considered the Developer's planning applications, as this contention by the Applicants, is not borne out by the papers filed of record.

There can be no misgivings that heritage enjoyed a distinct degree of attention throughout the various stages of the application. The objectors' concerns, as noted by Heydenrych, were the height, massing and position of the building. On this point it was noted by Heydenrych that the bulk of the building was on the lower levels (9 storeys and below) "which is at a similar height to the adjacent existing building on Erf 148791"; the revised proposal by the Developer were

preferred over a proposal based solely on primary rights; it was considered that the proposal provided an effective transition between the City and Bo-Kaap while being mindful of the heritage resources in the area; it was further found that the development had taken care with regard to the surrounding heritage elements and that the impact of the building was mitigated by the setbacks applied to the building which limited its impact on the surrounding heritage resources.

A member of the MPT considered that the redesign and mitigation measures achieved a balance between the developer's statutory rights and the built infrastructure of the Bo-Kaap and the MPT gave as a reason for their decision the fact that the proposal takes cognizance of the heritage resources within the area.

At the MAP, one of [the] councillors was of the view that the application responded to the HPOZ and that the developer had been sensitive to the Bo-Kaap by scaling down the building on the Rose Street side. Another councillor of the MAP thought that the design had been as sensitive as possible. The MAP also echoed the reasons for the MPT's decision by finding that the proposal took cognizance of the heritage resources within the area.

The Mayor agreed with the MAP. The following was recorded:

"I accept the recommendation of the Advisory Panel and agree with its report to me. I considered, in particular, the view of the City's Environment and Heritage Department that the surrounding heritage resources will be impacted on in a negative manner to a certain degree by the proposed development due to the design's sheer size, height and magnitude. However, I agree with the MPT and the Advisory Panel that the proposed development responds appropriately to the neighbouring buildings and the environment.''

The City further considered the fact that the bulk of the building was moved away from the Bo-Kaap towards Buitengracht Street. Secondly, the Rose Street façade of the building would only be three storeys which is entirely in keeping with the vernacular of the Bo-Kaap and the Second Applicant's building.'

[60] The court below held that the City and the Mayor had arrived at the decisions referred to above in a balanced fashion that they did not act unreasonably or irrationally. The Mayor and the City did not commit an error of law and they did not ultimately hold a rigid view that base zoning rights trumped all countervailing considerations. Insofar as all the other allied bases of objection of the appellants were concerned, the following is relevant:

(a) In respect of the lack of a visual impact assessment, the court held that no height departure was required in terms of the Tall Buildings Policy, which left the City with a wide discretion in respect of whether to require a visual impact assessment from a

prospective developer. Sufficient information was provided so as to enable the City and the Mayor to assess the visual impact of the building.

(b) In relation to the appellants' complaint that the City and the Mayor failed to have due regard to the proposed development's impact on traffic, the court below found that the challenge was unmerited. Le Grange J recorded that the inner city is congested in many places during peak hours, but that that cannot be held to mean that the entire enterprise of providing further retail and residential opportunities within for the CBD must now be abandoned. The court held that the recommendations set out in the traffic impact assessment, which for present purposes need not be repeated, and the conditions of approval which included costs accruing to the Developer, were adequate to deal with traffic-related problems.

[61] The court below rejected HWC's contention that s 27(18) of the Heritage Act was triggered and that declaratory relief in that regard was justified. Since HWC is no longer before us, and since no other party persisted in that argument, there is no need to deal with that aspect. Relying on the principal of subsidiarity the court below held that appellants' further reliance on s 24 of the Constitution was misplaced. In the result the court made the following order:

'The Review application and the Fourth Applicant's application for a Declaratory order are dismissed with costs. The Applicants are to pay the Respondents' costs jointly and severally, the one to pay the other to be absolved. Such costs to include the costs of two counsel.'

[62] Before turning to deal with whether the conclusions of the court below set out above and the ensuing order were well-founded, it is necessary at the outset to deal with a preliminary matter. Shortly before the appeal was heard an application to lead further evidence on appeal was filed on behalf of the appellants. In short, it related to an enquiry conducted by a firm of attorneys in Cape Town, after allegations were made by as yet unidentified members of the EHM in relation to the then Mayor's antipathy to heritage concerns.[5] The allegations made were serious and the Mayor was accused of abusing her position and being guilty of misconduct and misrule by deliberately ignoring any input or assertions about heritage concerns. Although Professor Todeschini had made public utterances about bias and mala fides on the part of the

[5] The Mayor who made the decision in question is no longer in office.

City and the Mayor, these were not repeated in the affidavits on which the application in the court below was based. While there was not a complete disavowal of Professor Todeschini's stance, there was, for the purposes of the litigation, a dissociation from the allegations of mala fides and bias.

[63] The basic problem for the applicants in relation to the admission of new evidence is that the recommendation by the firm of attorneys was that the allegations set out in the preceding paragraphs require investigation and that their veracity must be tested. The City has accepted the recommendation, but the investigation has not yet commenced. The City has also made it known, publicly, that the allegations concerning the Mayor will be contested. The allegations, sought to be adduced on appeal, are hearsay. They remain untested and are from a source that is generic rather than specific. There has been no attempt to obtain first-hand substantiation of the allegations made. Moreover, there has been no attempt to have the evidence adduced in terms of the Law of Evidence Amendment Act 45 of 1988. Section 3(1) of that Act provides that as a general rule hearsay evidence is inadmissible. There are a few exceptions, one of which is that evidence should be admitted in the interest of justice, if the court so opines after considering all relevant factors, including the reason why such evidence is not given by the person upon whose credibility the probative value depends. There are also all the other requirements provided for in s 3(1)(*c*) that a court has to consider before such evidence is admitted. As stated above no attempt was made in terms of s 3 of the Evidence Amendment Act to lay a basis for the admission of the evidence.

[64] The legal principals regulating the admission of further evidence on appeal are well-established. Our courts have repeatedly stated that, in the interest of finality, a court's power to receive further evidence in terms of s 19(*b*) of the Superior Courts Act 10 of 2013[6] should be exercised sparingly and that further evidence on appeal should only be admitted in exceptional circumstances.[7] As stated in the preceding paragraph, the evidence sought to be placed before us is, in general terms, inadmissible and no legal basis has been provided for its reception. Furthermore, it is an attempt to make

[6] Previously s 22(*a*) of the Supreme Court Act 59 of 1959.
[7] *De Aguiar v Real People Housing (Pty) Ltd* [2010] ZASCA 67; 2011 (1) SA 16 (SCA) paras 9-12 and the authorities there cited.

out a new case on appeal on as yet untested allegations. In light of what is set out above we are disinclined to admit the evidence and the necessary order will be made at the end of this judgment.

[65] I now turn to deal with the substance of the appeal. Before us counsel on behalf of the appellants were constrained to restrict their submissions to the question whether the criteria under s 99 of the By-law, the provisions of which are set out hereafter, were adhered to by the City and the Mayor. In short, the nub of the appellants' case, whether by reference specifically to the By-law or to the labyrinth of policies, strategies and statutory provisions, was that heritage considerations were ignored or downplayed and that the decisions by the City and the Mayor were therefore unreasonable, irrational or tainted by the City's mistaken position in relation to base zoning rights. Section 99 provides as follows:

'99. Criteria for deciding application

(1) an application must be refused if the decision-maker is satisfied that it fails to comply with the following minimum threshold requirements -

(a) the application must comply with the requirements of this By-law;

(b) the proposed land use must comply with or be consistent with the municipal spatial development framework, or if not, a deviation from the municipal spatial development framework must be permissible;

(c) the proposed land use must be desirable as contemplated in subsection (3); and

(d) in the case of an application for a departure to alter the development rules relating to permitted floor space or height, approval of the application would not have the effect of granting the property the development rules of the next subzone within a zone.

(2) if an application is not refused under subsection (1), when deciding whether or not to approve the application, the decision-maker must consider all relevant considerations including, where relevant, the following -

(a) any applicable spatial development framework;

(b) relevant criteria contemplated in the development management scheme;

(c) any applicable policy or strategy approved by the City to guide decision making;

(d) the extent of desirability of the proposed land use as contemplated in subsection (3);

(e) impact on existing rights (other than the right to be protected against trade competition);

(f) in an application for the consolidation of a land unit -

(i) the scale and design of the development;

(ii) the impact of the building massing;

(iii) the impact on surrounding properties; and

(g) other considerations prescribed in relevant national or provincial legislation.'

[66] Section 99(3), as amended, provides that certain considerations come into play when the desirability of a proposed development is being considered in terms of s 99(2)(d). These are socio-economic impact, compatibility with surrounding uses, impact on the external engineering services, impact on safety, health and wellbeing of the surrounding community, impact on heritage, impact on the biophysical environment, traffic impacts, parking, access and other transport related considerations, and whether the imposition of conditions can mitigate an adverse impact of the proposed land use.

[67] As can be seen, s 99 has to be applied in distinct stages. First, there is the threshold enquiry set out in s 99(1). The proposed land use must be consistent with the municipal spatial development framework. The base zoning is a convenient starting point. It does allow for the kind of development here in question. Insofar as desirability is concerned, which is intimately associated with the core issue, the factors set out in s 99(3) of the By-law come into play. In relation to socio-economic impact, the City's view was that the proposed development would have a positive effect on commercial life and inner city living and on regeneration and rejuvenation of the CBD. The City's experts in relation to engineering services, safety and health were all in accord. They took the view that those aspects were adequately dealt with by the proposed development and had no concerns in that regard. So, too, with the traffic, parking, access and transport related considerations, including, the conditions put in place in relation thereto, (as noted by the court below).

[68] It is now necessary to deal with the core complaint, postulated in the court below and before us, namely, that the City and the Mayor were averse to dealing with any criticisms concerning heritage impact, that they had adopted a rigid approach concerning the base zoning and assumed the attitude that base zoning trumped or negated all other considerations.

[69] Whilst it is unfortunate that City officials, the MPT and the MAP used language that was sometimes confusing, the question to be addressed is whether, in fact, they

had regard to the criteria set out in s 99 of the By-law, referred to in preceding paragraphs. It is true that they referred to rights conferred in terms of base zoning and on occasion spoke about the sacrifice of rights. It is equally true that the documents indicate that they engaged with heritage concerns and considered the massing away from Rose Street as a significant concession to heritage concerns. The part of the City's report set out in para 50 above makes it clear that the City ultimately did not consider the primary or base zoning rights to trump all other considerations. In relation to the title deed condition, referred to above, upon which the appellant's relied, the City adopted the attitude that the title deed condition would be enforced when building plans are submitted by the developer.

[70] The mass of documentation produced by the parties to the litigation is a clear indication that the full range of countervailing interests were seriously and extensively engaged with. At this stage of the consideration of whether the application for review of the approvals by the City and the Mayor was well founded, it is apposite to consider what judicial review entails. In Endicott *Administrative Law* at 328 the following appears:

'All public authorities ought to make the best possible decisions (and Parliament can be presumed to intend that they should do so). But that does not mean that the judges have jurisdiction to hold that a decision was *ultra vires* on the ground that it was not the best decision that could have been made.'[8]

[71] Wade and Forsyth *Administrative Law* state the following:

'The system of judicial review is radically different from the system of appeals. When hearing an appeal the court is concerned with the merits of a decision: is it correct? When subjecting some administrative act or order to judicial review, the court is concerned with its legality: is it within the limits of the powers granted? On an appeal the question is "right or wrong?" On review the question is "lawful or unlawful?"

. . .

Judicial review is thus a fundamental mechanism for keeping public authorities within due bounds and for upholding the rule of law. Instead of substituting its own decision for that of

[8] T Endicott *Administrative Law* 4 ed (2018).

some other body, as happens when on appeal, the court on review is concerned only with the question whether the act or order under attack should be allowed to stand or not.'[9]

[72] Laws J in *R v Somerset County Council, ex parte Fewings & others* [1995] 1 All ER 513 (QB) at 515d-g stated:

'Although judicial review is an area of the law which is increasingly, and rightly, exposed to a great deal of media publicity, one of its most important characteristics is not, I think, generally very clearly understood. It is that, in most cases, the judicial review court is not concerned with the merits of the decision under review. The court does not ask itself the question, "Is this decision right or wrong?" Far less does the judge ask himself whether he would himself have arrived at the decision in question. It is, however, of great importance that this should be understood, especially where the subject matter of the case excites fierce controversy, the clash of wholly irreconcilable but deeply held views, and acrimonious, but principled, debate. In such a case, it is essential that those who espouse either side of the argument should understand beyond any possibility of doubt that the task of the court, and the judgment at which it arrives, have nothing to do with the question, "Which view is the better one?" Otherwise, justice would not be seen to be done: those who support the losing party might believe that the judge has decided the case as he has because he agrees with their opponents. That would be very damaging to the imperative of public confidence in an impartial court. The only question for the judge is whether the decision taken by the body under review was one which it was legally permitted to take in the way that it did.'

[73] Schreiner JA in *Sinovich v Hercules Municipal Council* 1946 AD 783 at 802-803 said:

'The law does not protect the subject against the merely foolish exercise of a discretion by an official, however much the subject suffers thereby. But the law does protect the subject against stupid by-laws or regulations, however well intended, if their effect is sufficiently outrageous.'

[74] Hoexter makes the point as follows in *Administrative Law in South Africa* (2 ed) at 113:

'In administrative law "judicial review" refers more specifically to the power of the courts to scrutinise and set aside administrative decisions or rules (delegated legislation) on the basis of certain grounds of review.'[10]

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[9] Wade & Forsyth *Administrative Law* 11 ed (2014) at 26.
[10] C Hoexter *Administrative Law* 2ed (2012) at 113.

[75] In *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* [2004] ZASCA 15; 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC), O'Regan J explained that s 6 of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) identifies the circumstances in which the review of administrative action might take place. The authority for that basis is the Constitution.[11]

[76] In the present case, the focus before us was whether the City and Mayor were materially influenced by an error of law in that they allegedly adopted the attitude that base zoning negated or trumped all countervailing considerations. It was also in general terms submitted that the approvals were irrational or were so unreasonable that no reasonable person could have reached that decision. This, in essence, was reliance on the grounds of review provided for in s 6(2) of PAJA. In adjudicating whether those grounds are justified, we are precluded from considering whether we would have reached a decision within a band of decisions, but rather whether the grounds of review provided for in s 6(2) of PAJA and relied on by the appellants are sustainable.

[77] In determining whether a decision was reasonable or not, factors to be considered are the nature of the decision, the identity and expertise of the decision-maker, the range of factors relevant to the decision, the reasons given for the decision, the nature of the competing interests involved, and the impact of the decision on the lives and well-being of those affected.[12] As taught by the Constitutional Court, although the review function of courts now has a substantive as well as a procedural ingredient the distinction between appeals and reviews continues to be significant. [13]

[78] In *Bato Star* the following was stated:

'In treating the decisions of administrative agencies with the appropriate respect, a court is recognising the proper role of the executive within the Constitution. In doing so a court should be careful not to attribute to itself superior wisdom in relation to matters entrusted to other branches of government. A court should thus give due weight to findings of fact and policy

[11] Para 25.
[12] *Bato Star* Para 45.
[13] *Bato Star* Para 45.

decisions made by those with special expertise and experience in the field. The extent to which a court should give weight to these considerations will depend upon the character of the decision itself, as well as on the identity of the decision-maker. A decision that requires an equilibrium to be stuck between a range of competing interests or considerations and which is to be taken by a person or institution with specific expertise in that area must be shown respect by the courts.'[14]

[79] Returning to the facts of the present case, as stated above, the City's officials, the MPT and the MAP, despite the use of somewhat opaque language, in fact had regard to heritage concerns. They all engaged with the Developer and objectors on that aspect. In truth, the balance envisaged by s 99 was achieved. The City's experts and those who served on the MPT and MAP were undoubtedly qualified to deal with the subject matter, as was the Mayor's technical advisor. It is not for the court to second-guess these experts, save where they committed a reviewable irregularity. This is not to imply judicial timidity but rather to ensure that when judicial intervention occurs it is based on principle and within the bounds of the law, including observing the doctrine of the separation of powers. The court below, in my view, cannot be faulted for holding that the City's experts had regard to relevant considerations and were not guilty of the irregularities they were accused of.

[80] Even if it could be argued that what is set out in the preceding paragraph is too charitable to the City's officials and departments, there is a further obstacle for the appellants to overcome. The appeal before the Mayor, it was accepted by counsel on behalf of the parties, was an appeal in the wide sense, so that the merits of the applications for approval could be considered afresh.[15] It amounts to a re-hearing of the merits of the matter with or without further evidence or information. It was accepted by counsel on behalf of the appellants, that whatever flaws there might conceivably have been in relation to the decision of the MPT, that in the event of a finding that the Mayor's decision was untainted by a reviewable irregularity, that would be sufficient to thwart success in the appeal.

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[14] See para 48.

[15] *Golden Arrow Bus Services v Central Road Transportation Board and Others* [1948] 3 All SA 478 (A); 1948 (3) SA 918 (A) at 925, 1948 (3) All SA 478 (A); *South African Broadcasting Corporation v Transvaal Townships Board and Others* 1953 (4) SA 169 (T) at 178A-D; *Tikly and Others v Johannes NO and Others* 1963 (2) SA 588 (T) at 590G-H.

[81] In paras 56 and 57 above the Mayor's reasons for arriving at her decision, as well as the statement from her opposing affidavit, are set out. They undoubtedly reveal that she considered the base zoning as well as all the other aspects she was obliged to take into account. In particular, she took into account heritage concerns especially those raised by the EHM. She had all the expert advice she required in order to enable her to reach a balanced decision in terms of s 99. Insofar as the allied aspects related to the core question are concerned, such as traffic, access and the provisions of parking bays, as demonstrated above, the court below dealt with them all in a manner that cannot be faulted. In the result the appeal must fail.

[82] What remains is the question of costs. In respect of costs, the court below said the following:

'There is no reason why the usual position relating to costs in review matters should not apply. The rule that in constitutional matters, the unsuccessful party is ordinarily not ordered to pay costs, does not apply in this instance.'

[83] The appellants contended that they were vindicating constitutional rights and therefore the principle set out in *Biowatch Trust v Registrar, Genetic Resources and Others* [2009] ZASCA 14; 2009 (6) SA 232 (CC) at para 22 applies, namely that, ordinarily in constitutional litigation, if the government loses it should pay the costs of the other side, and if the government wins, each party should bear their own costs.

[84] It was submitted on behalf of the respondents that the question of costs properly falls within the discretion of the court, having regard to all of the prevailing circumstances. In the present case it was pointed out that the first appellant's litigation was funded by Ms Petra Wiese, a neighbour and a person of means who also has an interest in the neighbouring building, 35 on Rose Street. It was pointed out that both Ms Wiese and Professor Todeschini had property interests in the vicinity of the building and stood to benefit in the event of success in the litigation. The agreement to fund the litigation included an indemnification by Ms Wiese against a costs order that might result against the first appellant. In proper perspective, the application in the court below was about whether s 99 of the By-law was complied with by the City. The second and third appellants had proprietary rights that might be affected by the City's decision.

The first appellant, as indicated above, was placed in funds and indemnified against cost orders.

[85] Furthermore, the scale of the present litigation was excessive. It might well have been driven by the funding that was available. As described at the commencement of this judgment and demonstrated later, the issues, properly distilled, were within a narrow compass. The necessity for photomontages and extensive affidavits in relation to the disputation concerning the impact of an 18-storey building is questionable. One need not be an architect or a construction expert to understand that an 18 storey building is imposing.

[86] As has been stated by this court in *National Home Builders' Registration Council & another v Xantha Properties 18 (Pty) Ltd* [2019] ZASCA 96; 2019 (5) SA 424 (SCA) at para 26, the mere labelling of litigation as 'constitutional' is insufficient. For the *Biowatch* principle to apply the case should raise genuine, substantive, constitutional considerations. The rule does not mean risk-free asserted constitutional litigation. I can find no detectable misdirection on the part of the court below in relation to cost.

[87] For all the reasons stated above, the following order is made:

1 The application to lead further evidence on appeal is dismissed with costs, including the costs of two counsel.
2 The appeal is dismissed with costs, including the costs of two counsel.

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M S Navsa

Judge of Appeal

APPEARANCES

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For First to Third Respondent:	L A Rose-Innes SC, with him H J de Vaal SC
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For Fourth Respondent:	S P Rosenberg SC and D W Baguley
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