**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA**

# JUDGMENT

Case no: 560/08

**In the matter between:**

**THE CAMPS BAY RATEPAYERS' AND RESIDENTS' ASSOCIATION**
**First Appellant**
**PS BOOKSELLERS (PTY) LIMITED** **Second Appellant**

and

**GERDA YVONNE ADA HARRISON** **First Respondent**
**THE MUNICIPALITY OF THE CITY OF CAPE TOWN**
**Second Respondent**

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| **Neutral citation:** | *Camps Bay Ratepayers' & Residents' Association v Harrison*(560/08) [2010] ZASCA 3 (17 February 2010) |
| **Coram:** | NAVSA, NUGENT, VAN HEERDEN, MLAMBO and MAYA JJA |
| **Heard:** | 25 AUGUST 2009 |
| **Delivered:** | 17 February 2010 |
| **Summary:** | Local authority – National Building Regulations and Building Standards Act 103 of 1977 – application to review and set aside approval of building plan – whether plan complies with the relevant statutory requirements. |

**ORDER**

**On appeal from**: Cape High Court (HJ Erasmus J sitting as court of first instance):

The appeal is dismissed with costs including the costs of two counsel.

**JUDGMENT**

MAYA JA (NAVSA, NUGENT, VAN HEERDEN and MLAMBO JJA concurring)

**Introduction**

[1] This is an appeal, with the leave of the court below, against its refusal of an application for the review and setting aside of a decision of the second respondent (the municipality) approving the first respondent's building plans relating to the proposed development of Erf 590 Brighton Estate Extension No. 2 Township Camps Bay (the property), under s 7 of the National Building Regulations and Building Standards Act 103 of 1977 (the Building Standards Act).

[2] The litigation between the parties has a long history dating back to 2005 and a few orders have been made at various stages of their legal skirmishes. This makes it necessary to set out the relevant background facts in some detail and, in so far as they may be disputed, I will apply the test laid down in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*.[1]

[1] 1984 (3) SA 623 (A) at 634-635C.

[3] The main protagonists are the second appellant, PS Booksellers, and the first respondent, Harrison, who are neighbours. PS Booksellers is the registered owner of Erf 594, which is its principal place of business situate diagonally opposite the property. Harrison is a property developer and the registered owner of the property which she acquired in September 2004 for development and resale. The litigation arose from the appellants' objections to building operations she commenced on the property, which allegedly contravened the applicable municipal zoning scheme and restrictive title deed conditions (which are discussed later in the judgment) in respect of building set-back and height requirements.

[4] On 24 January 2005, the municipality approved Harrison's building plans under Plan No. 480217 (the original plan) which depicts a three-storey residential dwelling with a swimming pool on a plot measuring 427m$^2$in extent. The storeys are designated 'Upper Ground Floor', 'First Floor' and 'Second Floor'. According to this plan the property is situated at the corner of Geneva Drive and Blinkwater Road. Its topography slopes from Blinkwater Road down towards Geneva Drive. It has an open parking area with access from Blinkwater Road. There is another open parking area and a basement garage on the side of Geneva Drive designated 'Lower Ground floor' which, because of the steeply sloping nature of the property, are at a significantly lower level than the parking facilities off Blinkwater Road.

[5] Building operations commenced in March, shortly after the original plan's approval. However, the appellants objected to the construction. After the objections were raised, a chain of correspondence flowed between the appellants and Harrison in an attempt to reach a compromise. In consequence, Harrison submitted a substantially revised plan which the municipality approved under Plan No. 485042 (the September 2005 plan). The appellants were nonetheless not satisfied that their concerns had been addressed. In November 2005, they instituted an application to interdict any further building operations on the property and its sale, transfer or alienation pending (a) an appeal to be launched in terms of s 62 of the Local

Government: Municipal Systems Act 32 of 2000 (the Systems Act)[2] against the approval of the September 2005 plan, (b) an application for the demolition of any construction which contravenes the title deed conditions and (c) certain review proceedings.[3]

[6] The principal issue in the application (as in the s 62 appeal which followed) concerned a wall which included a large planter and a swimming pool water reticulation system constructed along the western side of the property on the Geneva Drive boundary which continues on the eastern side of the property on the Blinkwater Road street boundary to which portion of the dwelling abuts on. The appellants complained that it was not merely a boundary wall but was designed to support not only the swimming pool and the planter but also to retain a substantial amount of fill material deposited and compacted behind it to its full height. This, they contended, contravened clause D(d) of a reciprocal restrictive title deed condition registered in favour of every owner of an erf in Camps Bay under the provisions of s 18(3) of Ordinance 33 of 1934 (the Ordinance), which is applicable to the parties' respective properties. The clause prohibits the erection of a 'building or structure or any portion thereof, except boundary walls and fences ... nearer than 3.15 metres to the street line which forms a boundary' of an erf.

[7] The appellants also argued that the 'finished' ground level abutting the dwelling from which the dwelling's height was to be measured had been achieved by unlawful manipulation. This was so, they contended, because the retaining wall impermissibly altered the finished ground level adjacent to the facades of the dwelling, which was artificially raised by some 3,5 metres, and disguised the height of such facades thus enabling Harrison to construct a dwelling to a height in excess of the restriction of 10 metres prescribed by the applicable provisions of s 98(2) of the Zoning Scheme Regulations (the

[2] Section 62(1) of the Systems Act entitles '[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, [to] 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'.

[3] The review proceedings which would have targeted the September 2005 plan approval never got off the ground as the intended result was achieved in the s 62 appeal proceedings.

Zoning Scheme).[4]

[8] In April 2006, the appellants obtained the interdict which remains in operation.[5] This relief was granted on the basis that the retaining walls reflected in the September 2005 plan indeed contravened clause D(d) and that, prima facie, they artificially raised the finished ground level by retaining fill material compacted behind them and reconfigured the original steep slope in the property to an almost horizontal platform thus concealing an infringement of the relevant height restriction.

[9] The s 62 appeal which the appellants duly lodged thereafter was also decided in their favour on the same basis as the interdict proceedings. The September 2005 plan was accordingly set aside. The appellants went further and instituted an application for the demolition of the dwelling, a shell of a three-storey structure built in accordance with the original plan. That application currently stands over by the parties' agreement pending the finalisation of the review proceedings which are the subject of this appeal.

[10] Prior to the finalisation of the s 62 appeal, Harrison had meanwhile submitted for the municipality's approval a further plan as a rider to the original plan. (As to which plan this document was meant to be a rider is a point of hot dispute as the appellants contend that it was intended to be a rider to the defunct September 2005 plan but I deal with this aspect later.) This plan was also met with written objections from the appellants but after further revisions, on 6 September 2007, it was approved by the municipality's Development Co-ordinator, Mr Holden, on the written recommendation of Mr Moir, the municipality's Building Control Officer, under plan 506011 (the plan). This is the impugned decision which the appellants seek to have reviewed and set aside.

[11] In the plan's final version the swimming pool is in a different,

[4] The Regulations were promulgated in terms of s 9(2) of the Land Use Planning Ordinance 15 of 1985 published in Provincial Gazette 4684 of 1 March 1991.

[5] The judgment is reported as *PS Booksellers (Pty) Ltd v Harrison* 2008 (3) SA 633 (C) per Meer J.

uncontentious position. The planter and other garden landscaping features and structures erected to provide access to the parking space and the front door have been omitted altogether. The walls along the northern and western boundaries of the property previously retaining the swimming pool and the planter thus no longer serve a retaining function to those structures. The 'sandbag wall' running from the corner of the garage to the Geneva Drive boundary and intersecting the main boundary wall which retained some soil has been removed. Fill material between the boundary wall and the facade of the dwelling has also been removed. The plan shows contours in this area which, according to Moir, is an indication of a 'fall' and the absence of fill material thus leaving nothing to be retained by the remaining wall. The appellants confirm the removal of these objects but persist that the exposure of the facades by the removal of fill material has served to reveal an infringement of the 10 metre height restriction and that the remaining boundary walls still retain compacted fill material. The plan further shows an embankment along the northern side and the boundary wall measuring a compliant height of 2,1 metres.

[12] The appellants' grounds of review in their founding papers were framed as follows:

'[1] The buildings as contemplated by the plans approved by the [municipality] in plan no. 506011, will contravene both the title deed conditions applicable to the property and also the provisions of the zoning scheme applicable to the area in which the property is situated;
[2] The [municipality], when considering the application for plan approval, failed to give due consideration to the objections lodged by the [appellants] against the approval of such plans;
[3] The [municipality] and its officials committed material errors of law and misdirected themselves as to the true nature of elements of the proposed building, when considering the plan for approval;

28.4 The [municipality]'s officials had regard to irrelevant considerations and failed to have due regard to relevant considerations – more particularly the facts, information and objections before them – when considering the plan for approval.'

[13] These grounds, as developed in the appellants' affidavits, turned on the legality of the plan, ie the alleged infringement of the height restriction imposed by the Zoning Scheme and the set-back requirements set out in the title deed; the competence of the delegated authority to the decision-maker

who approved the original plan (this ground was not pursued on appeal) and the procedural fairness or otherwise of the decision to approve the plan in relation to the manner in which the application was scrutinised, particularly the municipality's alleged failure to identify unlawful features and consider the appellants' objections. The appellants subsequently added further grounds in their replying affidavits, namely that (a) the plan also contravened s 47(1) of the Zoning Scheme and (b) the approval of the plan as a rider to a previously approved plan was incompetent.

[14] The court below refused to entertain the challenge relating to s 47(1) of the Zoning Scheme mainly on the basis that it had been raised late (in reply) and was as a result not adequately canvassed in the papers. The court then dismissed all the other grounds of review and found, inter alia, that even if the approval process was not fair because Moir's memorandum did not adequately reflect the appellants' objections, it would not be just and equitable to set the plan approval aside solely for that reason. In its view, the municipality had correctly decided that the plan complies with all the relevant legal provisions and no purpose would be served by remitting the matter for fresh consideration.

[15] Before us, the appellants contested the decision of the court below on the same grounds but added more: that (a) the municipality did not pay due regard to the objections raised by interested parties on the basis of derogation in value of their properties under s 7(1)(a) and (1)(b)(ii) of the Building Standards Act when it considered the plan; (b) the municipality failed to furnish the decision-maker, Holden, with a building control officer's recommendation (c) the court below wrongly exercised its discretion in refusing the review having regard, inter alia, to the fact that the municipality and the court itself did not consider a number of issues relating to whether the application complied with relevant law, bearing in mind that the doctrine of legality does not countenance invalid administrative acts.

[16] It is convenient to set out the legal framework within which the matter falls to be decided before I deal with the parties' contentions. The relevant and

principal statutory provisions are provided by the Building Standards Act the objective of which is to promote uniformity in the law relating to the erection of buildings within local authorities. Section 4(1) requires the local authority's written approval of a landowner's application comprising of building plans and specifications prior to the construction of a building. Section 5 enjoins every local authority to appoint a building control officer. This is a key official without whom a local authority may not function,[6] who must be skilled and specialized[7] and is vested with wide-ranging powers in the exercise of building approval and development within a local authority which are set out in s 6. Section 6(1)(a) obliges him or her to 'make recommendations to the local authority in question, regarding any plans, specifications, documents and information submitted to such local authority in accordance with s 4(3)'.[8]

[17] Section 7 regulates the approval of building plans. Its provisions empower a local authority to grant an application if satisfied that the application complies with the requirements of the Building Standards Act and stipulates the circumstances in which an application will be refused. The material provisions are couched in s 7(1) which reads:

'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 –

*(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

[6] See *Paola v Jeeva NO* 2004 (1) SA 396 (SCA) paras 14-16; *Walele v City of Cape Town* 2008 (6) SA 129 (CC).

[7] See Part A16 of the Regulations under the Building Standards Act, GN R2378 RG4565, 12 October 1990 (the Building Regulations) which stipulates the tertiary educational qualifications which must be vetted by the Human Sciences Research Council that a building control officer must possess to qualify for the position.

[8] Section 4(3) sets out the nature of the particulars which the application envisaged in the section should contain.

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;

Provided that the local authority shall grant or refuse, as the case may be, its approval in respect of any application where the architectural area of the building to which the application relates is less than 500 square metres, within a period of 30 days after receipt of the application and, where the architectural area of such building is 500 square metres or larger, within a period of 60 days after receipt of the application.'

[18] I turn to deal with each of the grounds of review.

*The alleged failure by the decision-maker (Holden) to consider the appellants' objections under s 7(1)(a) and (1)(b)(ii) of the Building Standards Act*

[19] It was contended for the appellants that they duly lodged an objection that the proposed building would derogate from the value of neighbouring properties, including Erf 594, which both Moir and Holden were obliged to consider; that Moir failed to inform Holden of the objection by furnishing him with a copy of the document in which it was embodied or a fair and accurate summary thereof, as he was obliged, and that such failure – to place statutorily relevant information before the decision-maker – nullified Holden's approval of the plan. The objection was purportedly embodied in two letters dated 27 October 2006[9] and 15 January 2007,[10] respectively, and an affidavit

[9] The material part of this letter reads:
'The approval of these building plans with their reliance on a fictitious and unattainable finished level of the ground abutting the façade of the building would permit the retention of the currently illegal building when the height of the façade would exceed the 10m limitation (by some 2m) … [t]hat is, the unlawfully constructed three storey building achieves, and would retain, a physical height of one storey higher than the legitimate expectations of the owners of adjoining and neighbouring properties. We accordingly submit that the building in question … "is to be erected" … in such a manner that it will be … undesirable and will … derogate from the value of adjoining and neighbouring properties, and that the Council is therefore compelled to reject the building plan application by virtue of the provisions of s 7(1)(b) of the [Building Standards Act].'

[10] In this letter the relevant objection was recorded as follows:
'Quite apart from all the aforegoing objections, our clients object to the revised plans now submitted on the basis that in terms of s 7(1)(b)(ii)(aa)(ccc) the structure will in fact derogate

filed in support of the appellants' founding papers which was deposed to on the latter date by Mr van der Spuy, a sworn valuer. Van Der Spuy's brief affidavit, one of a number of documents attached to the founding affidavits, merely stated without proffering any supporting facts that the basis for determining Erf 594's market value was the arm's length price which he estimated a willing buyer would pay a willing seller in an open market situation and that the dwelling, described as 'imposing and somewhat overbearing', would substantially derogate from the market value of Erf 594 if permitted to stand.

[20] The appellants' submissions in this regard may, in my view, be disposed of shortly. The issue of derogation of value was not pertinently raised as a ground of review in the court below. The passing reference to the issue in the letters of objection and Van Der Spuy's affidavit to which no weight can be accorded remained merely that, and no more, as the allegations were not adopted in the founding affidavit to found a ground of review on which the appellants relied. The respondents, who could well have raised a solid defence, were therefore not required to address these documents and rightly did not address the issue in their opposing affidavits. Notably, the ground was not mentioned at all in the comprehensive judgment of the court below which scrupulously listed those argued before it. The appellants' counsel was also constrained to concede, albeit reluctantly, that the ground was rather canvassed in the demolition application which was not before us and was not 'dealt with as a separate and distinct ground' in these proceedings.

[21] The appellants therefore seek, at appeal stage, to rely on a ground that they not only failed to establish in their founding papers but was not canvassed at all in the court below. This is impermissible. As Cloete JA pointed out in *Minister of Land Affairs and Agriculture v D & F Wevell Trust*:[11]

from the value of adjoining or neighbouring properties. In support of our clients' aforementioned objections, we annex hereto … an affidavit deposed to on the 15th January 2007 by Mr John Phillip van der Spuy, a Sworn Valuer, which must be treated as if inserted herein'.

[11] 2008 (2) SA 184 (SCA) para 43. See also *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) para 47; *Van Zyl v Government of the Republic of South Africa* 2008

'It is not proper for a party in motion proceedings to base an argument on passages in documents which have been annexed to the papers when the conclusions sought to be drawn from such passages have not been canvassed in the affidavits. The reason is manifest – the other party may well be prejudiced because evidence may have been available to it to refute the new case on the facts. The position is worse where the arguments are advanced for the first time on appeal. In motion proceedings, the affidavits constitute both the pleadings and the evidence: ... and the issues and averments in support of the parties' cases should appear clearly therefrom. A party cannot be expected to trawl through lengthy annexures to the opponent's affidavit and to speculate on the possible relevance of facts therein contained. Trial by ambush cannot be permitted.'
This review ground must, therefore, fail.

*The alleged failure by the municipality to provide the decision-maker with a recommendation from the Building Control Officer as contemplated by sections 6 and 7 of the Building Standards Act*

[22] The appellants' attack in this regard was based on the ground that the memorandum Moir submitted to Holden was not a recommendation as envisaged by sections 6 and 7 of the Building Standards Act because it, inter alia, (a) did not fairly or accurately summarise their objections to the plan and was in certain respects factually incorrect, (b) did not inform Holden, even in summary, of all their objections particularly those relating to the infringement of the height restrictions and derogation of value of neighbouring properties, (c) contained insufficient information such as would enable Holden to independently make a rational decision on the application before him and (e) showed that Moir himself failed to appreciate the nature of the objections or left out information he thought had no merit thus arrogating himself a discretion he did not have. Reliance for this proposition was placed on the *Walele*[12] decision which we were advised was delivered after the matter was argued before the court below but before judgment was given.

[23] As with the derogation of value argument dealt with above, the contention that Moir's memorandum was not a proper recommendation was not one of the review grounds in the appellants' affidavits; it was raised for the

(3) SA 294 (SCA) para 40; *Swissborough Diamond Mines (Pty) Ltd v Government of the Republic of South Africa* 1999 (2) SA 279 (T) at 324F-G.
[12] Op cit n6.

first time in their heads of argument in this court. I am not inclined to lend it any credence for the same reason that I refused to entertain the derogation of value point. As I have said, it would be prejudicial to the municipality if the appellants were allowed to advance a new issue on appeal which was not raised in their founding affidavits and which the municipality did not have an opportunity to deal with in its opposing affidavit. But I will consider the question whether or not the municipality gave due regard to relevant considerations and the appellants' objections as that is what was canvassed in the affidavits.

[24] That Holden's decision constituted administrative action as defined by the Promotion of Administrative Justice Act 3 of 2000 (PAJA), which is constitutionally required to be lawful, reasonable and procedurally fair,[13] was not in dispute. As pointed out, the appellants' main complaint in their papers was that the municipality's officials did not have due regard to their objections which the municipality denied. Although there was no statutory obligation on the municipality to afford the appellants an opportunity to make representations about the impact the proposed building might have on their properties,[14] it nevertheless commendably invited PS Booksellers' input. Once it did so, it was enjoined to consider the appellants' representations. A determination of whether such representations were properly considered requires an examination of the procedure followed in the approval process.

[25] Undisputed evidence is that the exercise, which was undertaken by various departments within the municipality, took the following sequence. On 2 June 2006 the Land Information Property Management Department granted the necessary clearance after verifying and confirming cadastral boundary measurements, title deed information, servitude and road widening information. On 17 August 2006 Messrs Napoli (a Principal Plans Examiner) and September (the Section Head) of the municipality's Land Use Management Department granted clearance after verifying and confirming

[13] Section 3(1) of PAJA requires that '[a]dministrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair.'
[14] *Walele* at para 71.

that the plan was consistent with the Zoning Scheme Regulations, including height restrictions and building lines. These officials had sight of and considered the actual letters of objection before endorsing the plan. Structural engineering acceptance indicating that structural certification was in order had been granted by the Plans Examiner who, after assessing that the application complied with the Building Standards Act and other relevant laws, submitted it to Moir.

[26] Moir then requested Harrison and her experts to address him on the merits of those objections. He subsequently requested further information from her in response to which the municipality received correspondence from Messrs Lewis (a land surveyor) and Labrum (a structural engineer). After considering these responses Moir referred the plans to Mr Henshall-Howard, the municipality's Building Development Management Head, on 5 June 2007, and thereafter, on 17 August 2007, he passed them on to September to consider the certificate from Labrum for further verification and clearance. According to Moir, he did not only consider the objections and all the information placed before him but also inspected the property before compiling his memorandum which included a summary of the objections. It is that memorandum and the approval document which made reference to the different departmental clearances that Holden relied on in granting the approval.

[27] In his affidavit, Holden stated that in reaching his decision he relied on the facts, opinions and advice provided to him by Moir and the other in-house experts who scrutinised the application. He said that he considered the information furnished by Moir adequate and was satisfied that the appellants' objections – the memorandum recorded that the objections included that the proposed building contravened the title deed conditions; that the levels furnished by the land surveyor were incorrect and that the embankment around the dwelling would become unstable – which were 'clearly and properly conveyed' (as confirmed by a later, thorough perusal of the original letters of objection) had no merit and that the plan met the statutory requirements. He reached this conclusion after giving particular attention to

the fact that the application had been revised to comply with the title deed conditions and the Zoning Scheme; Labrum's advice that the building was founded at undisturbed ground level and did not rely on any fill against the boundary for support; that the walls encroaching the title deed requirements could be removed and responsible landscaping would not affect the structure; the opinion of the experienced and reputable Lewis that the levels were correct and no point of the building would exceed the prescribed 10 metre height level above the finished ground level and Moir's advice that none of the statutory requirements would be infringed. (These were the very issues at the heart of the appellants' case which essentially concerns the height levels and building lines of the proposed building.)

[28] There is, generally, nothing improper about such conduct, as a decision-maker may rely on the expertise and advice of officials within his or her institution as long as he or she is fully apprised of the interested parties' representations – an accurate summary containing a fair synopsis of the relevant evidence and such representations will generally suffice – and does not abdicate the responsibility of independently assessing the application and making the ultimate decision.[15]

[29] It appears to me on this evidence that all the necessary protocols were scrupulously observed by the relevant officials and due regard paid to the appellants' concerns in the approval process. I cannot conceive what more could have been done to render the process fair. As I see it, Holden was entitled to rely on Moir's memorandum and the accompanying document in the manner he did. This must be so, bearing in mind that the building control officer's recommendation is intended to be the decision-maker's primary source of information which forms the basis of his or her opinion.[16] As the court put it in the *Walele* decision '[t]he discretion conferred on the decision-maker is highly circumscribed because the decision taken is reliant upon the

[15] *Earthlife Africa (Cape Town) v Director-General: Department of Environmental Affairs and Tourism* 2005 (3) SA 156 (C) para 76; *Minister of Environmental Affairs and Tourism v Scenematic Fourteen (Pty) Ltd* 2005 (6) SA 182 (SCA) para 20; *Jeffs v New Zealand Dairy Production and Marketing Board* [1996] 3 All ER 863 (PC) at 870F-G; *Walele* para 69.
[16] *Walele* paras 68 and 70.

antecedent opinion reached ... upon a consideration of the [building control officer's] recommendation.'[17]

[30] The question whether the action complained of causes prejudice is important in deciding whether or not to grant the relief sought. None seems to have been occasioned here by reason of the procedure followed. Bearing in mind that what constitutes a fair administrative procedure depends on the circumstances of each case,[18] I am unable to find that such procedure is so flawed as to vitiate the decision to approve the plan.

*The alleged unlawfulness of the approval of the plan as a rider plan*

[31] The appellants persisted with their argument in the court below that the Building Standards Act makes no provision for the concept of a rider plan and that municipality therefore impermissibly approved the plan as a rider plan to a previously approved plan. They contended further that the plan was in any event approved as an amended version of and a rider to the defunct September 2005 plan, a fact which alone rendered its approval incompetent.

[32] I deal first with the latter submission. The plan expressly states on its face that it was approved as a rider to the original plan. The Moir memorandum referred to it as such as did the parties themselves in the founding and opposing affidavits. As pointed out by the appellants in their replying papers, Holden's approval document referred to it as a rider to the September 2005 plan, perhaps because the latter plan was the most recently approved plan and still subsisted when the plan was approved on 2 June 2006. But, whatever the reason for this obvious error was, I do not think that it can detract from the patent fact that the municipality approved the plan as a rider to the original plan.

[33] Concerning the first contention, iis so that the Building Standards Act makes no mention of a rider plan. However, s 17(1) empowers the Minister to

[17] At para 67.
[18] See s 3(2)(a) of PAJA; *Premier, Province of Mpumalanga v Executive Committee, Association of State-Aided Schools, Eastern Transvaal* 1999 (2) SA 91 (CC) para 39.

make regulations regarding, inter alia, 'the preparation, submission and approval of plans and specifications of buildings, including the approval of amendments or alterations to plans and specifications of buildings during the erection thereof'. In consequence, Regulation A25(5) criminalizes deviation from an approved plan building 'except where such deviation has been approved'. Regulation A25(6) then empowers a local authority to stop the erection of a building where there is an unauthorized deviation from approved plans during the course of construction, except where it is found that the deviation is necessary, in which case construction may be allowed to continue subject to the submission of an amended plan for approval.

[34] These provisions undoubtedly contemplate a deviation from an approved plan and the submission and approval of an amended plan, drawing or particulars to cater for such a deviation where necessary. At a practical level, according to Moir's uncontested allegations, the municipality routinely receives and processes applications for the approval of additional or supplementary plans (commonly referred to as rider plans) amending or qualifying a previously approved plan whenever a deviation from such approved plan becomes necessary during the construction of a building.

[35] I am inclined to agree with the court below that the Legislature would hardly have vested the Minister with the authority to make provisions of this nature if local authorities did not have the implied power to approve amendments or alterations to approved plans in terms of the governing provisions contained in s 7 of the Building Standards Act. It seems to me that to give effect to the Legislature's clear intention, the plans, specifications and documents required to accompany an application in respect of the erection of a building by s 4 of this Act (the wording appears to envisage the possibility of a plurality of plans per application) must necessarily include amended or rider plans. In the circumstances, I find that the plan was a rider to the original plan and that its approval was not *ultra vires* provisions of the Building Standards Act.

*The alleged contravention of title deed conditions*

[36] As indicated above, the appellants' other complaint is that the plan impermissibly allows retaining walls which encroach on the 3,15 metre setback to the street line and form a boundary to the property in contravention of clause D(d) of the applicable restrictive title deed conditions. Although this issue does not appear to have been pursued with any vigour or at all in argument in the court below the appellants insist that the infringing walls remain in the original plan and are depicted on the plan. According to Moir, the walls along the northern and western boundaries of the property no longer serve a retaining purpose but mark the boundary walls of the property. Only the abutting Blinkwater Road serves a retaining function. But, he says that this wall supports only a municipal public footway incidentally and this, the municipality contends, does not infringe the relevant requirements but places it in line with clause D(g) of the title deed provisions imposing favourable conditions in the municipality's favour against property owners.[19]

[37] It must be considered that the main objective of the title deed conditions, which were introduced in the absence of comprehensive town planning legislation, was to regulate development and usage of land between developers and the purchasers and owners of individual erven and their successors-in-title. The purpose of this particular setback restriction must obviously have been to prevent property owners from building too close to the street lines. That does not seem to have happened here. No building or structure encroaches on the 3,15m setback as the wall in issue does not retain any ground or structure on the property itself. It merely performs a boundary function as it encloses an open space,[20] which is permitted by the restriction, and benefits the municipality on a portion of the latter's land external to the property. It seems inconceivable that this was the contemplated target of the restriction and I can find no transgression of the

[19] Clause D(g) reads: 'As being in favour of the Council of the Municipality of Cape Town:- That the owner of this erf shall be obliged to receive material to give a proper slope to the bank, if this erf is below the level of the adjoining erf, and if this erf is above the level of the adjoining erf, he shall [in] like manner permit a safe slope to the bank, unless in either case he shall elect to build retaining walls to the satisfaction of the City Engineer and within a period to be determined by the Municipality of Cape Town.'

[20] *BEF (Pty) Ltd v Cape Town Municipality* 1983 (2) SA 387 (C) at 396D-G.

provisions of clause D(d).

*The alleged contravention of s 98 of the Zoning Scheme in respect of the 10 metre height restriction*

[38] In support of this ground, the appellants contended that Harrison artificially raised the ground level on the property to evade the height restriction by using fictitious ground levels in the plan as evidenced by the differences between the levels shown in the survey and the architect's drawings in the plan.

[39] 98 of the Zoning Scheme provides:

'Camps Bay and Bakoven

(1) No building within the area of Camps Bay and Bakoven bounded by the municipal boundary to the South and Kloof Road to the North shall exceed three storeys in height.

(2) No point on the façade of any building within such area shall be more than 10m above the level of the ground abutting such façade immediately below such point.

(3) For the purpose of subsection (2) "façade' means a main containing wall of a building, other than a wall of an internal courtyard.'

[40] Lewis deposed to an affidavit recording his findings. He prepared a survey map in September 2004 on which he subsequently superimposed the plan. In his view, the heights of the contour lines in the plan were accurate as they accorded with his earlier survey and corresponded with those reflected in the original plan. These findings were supported by another land surveyor, Mr Abrahamse, who undertook an independent survey at Harrison's instance. Abrahamse confirmed that a survey of the finished ground level surrounding and immediately adjoining the dwelling revealed that no point of the façade of the dwelling was more than 10 metres above the level of the ground. Another expert, Mr Lowden, a civil engineer specializing in structural engineering engaged by the municipality, found amongst other things that 'the foundations of the dwelling are founded at an appropriate level and that the building structure is not dependent on the construction of any retaining walls to provide

stability to the foundations'.

[41] The appellants' response to these experts' allegations in their replying papers was that their objection was 'never that the height from the top to the bottom of the parapet [of the dwelling] to the ground immediately abutting the façade as currently shown on the plan exceeds 10 metres' but that 'the true height of the façade, absent the illegal structures and the fill retained thereby, will and does exceed 10 metres'.

[42] It is clear from these allegations that the appellants accept that the dwelling reflected in the plan falls within the permissible height restriction and that their complaint concerns rather the dwelling that has actually been constructed. In that case the appellants cannot challenge the approval of the plan on the basis they have advanced namely; that the municipality approved a plan that permits a dwelling that infringes the 10 metre height restriction imposed by s 98 of the Zoning Scheme. It did not. That, I think, puts paid to this review ground.

[43] It is not necessary in the light of this finding to determine whether or not the height of the actual dwelling is compliant, an exercise I suspect may prove unwinnable for the appellants on the available evidence. The Building Standards Act does provide for a situation where a building has been built contrary to approved plans but that enquiry (which is probably the subject of the pending demolition application) falls outside the purview of these proceedings.

*The alleged contravention of s 47 of the Zoning Scheme in respect of setback requirements*

[44] The court below declined to consider this ground of review on the grounds that it was raised too late in the proceedings and that the required interpretation of s 47 was highly controversial as it involved the measurement of the average depth of the site and the scrutiny of the relationship, if any, between the relevant regulation and the title deed conditions; issues which, in

its view, had not been properly canvassed in the papers.

[45] I am of the respectful view that the court's refusal to entertain the matter was wrong. This, however, is an appeal against the exercise of another court's discretion in the strict or narrow sense which involves a choice between permissible options. The approach to be followed by this court, therefore, is not to consider whether the decision of the court was correct or not and substitute its decision simply because it would have reached a different conclusion: it may interfere only where it is shown that the discretion was not exercised judicially or was exercised based on a wrong appreciation of principles of law or a misdirection on the facts or reached a decision that could not reasonably have been made on the relevant facts and principles.[21]

[46] In my view, the basis on which the court's decision was premised indicates a misapprehension of both the relevant principles and the facts and that the court may even have misconceived the very nature of the enquiry. First, the matter was raised purely as a law point. The dispute raised was not fact-based (the relevant boundaries of the site, setbacks and measurements represented on the plans which seem to have caused the court below some anxiety were common cause) but concerned only the interpretation and application of statutory provisions. It did not alter the legal basis upon which the appellants relied or the ambit of the relief sought. Furthermore, the appellants alleged no prejudice – the foremost consideration in a court's exercise of its discretion as to whether or not to entertain a belated point[22] – and were in fact able to deal with the issues fully in their supplementary papers and argument as indicated by the court itself in its judgment. I think that these reasons alone were sufficient to persuade the court below to entertain the review ground. This court is thus at large to interfere.

[47] Section 47 of the Zoning Scheme prescribes specific building lines for buildings and reads:

[21] *Knox D'Arcy Ltd v Jamieson* 1996 (4) SA 348 (A) at 361H; *Naylor v Jansen* 2007 (1) SA 16 (SCA) para14; *Giddey NO v JC Barnard and Partners* 2007 (5) SA 525 (CC) para 19.
[22] *Anglo Operations Ltd v Sandhurst Estates (Pty) Ltd* 2007 (2) SA 363 (SCA) para 32.

'(1) Except as provided in subsection (2), no building which is a Dwelling House, Double Dwelling House, Group of Dwelling Houses or an Outbuilding to any of the foregoing shall be erected nearer than 4,5m to any street boundary of the site of such building provided that:

(a) where a lesser building line is prescribed for the street concerned in Schedule 4 of Appendix A, the distance prescribed in terms of Schedule 4 shall apply;

(b) the above prohibition shall not apply to the boundary between a site and a street or portion thereof adjacent to such site which street or portion cannot in the opinion of the Council be constructed or is in the form of a service lane, pedestrian way or steps, and such boundary shall, for the purpose of Chapter VII, be deemed to be a common boundary.

(2) Where the average depth of the site of any building referred to in subsection (1) measured at right angles to a street boundary of such site does not exceed 20m, such building may be erected nearer than 4,5m but not nearer than 3m to the street boundary concerned.

(3) Where the boundaries of a site are so irregular that doubt or uncertainty exists as to the correct value of the average depth of the site, the Council shall define such average depth in accordance with the intent of this section.'

[48] The plan reflects that the dwelling is set back 3,233 metres from the north eastern street boundary. It therefore infringes the provisions of s 47(1) unless covered by the exceptions created by subsections (2) and (3). The appellants contend that the municipality was obliged to refuse plan approval in the face of this patent contravention of the 4,5 metre setback restriction.

[49] Harrison contended that the average depth of the site is less than 20 metres with the result that the exception in s 47(2) applies. In addition, it was argued on her behalf that even if there was an illegality the appellants had unduly delayed raising their challenge which is in any event improper as the original plan and the source of the contravention is not impeached.

[50] The municipality went further and argued that the boundaries of the site are so irregular that doubt or uncertainty exists as to the correct value of the average depth of the site, which entitles the municipality to then define such average depth, as provided for in s 47(3). It is difficult to see how the boundaries of the site can be said to be irregular as contemplated by that

section when the boundaries are made up of a series of straight lines. But that apart there is no suggestion in the papers that the municipality was pertinently aware at the time it approved the plan that the building encroached over the building line, least of all that it applied the provisions of that section when determining whether to approve the plan. Its reliance upon that provision thus seems to me to be an afterthought.

[51] The manner in which the 'average depth' of a site is to be calculated for purposes of s 47(2) is in dispute but, on the view that I take of the matter, it is not necessary to resolve that dispute and I have assumed for present purposes that the building indeed encroaches over the building line on its north eastern boundary by 1,267 metres as alleged by the appellants. The question that then arises is whether the appellants are entitled to have the plan set aside on that ground.

[52] The infringement that is now complained of appeared on the original plan that was approved in February 2005. Yet the challenge was raised for the first time by the appellants more than three years later in the replying affidavits that were filed in May 2008. The appellants had by then dragged the respondents through a whole gamut of internal processes and litigation. Significantly, the appellants have from inception been aided by a battery of experts. The appellants' explanation for failing to raise this challenge until the last moment is that they became aware of the issue only in the course of preparing their replying affidavits when it was drawn to their attention by their town planning advisor who had previously relied on handwritten notes and visual memory as he was prevented from copying the submitted plan. I think it is quite clear from that explanation that the real concern of the appellants was unrelated to the distance that the building was to be constructed from the street boundary.

[53] In terms of s 7(1) of PAJA:

'Any proceedings for judicial review in terms of section 6(1) must be instituted without unreasonable delay and not later than 180 days after the date –

(a) . . . on which any proceedings instituted in terms of internal remedies as

contemplated in subsection (2)*(a)* have been concluded; or

(b) where no such remedies exist, on which the person concerned was informed of the administrative action, became aware of the action and the reasons for it or might reasonably have been expected to have become aware of the action and the reasons.'

[54] The appellants 'might reasonably have been expected to have become aware' of the infringement when they first inspected the original plan and proceedings for review on that ground ought ordinarily have been commenced within 180 days of that date. Section 9(2) however allows the extension of these time frames where 'the interests of justice so require'. And the question whether the interests of justice require the grant of such extension depends on the facts and circumstances of each case: the party seeking it must furnish a full and reasonable explanation for the delay which covers the entire duration thereof and relevant factors include the nature of the relief sought, the extent and cause of the delay, its effect on the administration of justice and other litigants, the importance of the issue to be raised in the intended proceedings and the prospects of success.[23]

[55] Here, it seems to me that had the appellants indeed been concerned about the distance that the building was to be constructed from the street, there is simply no acceptable explanation for why the infringement was not detected by their advisers at the outset. In my view, this lapse which as I have indicated shows that this infraction was not their primary concern, does not favour the appellants' application on this ground.

[56] But there is further reason why the challenge should not be entertained at this late stage. As pointed out by this court in *Oudekraal Estates (Pty) Ltd v City of Cape Town*:[24]

'[A] court that is asked to set aside an invalid administrative act in proceedings for judicial review has a discretion whether to grant or to withhold the remedy. It is that discretion that accords to judicial review its essential and pivotal role in administrative law, for it constitutes the indispensable moderating tool for avoiding or minimising

[23] *Brummer v Gorfil Brothers Investments (Pty) Ltd* 2000 (2) SA 837 (CC) para 3; *Van Wyk v Unitas Hospital* 2008 (2) SA 472 (CC) paras 20 and 22.
[24] 2004 (6) SA 222 (SCA) para 36.

injustice when legality and certainty collide.'

[57] Even before the advent of PAJA it was recognised that there may be circumstances in which delay might justify the refusal of relief, thereby effectively giving legal effect to an otherwise unlawful act. In *Harnaker v Minister of the Interior*,[25] which concerned a challenge to a legislative act, the court said the following:[26]

'[I]f the affected members of the public, having *locus standi* to apply to Court for an order declaring the legislative act null and void, delay unreasonably in taking such action and this causes prejudice, I do not see why they should not all be precluded from obtaining relief. . . . I can see no inequity arising from the application of the delay rule in this way. Accordingly . . . unreasonable delay by the plaintiff in instituting action, coupled with resultant prejudice to defendant, is a valid defence, or objection, to the action.'

[58] In *Wolgroeiers Afslaers v Munisipaliteit van Kaapstad*[27] this Court, after an extensive discussion of *Harnaker* and other cases, set out the parameters of a court's discretion in relation to delay:[28]

'What has indeed been prescribed by our Courts is that proceedings should be instituted within a reasonable time and, as I have already mentioned, the Court is at liberty, depending on the circumstances and in the exercise of its discretion, to condone unreasonable delay in appropriate cases. I cannot possibly accept that in the formulation of the requirement that proceedings should be instituted within a reasonable time, it was intended to fetter the Court's discretion to such an extent that even where a litigant disregards the Court's directive by unnecessary and excessive delay in bringing proceedings, the Court does not have the right to refuse the application merely because it is not proved or cannot be proved that the respondent was not materially prejudiced, even though there were, on a review of all the circumstances, other well- founded reasons for the exercise of its discretion against the applicant. *I accept that prejudice to the respondent and the degree thereof are relevant factors in the consideration of whether unreasonable delay ought to be overlooked, and that they can sometimes be the decisive factor, especially in cases of comparatively trivial delays* . . . Whilst, as I have already indicated, the question whether there was an unreasonable delay requires a factual finding, the answer to the question whether an unreasonable delay ought to be overlooked rests in the discretion of the Court, exercised by taking into consideration all the relevant circumstances and factors.' (my emphasis.)

[59] In *Oudekraal*,[29] this court, dealing with the necessity for a review to be

[25] 1965 (1) SA 372 (C); see also *Kalil and another NNO v Minister of Interior* 1962 (4) SA 755 (T) at 758A-759D; *Hassan & Co v Potchefstroom Municipality* 1928 TPD 827; *Oudekraal Estates (Pty) Ltd v City of Cape Town* 2004 (6) SA 222 (SCA).

[26] At 381D-G.

[27] **1978 (1) SA 13 (A) at 42A-D.**

[28] Original Afrikaans text translated into English.

[29] Above n24, para 46.

properly brought by a party seeking to set aside an alleged invalid administrative act, referred to the *Wolgroeiers* dictum set out in the preceding paragraph and remarked as follows:

'No doubt a court that might be called upon to exercise its discretion will take account of the long period that has elapsed since the approval was granted, but the lapse of time in itself will not necessarily be decisive: Much will depend upon a balancing of all the relevant circumstances, including the need for finality, but also the consequences for the public at large and indeed for future generations, of allowing the invalid decision to stand. In weighing the question whether the lapse of time should preclude a court from setting aside the invalid administrative act in question an important – perhaps even decisive – consideration is the extent to which the appellant or third parties might have acted in reliance upon it.'

[60] A review application to the Cape High Court followed on this court's decision in *Oudekraal*, which once again resulted in an appeal to this court. In the second appeal – *Oudekraal Estates (Pty) Ltd v City of Cape Town*[30] (I shall refer to the second appeal as *Oudekraal 2)* – this court, in applying *Wolgroeiers*,[31] had regard to the following dictum from that case:[32]

'If it is alleged that an applicant did not institute the proceedings within a reasonable time, the Court must decide (a) whether the proceedings were in fact only launched after a reasonable time had elapsed and (b) if so, whether the unreasonable delay should be condoned. Again, as it appears to me, with reference to (b), the Court exercises a judicial discretion while taking into consideration all the relevant circumstances.'

[61] In *Setsokosane Busdiens (Edms) Bpk v Voorsitter, Nasionale Vervoerkommissie*,[33] with reference to the aforesaid passage from *Wolgroeiers*, the following was stated:

'The investigation, as far as *(a)* is concerned, has nothing to do with the Court's discretion; it is simply an examination of the facts of the case in order to determine whether the period which has elapsed, in the light of all the relevant circumstances, was reasonable or unreasonable. (*Wolgroeiers Afslaers* at 42C-D; *Schoultz v Voorsitter, Personeel-Advieskomitee van die Munisipale Raad van George, en 'n ander* 1983 (4) SA 689 (C) at 697-8.) Naturally, the finding which is made in that regard implies that the Court makes a value judgment in the sense of the Court's view of the reasonableness of the period which has elapsed in the circumstances of the case. Equating such a value judgment with a discretion is, however, legally and logically indefensible.'[34]

[30] 2010 (1) SA 333 (SCA).

[31] At 39C-D; original Afrikaans text translated into English.

[32] Para 50.

[33] 1986 (2) SA 57 (A) at 86D–E.

[34] Original Afrikaans text translated into English; See also *Oudekraal 2* at para 51.

[62] In the present case the lapse of three years before the appellants acted was undoubtedly inordinate, particularly if regard is had to the promptitude with which people might ordinarily be expected to act and build in accordance with approved building plans. Proceeding to the next step of the enquiry, namely whether the delay should nevertheless be condoned, it is necessary to step back and consider the totality of circumstances. There is no suggestion that Harrison consciously flouted the building line restriction. Acting in reliance upon the approval of the plan she has built a substantial structure. Besides the substantial cost that would be necessitated by adapting the building, Harrison has sustained considerable cost in defending litigation that was quite unrelated to the encroachment over the building line. Moreover, the infraction is relatively minimal, so much so that it went unnoticed even by the array of experts employed by the appellants until the litigation was well advanced. The local authority supports Harrison and there is not the slightest prospect that the infraction will impact in any meaningful way on the aesthetics or future development of Camps Bay. Throughout this saga Harrison has attempted to the best of her ability to deal with the appellants' concerns. They, on the other hand, have been intractable. For all these reasons I conclude that the delay in raising this issue should not be condoned and the application to review and set aside the plans on that ground should not succeed.

[63] For these reasons the appeal should fail. It is accordingly dismissed with costs including the costs of two counsel.

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**MML MAYA**

**Judge of Appeal**

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