

SUMMARY OF THE JUDGMENT

BUILDING OBJECTIONABLE, UNSIGHTLY OR DISFIGURING OF AREA? APPLY LEGITIMATE EXPECTATION TEST

Trustees of the Simcha Trust v Da Cruz and Others; City of Cape Town v Da Cruz and Others (CCT125/18; CCT128/18) [2019] ZACC 8 (19 February 2019)

This Constitutional Court judgment provides clear guidelines as to the proper import and interpretation of section 7(1) of the Building Standards Act which finds application when a local authority is asked to approve building plans. The Court confirmed that the 'legitimate expectation' test must be applied by the decision-makers, who must, amongst other things, objectively determine whether the proposed building will probably, or in fact, be so disfiguring of the area, objectionable or unsightly that it would exceed the legitimate expectations of a hypothetical owner of a neighbouring property. The judgment illustrates the practical application hereof.

The Judgment can be viewed [here](#).

FACTS

Between 2005 and 2007, the Four Seasons sectional title development in Buitenkant Street, Cape Town, erected a 17 storey building with balconies abutting the boundary of the property. The zoning regulations for the area permit owners to build up to the boundaries of their respective properties. However, it was not disputed that the City of Cape Town Municipality (the Municipality) did not usually approve plans with habitable areas or balconies on the boundaries abutting neighbouring erven. (Uninhabited spaces, like fire escapes, ordinarily occupy these spaces.) Contrary to common practice, the Municipality nonetheless approved the plans of Four Seasons which placed balconies on the boundary abutting the neighbouring property.

The Simcha Trust (the Trust), owner of a neighbouring property, submitted a development application in October 2007. It sought to build an additional four stories to the existing four-storey structure on its land. All storeys were to be built up to the boundary of the property. If implemented, the top three storeys of the new building would touch the existing balconies on the eighth, ninth and tenth floors of Four Seasons' building.

The Municipality approved the Trust's building plans. In doing so, the Building Control Officer stated in his report that was submitted to the Head of the Building Development Management Section for approval, that the Trust's application and plans complied with the legal and technical requirements of section 7(1) of the National Building Regulations and Building Standards Act 103 of 1977 (the Act) and that there was "no basis to be satisfied"

that the building would be erected in such a manner or would be of such a nature or appearance that it would disfigure the area, or that it would be unsightly or objectionable or would derogate from the value of adjoining properties.

The neighbours, being owners in and the body corporate of the Four Seasons sectional title scheme, objected to the approval of the plans.

The dispute culminated in a whole series of court applications and judgments. In February 2018, the building plan approval was set aside, the Western Cape High Court reasoning as follows:

- The decision-maker who had to consider an application for the approval of building plans had to be satisfied: (i) that the plans complied with the necessary legal requirements in terms of section 7(1)(a) of the Act, the building regulations and the zoning scheme regulations; and also (ii) that none of the disqualifying factors set out in section 7(1)(b)(ii) would be triggered by the erection of the building concerned.
- The correct interpretation of the requirements of section 7(1) (as espoused in the Constitutional Court judgment in *Walele v City of Cape Town and Others*) should be understood to mean that a functionary who has to consider whether to grant approval for building plans has a positive duty to satisfy him or herself, not only that the plans were legally-technically compliant (section 7(1)(a)), but also that the building which was to be erected in terms thereof would not (actually or probably) disfigure the area or be unsightly or objectionable, or derogate from the value of neighbouring properties. Therefore, if there is any doubt, an application for the approval of building plans would have to fail. (Previously, in terms of a judgment of the Supreme Court of Appeal (SCA) in the matter of *True Motives 84 (Pty) Ltd v Madhi and Others*, the SCA differed from this interpretation (and found it did not have to follow *Walele* in this regard as it considered that statement in *Walele* as *obiter*). In respect of the disqualifying factors in section 7(1)(b), it was of the view that the subsection authorised a local authority to refuse to grant its approval only if there was a probability or actuality that one of those factors might eventuate. According to this approach, where a local authority might have some (not significant) level of concern about whether a proposed building would disfigure the neighbourhood or would be unsightly or objectionable, or would derogate from the value of neighbouring properties, but did not consider such outcome as probable, it was required to approve the application. So, in the case of doubt, an application for the approval of building plans should succeed. The controversy over the proper interpretation of section 7(1) was laid to rest in a subsequent judgment and the interpretation adopted in *Walele* was upheld.)
- Applied to the facts before it, the Cape Town High Court concluded that the report submitted in this matter by the Building Control Officer indicated that the Building

Control Officer had applied the incorrect test when considering the application.

The approval of the plans was therefore set aside.

The Trust and the Municipality approached the Constitutional Court for leave to appeal the High Court judgment.

The law:

The relevant parts of section 7(1) read as follows:

“7. Approval by local authorities in respect of erection of buildings.

(1) If a local authority, having considered a recommendation referred to in section 6(1)(a) –

- a) is satisfied that the application in question complies with the requirements of this Act and any other applicable law, it shall grant its approval in respect thereof;*
- b) 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 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...”*

HELD:

- It has been held before that the legitimate expectation test applies when the building control officer makes a determination whether or not building plans will derogate from the value of adjoining properties, as per section 7(1)(b)(ii)(aa)(ccc). (The legitimate expectations test is the means by which a decision-maker determines whether there will be a derogation in value sufficient to disqualify a building application under the Act. The decision maker must be positively satisfied that a hypothetical purchaser of a neighbouring property would not harbour legitimate expectations that the proposed development application would be denied because it was so unattractive or intrusive.)

- The point of law before the Constitutional Court here was whether the legitimate expectations test also applied in the context of the other two disqualifying factors found in section 7(1)(b)(ii)(aa), being the investigation whether the building would probably or in fact disfigure the area or will probably or in fact be unsightly or objectionable. The Trust submitted that the High Court erred when it applied the legitimate expectations test to the other disqualifying factors in section 7(1)(b)(ii)(aa) of the Act.

Merits

- On the merits, the Court confirmed that the High Court was correct in finding that the municipal decision-makers incorrectly applied the *True Motives* test rather than the *Walele* test.

Question of law

- The question of law in this appeal concerns whether the legitimate expectations test applies to all of the disqualifying factors in section 7(1)(b)(ii)(aa). It has been held that the legitimate expectations test is the means by which a decision-maker determines whether there will be derogation in value sufficient to disqualify a building application under the Act.
- In terms of section 7(1)(b)(ii)(aa) of the Act, the local authority must be “satisfied” that none of the disqualifying factors are present. Discretionary power, such as is granted to a local authority in section 7 of the Building Standards Act, is an essential tool in the administration and the legal system that governs it. The latitude of discretionary power varies with context – and with regard to the power in 7(1)(b)(ii)(aa), a broad discretion is conferred on the local authority to consider a range of factors. However, this discretion is not without borders as the Constitution requires that all administrative action must be lawful, reasonable and procedurally fair.
- The legitimate expectations test correctly circumscribes the discretion of the decision-maker with the constitutionally mandated requirements of lawfulness, reasonableness and procedural fairness.
- The legitimate expectation in this context differs from its application in pure administrative law. The reference to ‘legitimate expectations’ in the present context is “a reference to the hypothetical range of future possibilities which the parties to a notional sale would, as a legal construct, be considered to have had in the forefront of their minds, at the time, and is not to be confused with the concept of a ‘legitimate expectation’ as it has been established in law, in order to protect a party,

by way of a procedural remedy, from the adverse consequences of a decision being taken by another without a prior opportunity to be heard.” This means that the import of legitimate expectations in the context of section 7 of the Building Standards Act does not refer to an independent right held on behalf of a neighbour to have their opinion heard by the decision-maker. The phrase refers to an objective factual inquiry into the legitimate expectations of a party to a hypothetical sale of a neighbouring property. In the context of derogation in value, for example, the decision-maker must be positively satisfied that a hypothetical purchaser of a neighbouring property would not harbour legitimate expectations that the proposed development application would be denied because it was so unattractive or intrusive.

- When applied to each of the disqualifying factors in section 7(1)(b)(ii)(aa), the legitimate expectations test is an accurate translation of the duties of local authorities under the Act and the Constitution. It requires the decision-maker to consider the impact of the proposed development on neighbouring properties, from the perspective of a hypothetical neighbour. This infuses the exercise of the discretionary power under section 7(1)(b)(ii)(aa) with the constitutionally mandated requirements of reasonableness, lawfulness and procedural fairness, informed by the contextual approach mandated by the Act. The test is consistent with the objects of the Act and the constitutional requirement of just administrative action.
- This conclusion does not increase the administrative burden that the Municipality faces when considering building plan approval applications. The legitimate expectation test does not impose any additional duty on the Municipality to consult with the public above and beyond the existing requirements of the law; it is not a subjective test determined by the whim of a sensitive neighbour. The test is objective and based on relevant facts, which would, in the ordinary course, be placed at the disposal of the decision-maker. The decision-maker should consider whether the proposed building will probably, or in fact, be so disfiguring of the area, objectionable or unsightly that it would exceed the legitimate expectations of a hypothetical owner of a neighbouring property. The ordinary *Walele* requirements also apply, namely that the decision-maker must be positively satisfied as to the existence of the disqualifying factors and that the disqualifying factors must be considered separately from compliance with the other requirements of the Act.

The application for leave to appeal was therefore unsuccessful.

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