In the High Court of South Africa
(Western Cape Division, Cape Town)

[REPORTABLE]

Case no: A313/17

In the matter between:

THE CITY OF CAPE TOWN	First Appellant
THE TRUSTEES OF THE SIMCHA TRUST	Second Appellant
(IT 1342/93)	

and

JOAO JOSE RIBEIRO DA CRUZ	First Respondent
THE BODY CORPORATE OF THE FOUR SEASONS SECTIONAL TITLE SCHEME	
(SS 269/08)	Second Respondent

Coram: Hlophe JP, Fortuin et Sher JJ

Heard: 31 January 2018

Delivered: 2 February 2018

JUDGMENT

SHER J (HLOPHE JP and FORTUIN J concurring):

1. This is an appeal against a judgment and order which was handed down by this court[1] in terms of which it set aside the approval by the City of Cape Town (the 1st appellant) in February 2015 of certain building plans which were submitted to it by the Simcha Trust (the 2nd appellant) in respect of erf 5284 Cape Town, and remitted such plans for reconsideration. This was the second occasion on which such building plans were set aside on review. The first occurred in August 2013.

2. The matter concerns the application of s 7(1) of the so-called Building Standards Act,[2] which regulates the conditions under which a local authority shall either grant or refuse approval in respect of building plans, which the Act requires[3] must be submitted to, and approved by it, before any building may be erected.

3. As the court a *quo* remarked in the introductory paragraph of its judgment s 7 has been a fertile site for litigation and its interpretation has been the subject of divergent reported judgments of the Supreme Court of Appeal[4] and the Constitutional Court.[5] That it concerns a somewhat vexed area of the law is evident from the fact that in two of these matters it took the Supreme Court of Appeal and the Constitutional Court in the order of 7 months before judgment was handed down,[6] with the former describing the structure of the provision as 'confusing'[7] and the latter as the subject of much contestation.[8] Furthermore, an offshoot of the present dispute has also been the subject of 2 reported judgments, one by this court[9] and one by the Supreme Court of Appeal.[10]

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[1] Reported *sub nom Da Cruz & Ano v City of Cape Town & Ano* 2017 (4) SA 107 (WCC).
[2] The National Building Regulations and Building Standards Act 103 of 1977.
[3] In terms of s 4.
[4] *True Motives SA (Pty) Ltd v Mahdi and Ano* 2009 (4) SA 153 (SCA).
[5] *Walele v City of Cape Town and Ors* 2008 (6) SA 129 (CC); *Camps Bay Ratepayers and Residents Association and Ano v Harrison and Ano* 2011 (4) SA 42 (CC); *Turnbull-Jackson v Hibiscus Coast Municipality and Ors* 2014 (6) SA 592 (CC).
[6] In *True Motives* (n 4) judgment was handed down on 3 March 2009 after argument was heard on 28 August 2008, and in *Turnbull-Jackson* (n 5) argument was heard on 4 February 2014 and judgment was handed down on 11 September 2014.
[7] *True Motives* para [17].
[8] *Turnbull-Jackson* para [46].
[9] *De Jong and 16 Ors v the Trustees of the Simcha Trust and 1 Or* 2014 (4) SA 73 (WCC), in which Rogers J dismissed a claim by Simcha against the City for compensation for plan and scrutiny fees and legal costs incurred in relation

The background

4. The respondents are the owner of a residential unit in, and the body corporate of, the Four Seasons sectional title scheme which manages the Four Seasons building which is situated in Buitenkant street, Cape Town. The building was erected between 2005 and 2007 and occupies some 17 storeys.

5. The Simcha Trust is the owner of an adjoining property on erf 5284 which it acquired in October 2006 and which is situated on the corner of Buitenkant and Commercial streets. At the time when the Trust acquired the property there was an old four-storey office block on it. The Trust's intention was to redevelop the property into an upmarket hotel complex which was to be known as the 'Oracle'.

6. In terms of the City's zoning scheme the area in which the 2 buildings are situated is zoned for mixed use, thereby permitting both commercial and residential buildings to be erected. This zoning allows for so-called 100% coverage ie property owners have the right to build over their entire erf and unlike areas which are zoned residential there is no stipulation in respect of any setback, in terms of which building works may not extend up to a common boundary and may only go up to a set building line. However, although there is no legal prohibition to this effect, as a matter of common practice in such mixed-use areas habitable spaces with windows or balconies are not usually constructed along common boundaries, and in the case of 2 adjoining erven with such coverage rights façades on the common boundary are ordinarily reserved for non-habitable utility areas such as lifts, stairwells, passages, or storerooms. As these spaces are non-habitable they do not require windows for light and ventilation in terms of the National Building Regulations.

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to an interdict and the earlier review application which the City conceded, a decision which was upheld by the SCA on appeal.

[10] *Trustees of the Simcha Trust v De Jong and 16 Ors* 2015 (4) SA 229 (SCA).

7. The developers of the Four Seasons building did not follow this architectural convention and, as it was somewhat euphemistically put, in order to extract 'maximum value' from their development from the 8th floor upwards (the levels below that were reserved for parking) provided in their building plans for apartments which faced towards the common boundary with erf 5284. In order to comply with the requirements of the Building Regulations in relation to the risk of fire spreading to or from an adjoining building,[11] and sufficient light and ventilation,[12] these apartments were required to be stepped back a distance of approximately 3m from the common boundary. The plans made provision for the erection of balconies for the 8th floor apartments (over the roof of the garage level underneath), which extended over the 3m setback up to the common boundary. Although (as an architect and a former Head Principal Planner of the City's central zoning section who deposed to supporting affidavits on behalf of the Trust pointed out[13]), the plans were thus contrary to well-established practice and 'out of kilter' with the rest of the buildings in the area, they were approved by the City's planning department without demur. The court a *quo* commented that from the aerial photographs which were annexed to the parties' affidavits the Four Seasons building thus constitutes a 'striking exception to the rule' in relation to buildings in the area.[14]

8. The Trust delivered its plans for the Oracle development to the City in October 2007. By that time the adjoining Four Seasons development was complete. The plans provided for the renovation of the existing four-storey building and the erection on top of it of a further four storeys, with a terrace on the roof. In essence the plans, if implemented, would result in the top three storeys of the Oracle building virtually 'abutting' as a blank and solid wall, against the apartments on the 8th to 10th storeys of the Four Seasons building, along the common boundary. As is customary in such matters copies of the plans were not provided to the owners of any of the neighbouring buildings. and the affected

[11] Reg T1 of the National Building Regulations.
[12] *Id,* Reg O1.
[13] *Vide* para 69.2 of the answering affidavit of Harrison, on behalf of the Trust.
[14] Paragraph [8] of the judgment.

owners of units in the Four Seasons building were thus unaware of what was envisaged. After the plans were approved by the City in September 2008 the Trust commenced preliminary construction work, but the project was called to a halt shortly thereafter following the global economic downturn.

9. Building work only resumed some 4 years later, in May 2012. The affected owners of units in the Four Seasons building were initially unconcerned by the construction that was taking place, until or about September, when they noticed that the adjacent building works were being erected flush on the common boundary and at zero setback, 'hard-up' against the balconies on the eighth floor. They pointed out in a letter of objection from their attorneys, that they were unaware that the City had approved plans which allowed for this and that they had expected that the Trust's building would be stepped back once construction reached the residential part of the Four Seasons building.

10. A request to cease work pending a review of the approval of the building plans was not acceded to and consequently in November 2012 an application for an interdict preventing any further building work pending the outcome of such review was launched. After hearing argument and conducting an inspection in *loco* Dolamo J granted the interdict, and the review was launched soon thereafter.

11. The state of construction at the time when the building works were interdicted can best be seen and understood from the photographs[15] at pages 48-60 of the record, which the court a *quo* said amply illustrated the "*confining effect*" on units in the Four Seasons building of the construction on the common boundary, an effect which was most striking at the 8th floor level, where the balconies had effectively been converted into "*small courtyards confined between towering walls*".[16]

12. The review was eventually conceded by the City and the Trust, and by agreement between the parties an order was taken in August 2013 whereby the

[15] Annexures "JC8.1-8.19"to the founding affidavit. Some of these photographs can also be seen at pp 482.27-482.30 of the record.
[16] Paragraph [10] of the judgment.

City's approval of the plans was set aside. The concession followed upon the fact that contrary to the injunction by the Constitutional Court in its judgment in *Walele*[17] (which was handed down some 4 months before the plans were approved), the functionary who made the decision to approve the plans did so on the basis of a simple endorsement from the City's Building Control Officer[18] instead of a properly considered and motivated recommendation.

13. It is not necessary to say much more about the first review application, other than to point out that apart from the grounds on which they eventually succeeded the affected owners and the body corporate also averred, in their papers, that the plans were liable to be set aside on the basis that if implemented they would result in a derogation of value to affected units, within the meaning ascribed to that term in s7. But more about that later.

14. After conceding the review the Trust made application for an order that the City should compensate it[19] for the legal costs it had incurred in the interdict and review proceedings and in respect of certain building expenses and related costs which it alleged flowed from the City's failure to give proper effect to the judgment in *Walele*. The claim was dismissed by Rogers J in November 2013 and a subsequent appeal to the SCA was dismissed in February 2015.

15. In the absence of any further building works, and on the understanding that the review court had set aside the plans for the Oracle development and no new plans had been submitted to the City for approval, during October 2014 the Four Seasons body corporate launched an application for an order directing that the partially constructed building works on erf 5284 be demolished. In response the Trust indicated that a new application for approval of building plans had been submitted to the City during June 2014. In this regard it appears that the City was of the view that the process would have to commence from scratch and it had

[17] Note 5.
[18] In terms of s 6 of the Act a building control officer is required to make a recommendation to the local authority in regard to any plans that are submitted to it for approval (which the court in *Walele* held must be a properly motivated and reasoned recommendation and not just a simple endorsement on a form).
[19] In terms of s 8 (1)(c)(ii)(bb) of the Promotion of Administrative Justice Act 3 of 2000 ('PAJA').

required the Trust to submit a fresh set of plans for reconsideration. This time round the process was more rigorous in that the City required the Trust to advertise the plans for public comment in relation to certain heritage aspects.[20] After a lengthy public consultation process and the processing of objections the heritage aspect of the application was approved in January 2014.

16. In December 2014 the City invited the affected owners and the Four Seasons body corporate to comment on the re-submitted plans. On 23 January 2015 their attorneys duly delivered a detailed submission to the Head of the City's Building Development Management Section (who was the relevant delegated functionary responsible for considering whether or not to approve the plans), which outlined the history of the matter and the case law in respect of s 7 of the Building Standards Act, and with reference to the requirements contained therein set out a number of objections to the plans.

17. The body corporate and affected owners contended that in terms of s 7 the City was required not only to consider whether the plans were technically compliant with the standards demanded by the Act and the Building Regulations promulgated in terms thereof, but also whether the building to be erected in terms of such plans would be "*unsightly or objectionable*", or would derogate "*impermissibly*" from the value of adjoining or neighbouring properties. In their view, the plans failed on each of these counts and should therefore be refused.

18. They submitted that in terms of *Walele* the City was required to positively satisfy itself that none of these disqualifying factors were present, and to this end requested an opportunity to meet on site with the Head of the Building Development Management Section, as well as the relevant plans examiner and the Building Control Officer as in their view this was indispensable for a proper appreciation of whether or not the building works carried out by the Trust were "*unsightly or objectionable*" or would derogate "*impermissibly*" from the value of neighbouring properties. In this regard they contended that the Oracle building was so "*intrusive and overbearing*" that it exceeded the legitimate expectations of

[20] In terms of s 108 of the zoning scheme.

any notional informed buyer of an affected unit on the 8th to 10th floors of the Four Seasons building, in regard to what might be built along the common boundary.

19. From the answering affidavit which was filed by the Head of the Building Development Management Section it does not appear that he did anything in response to the submissions that were made to him, at that point in time. He said he did have regard for the contents thereof at a later stage, when considering whether or not to approve the plans, after the Building Control Officer had favoured him with his recommendations. He did not take up the invitation to attend an inspection in *loco* and adopted the attitude that City officials could not be expected to gain access to neighbouring properties when considering applications for building plan approval, in order to inspect the subject property from "*that vantage point*" (sic) and take what they saw into "*account*", as that would place an "*intolerable and unjustifiable burden*" on them, as they had limited time and resources and had to deal with many thousands of such applications.[21]

20. The submissions by the affected Four Seasons owners and its body corporate found their way to the Building Control Officer. He said[22] that in order to ensure a fair and transparent process he forwarded it on to the Trust's attorneys, and on 9 February 2015 he received an equally detailed submission in response, from them, which included a memorandum prepared by the Trust's legal representatives together with copies of the papers in the pending application for demolition and reports by an expert valuer (Du Toit) and a planner (Saunders).

21. I do not think it will be unduly brief or unfair to summarize the contents of the memorandum and the expert reports by saying that, in essence, they each claimed, in their own way, that although the building works could indeed be viewed by the neighbouring affected owners of units in the Four Seasons as "*intrusive or unattractive*", inasmuch as their design and construction were conventional and in line with contemporary architectural trends and existing

[21] Paragraphs 78 and 82 of his affidavit.
[22] In his memorandum dated 25 February 2015.

surrounding developments, they were not unsightly or objectionable within the meaning of s 7, nor did they derogate from the value of neighbouring properties. Insofar as the latter was concerned it was submitted (with reference to the decisions of the Constitutional Court in *Camps Bay Ratepayers*[23] and the Supreme Court of Appeal in *True Motives*[24]) that derogation of value could only be constituted where the building was so intrusive that it exceeded the legitimate expectations of parties to a hypothetical sale, and inasmuch as the zoning scheme allowed for 100% coverage and zero set-back, the notional parties to such a sale of any affected Four Seasons units would always have had in mind that the owners of erf 5284 could build right up to, and on the common boundary, thereby obliterating whatever view, space and light they might have had. Thus, there could never be any claim for derogation of value by such affected parties.

22. Following receipt of the Trust's response the Building Control Officer conducted a number of what he described as "*site inspections*". Presumably this was a reference to the building site on erf 5284, as it is not expressly apparent from his report that he ever inspected any other properties. Thereafter, the Building Control Officer compiled a report dated 25 February 2015, which he forwarded on to the Head of the Building Development Management Section. The contents of the report are dealt with in some detail below. It will suffice, at this stage, merely to point out that the Building Control Officer concluded that the application complied with the legal and technical requirements of the Building Standards Act, and there was "*no basis to be satisfied*" (sic) that the "*proposed*" building (this is a somewhat peculiar formulation as the plans he was assessing were in respect of a largely existing building which was substantially complete) 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.

[23] Note 5 at paras [39]- [40].
[24] Note 4 at para [30].

23. On the very same day that the Building Control Officer's report was forwarded to him the Head of the Building Development Management Section approved the application.

The law

24. S 7(1) has two parts. S 7(1)(a) provides that if a local authority, having considered a recommendation by the Building Control Officer, is satisfied that an application for the approval of building plans complies with the requirements of the Building Standards Act and any other applicable law it shall grant its approval in respect thereof. S 7(1)(b) provides that if it is not so satisfied,[25] or if it is satisfied that the building to which the application relates is to be erected in such a manner or will be of such nature or appearance that it will probably or in fact be "*unsightly or objectionable*"[26] or will derogate from the value of adjoining or neighbouring properties,[27] it shall refuse to grant its approval.

25. In *Walele*[28] the Constitutional Court held that third party owners of adjoining properties could not claim, on the basis of the *audi alteram partem* principle, that they had either a right or a legitimate expectation to being heard in pending applications for building plan approvals which had been lodged by neighbours. This was because the approval of such plans by a local authority could not in itself cause any prejudice to them, and it was only the erection of any building in terms of such plans which might do so.[29] But, because of this, and motivated by the provisions of s 39 of the Constitution[30] the Court was of the view that the provisions of s 7 had to be construed not in a literal but in a purposive manner, which took account not only of a landowner's rights of ownership, but also the rights of owners of neighbouring properties which might be adversely affected by

[25] S 7(1)(b)(i).
[26] S 7(1)(b)(ii)(bbb).
[27] S 7(1)(b)(ii)(ccc).
[28] Note 5 at para {52].
[29] *Id*.
[30] Which requires a court to interpret any legislation in a manner which will promote the spirit, purport and object of the Bill of Rights.

the erection of buildings in terms of plans which had been authorized.[31] Consequently, the Court was of the view that the relevant decision-maker who had to consider an application for the approval of building plans had to be satisfied, not only that the plans complied with the necessary legal requirements[32] (ie with the Building Standards Act, the Building Regulations and the zoning scheme regulations), but also had to be satisfied that none of the disqualifying factors set out in s 7(1)(b)(ii) would be triggered by the erection of the building concerned.[33] Construed in such a manner the section would strike the right balance between the landowner's rights of ownership over the subject property, and the rights of owners of neighbouring properties, and would promote both such sets of rights.[34]

26. The interpretation afforded to s 7(1) by the court in *Walele* was understood to mean that a functionary who had to consider whether to grant approval for building plans had a *positive duty* to satisfy him- or herself not only that the plans were legally compliant, but also that the building which was to be erected in terms thereof would *not* (actually or probably) disfigure the area[35] or be unsightly or objectionable[36] or derogate from the value of neighbouring properties.[37] According to such an interpretation in the case of doubt an application for the approval of building plans would therefore have to *fail*.[38]

27. However, in *True Motives*[39] the Supreme Court of Appeal differed from this interpretation which it held it was not bound to follow as, in its view, it was wrong and *obiter*. Although the controversy over the proper interpretation of s 7(1) was subsequently laid to rest by the Constitutional Court in the decision in *Turnbull-*

[31] *Walele* n 5 at para [55].
[32] In terms of s 7(1)(a) of the Act.
[33] *Walele* at para {55].
[34] *Id.*
[35] S 7(1)(b)(ii)(aaa).
[36] S 7(1)(b)(ii)(bbb).
[37] S 7(1)(b)(ii)(ccc).
[38] Per Brand AJ in *Camps Bay Ratepayers* n 5 at para [33].
[39] Note 4 at paras [33]–[35].

Jackson[40] (which affirmed the interpretation adopted in *Walele* and held that it was not *obiter),* it is necessary to discuss the approach which was adopted by the SCA in *True Motives* in more detail as, in our view, if one carefully considers the contents of the report of the Building Control Officer and the memorandum of the Head of the Building Development Management Section in this matter, it appears that the authors thereof incorrectly applied the test which was espoused in *True Motives*, rather than that which was laid down in *Walele* and confirmed in *Turnbull-Jackson.*

28. On their interpretation of s 7(1) the majority of the Court in *True Motives* agreed (as per *Walele*) that as far as the requirements of subsection (a) were concerned, framed as it was it imposed a duty on the local authority to 'positively' satisfy itself that an application for the approval of building plans was technically and legally compliant. In respect of s 7(1)(b) and the disqualifying factors set out therein however, it was of the view that the subsection did not authorize a local authority to refuse to grant its approval if there was only a mere possibility that one of those factors might eventuate-it needed to be a probability or an actuality. As the Court put it: "*The Act is not to the effect that the local authority may withhold approval because it is not satisfied that the building will not cause one of those outcomes".*[41] According to this approach therefore, where a local authority might have some "*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, if it was not at a "*high enough level*" for it to be satisfied that such an outcome was probable, it was required to approve the application.[42] According to such an interpretation in the case of doubt an application for the approval of building plans would therefore have to *succeed*.

[40] Note 5.
[41] *True Motives* n 4, at para [21].
[42] *Id*, para [23].

29. In *Camps Bay Ratepayers* [43] Brand AJ explained that the practical effect of this difference meant that under the *Walele* approach it would inevitably be the *applicant* for approval of the plans who would have to satisfy the local authority that the potentially disqualifying factors *did not* exist, whereas in terms of *True Motives* it would be the *objector* to the plans who would have to satisfy the local authority about the "*positive existence*" of such factors. And importantly, whereas in terms of *Walele* there would be an obligation on the local authority to "*ensure the absence*" of such factors before it could grant approval, no such obligation would exist in terms of *True Motives*.[44]

The law applied

(i) <u>The report of the Building Control Officer</u>

30. It is time to consider the Building Control Officer's report, which was the bedrock for the decision which was ultimately made by the Head of the Building Development Management Section, and the memorandum prepared by the latter, which sets out the basis for how and why he arrived at his decision to approve the application. The court a *quo* made detailed reference to these documents in its judgment.

31. Having received a copy of the detailed objections from the affected owners and Four Seasons body corporate the Building Control Officer was clearly alive to the complaints raised therein. In relation to the disqualifying factors listed in s 7(1)(b) he divided his assessment into 2 groups: Firstly, whether the area would be disfigured or the 'proposed' building would be unsightly or objectionable and secondly, whether there would be derogation in the value of adjoining properties.

32. In regard to the former he said he was required to advise whether there was "*any basis to be satisfied*" that any of the relevant factors "*would* " actually or probably occur.[45] The appellants submit that in phrasing the test which he adopted in the way that he did the Building Control Officer was doing no more than to follow the

[43] Note 5 at para [33].
[44] *Id.*
[45] Para 22 of the BCO's report, at p 344 of the record.

literal wording of the subsection in question, and it did not mean that he misapplied the requisite test which was laid down in *Walele*, or that he wrongly adopted the test which was set out in *True Motives* instead. We do not agree. In our view, from an overall reading of his report it is abundantly clear that the Building Control Officer wrongly applied the *True Motives* test instead of that in *Walele*. The words he used indicate that he understood his duty to be one of assessing whether or not there were sufficient grounds (a "*basis*") for him to conclude, on a balance of probabilities, that any of the potentially disqualifying factors *would* eventuate. The proper approach which he should have adopted was to determine whether he was positively satisfied, on a balance of probabilities, that any of such factors *would not*. That we are in fact not just dealing with semantics but with the adoption of the wrong test is borne out by a number of other comments in like vein which are interspersed throughout his report.

33. So, for example, he said that whilst the new development might be "*controversial*" and notwithstanding its 'height and placement' on erf 5284, he could "*find no reason to be satisfied*" that it *would* disfigure the area (instead of determining that it would not.) [46] Once again, the test which he applied appears to be based on the *True Motives* interpretation of s 7(1), instead of that adopted in *Walele*.

34. In dealing with the issue of disfigurement he pointed out that the area concerned was characterized by a mix of buildings (which varied in age, height, bulk and architectural form), of which a number were taller than the 'proposed' building and were erected on common boundaries.[47] In fact, according to him there was a trend in the CBD to develop properties to their 'full potential' and this was the 'norm' for developments in the City.[48] He did not however mention, as the respondents and the court *a quo* pointed out, that whilst it is apparent[49] that there

[46] *Id,* para 28.
[47] *Id,* para 26.1.1 p 345.
[48] *Id*.
[49] This can clearly be seen on the photographs which were submitted by the Trust.

are buildings in the area which abut against one another along a common boundary, none of the abutting portions of such buildings consist of habitable accommodation.

35. Notwithstanding this, the Building Control Officer was of the view that as the right to build on the common boundary existed 'all along', whilst some might indeed regard the proposed building as "*intrusive, unattractive and unreasonable*" (sic) the march of progress made such "*changes inevitable"* as they occurred within the permitted 'parameters' for development.[50] He therefore did not 'agree' that the possibility of allowing a building zero metres from the boundary was so remote as to justify dismissing it.[51] He also did not 'agree' with the affected owners' contention that they expected that the Trust's building would be stepped back, once it reached the residential levels of the Four Seasons building. He said such an expectation was "*nowhere established in law*" (sic) and upholding such an expectation would undermine the development rights of erf 5284.[52]

36. These remarks not only reflect a number of material flaws in the logic of the Building Control Officer's reasoning, but further vividly illustrate the fundamental misconceptions he laboured under in regard to the applicable law.

37. In the first place, the fact that owners of immovable properties in the CBD of Cape Town which have been zoned for mixed use enjoy 100% coverage rights, and therefore in the absence of any required setback may be able to build across their entire property up and onto a common boundary with an adjoining property, does not necessarily mean that they should, or will, be entitled or permitted to do so, nor does it mean that they can therefore build what they like.

38. As the court a *quo* pointed out, in our law rights of ownership over immovable property have never been considered to be either supreme, or absolute. They are subject to all manner of restrictions both at common law (where the law pertaining to relations between neighbours is moderated by the principle of

[50] *Id,* para 26.1.1 p 345.
[51] *Id*.
[52] *Id,* at para [29].

reasonableness[53]) as well as by the provisions of various statutes, which in the context of this matter include those pertaining to zoning scheme restrictions and s 7, which allows expressly for the refusal of building plans where these would result in the erection of a building which would be objectionable, unsightly or a danger to life or property, or which would derogate from the value of neighbouring properties. As such, as the court a *quo* rightly pointed out[54] in discharging its functions in regard to the evaluation and the approval or refusal of building plans a local authority is required to act, in a sense, as a moderator between the potentially conflicting rights and obligations of neighbours.

39. In the circumstances, the basic premise from which the Building Control Officer proceeded to consider the objections by the affected owners and the Four Seasons body corporate was flawed. His understanding was that as long as the owner of the subject property sought, in its plans, to put forward a construction which was permitted by the zoning scheme and which was otherwise legally compliant (in a formal sense), the owners of neighbouring properties had to accept any intrusiveness which would result, even if it were gross and unreasonable, because this was the inevitable consequence of progressive development within the City. This amounted not only to a basic misunderstanding of the legal position but to an abdication of the duty which the Building Control Officer had to weigh up the envisaged development against the probable negative effect it would have on neighbouring properties. As the court a *quo* pointed out,[55] it is very noticeable that in his detailed report the Building Control Officer failed to set out and evaluate the possible effect which the construction on erf 5284 would have on the owners of units in the Four Seasons building, from their perspective.

40. Secondly, it is not clear what the Building Control Officer meant when he referred to there being no 'established expectation in law' that the building works on erf 5284 would be stepped back at a certain level of the Four Seasons building.

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[53] *Vide* the reference to *Regal v African Superslate* (Pty) Ltd 1963 (1) SA 102 (A) at para [50] of the judgment a *quo*.
[54] At para [46] of its judgment.
[55] At para [57.5] of its judgment.

Usually, when such language is used one is understood to be referring to a so-called 'legitimate expectation', a concept which has been developed by the courts to protect a substantive benefit, advantage or privilege which a person is expected to acquire or retain, and which it would be unfair to deny him or her, without prior consultation or an opportunity to be heard.[56]

41. The rationale for the development of the concept was to cover situations where there was no existing right which could be relied upon, and thus ordinarily no remedy when, as a matter of fairness, the facts cried out for one in order to protect an individual from decisions being arrived at unfairly by public authority.[57] In its ordinary and usual application it operates to afford affected persons a right to be heard, prior to a potentially adverse decision being taken against them which would affect their rights or status in some way or other.[58] Thus, it has traditionally been considered to afford only a procedural and not a substantive remedy to an affected person,[59] and whether or not a legitimate expectation has been established is primarily a factual enquiry based on the objective facts, and the parties' state of mind is irrelevant.[60] Commonly, it is constituted by or founded upon a practice which has been followed, or some undertaking, promise or representation which is made by one party to another.[61]

42. This accepted understanding of a legitimate expectation must be distinguished from the wording used in *Camps Bay Ratepayers*,[62] where Brand AJ spoke of the 'legitimate expectations' of notional informed parties to a sale. The remarks

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[56] *Administrator, Transvaal & Ors v Traub & Ors* 1989 (4) SA 731 (A) at 758D.
[57] *Id*, per Corbett CJ at 761E-G.
[58] In *Walele* for example the issue was whether on the basis of the doctrine of legitimate expectation, owners of neighbouring properties should be heard in regard, and prior to, the approval of building plans for adjoining properties- *vide* para 25 above.
[59] In *Minister of Home Affairs & Ors v Saidi & Ors* 2017 (4) SA 435 (SCA) at para [33] the Supreme Court of Appeal held (with reference to decisions of both the SCA as well as the Constitutional Court), that it was an 'open question' whether a party could be granted substantive as opposed to procedural relief on the basis of a legitimate expectation. *Vide* the remarks of O'Regan J in *Joe Slovo Community, Western Cape v Thubelisha Homes* 2010 (3) SA 454 (CC) at para 306 cited with approval in *Gerstle & Ors v City of Cape Town & Ors* 2017 (1) SA 11 (WCC) at para [44].
[60] *Walele* n 5 at para [38].
[61] *Id* at paras [35] and [39], *Traub* n 56, *President of the Republic of South Africa & Ors v South African Rugby Football Union & Ors* 2000 (1) SA 1 (CC).
[62] Note 5 at para [40].

which the learned judge made in that matter were in the context of derogation of value in terms of s 7(1)(b)(ii). He pointed out that the reference in the subsection to 'value' was to be understood as 'market value',[63] which commonly was defined as the price which an informed buyer would pay an informed seller in a notional transaction, where the parties would have contemplated all the potential risks, both realized and unrealized, in respect of a *merx*. One of the unrealized risks that such parties would contemplate would be that a neighbouring property, if unimproved at the time, might in future be built upon in a manner which might detract from the views, privacy, position etc which the subject property previously enjoyed. However, as a 'counterbalance' to this the parties would have in mind that any such future building works would be constrained by the restrictions imposed by town planning, zoning scheme and building regulations. As a result, if any such risk was later realized it would ordinarily not have any effect on the market value of the subject property as it would already have been discounted, given that it would have been within the parties' contemplation at the time of the notional transaction. Consequently, the fact that a neighbouring building may be erected which interferes with the previously existing attributes of an adjoining property will not in itself necessarily be regarded as derogating from the value of such property.[64]

43. Thus, Brand AJ pointed out,[65] derogation from market value would only commence when the negative attributes or effect of the new building would contravene zoning, building or planning restrictions[66] or when the new building, although legally compliant with such restrictions would, by way of example, be "*so unattractive or intrusive*" that it would be considered to exceed the "*legitimate expectations*" of the parties to the hypothetical sale.[67]

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[63] See also *Paola v Jeeva NO & Ors* 2004 (1) SA 396 (SCA).
[64] *Camps Bay Ratepayers* n 5 at para [39].
[65] *Id* at para [40].
[66] In such a case there would be derogation of value as a result of non-compliance with s 7(1)(a).
[67] In such a case there would be derogation of value as a result of non-compliance with s 7(1)(b).

44. The reference to 'legitimate expectations' in *Camps Bay Ratepayers* is therefore to be understood as 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.

45. As the concept of the legitimate expectations of hypothetical parties, as referred to in *Camps Bay Ratepayers*, requires a determination of what would have been in their minds at the time of a notional sale, this is an issue which will need to be determined based on the peculiar facts and legal constraints of an individual application for the approval of building plans. It is not predicated upon some fixed or established expectation in law. As such, on this aspect too, the Building Control Officer made no proper determination and erred in his appreciation of the legal test which was applicable.

46. The Building Control Officer also erred materially in regard to his treatment of the issue of potential derogation of value to neighbouring properties. Once again, at the outset,[68] he wrongly postulated the test as being whether the City was satisfied that the proposed building *would* have such a deleterious effect (as per the *True Motives* approach), instead of whether it was satisfied that it *would not* (as required in terms of *Walele*).

47. And once again, in respect of this issue too, his recommendation was based on the starting premise of what was permitted by the applicable zoning restrictions, which he said provided the subject property with a 'long-standing right' to develop a 'higher' building on the common boundary, which was in accordance with the common practice within the CBD and what he considered to be a trend towards densification. Therefore, in his view a developer could reasonably be expected to

[68] Para 30 of his report.

erect a building of the 'maximum size' permitted by the scheme regulations, on the property.[69]

48. In like vein, whereas he found that the proposed building would interfere with the existing views and the privacy and light of surrounding properties he was of the opinion that so long as it was legally compliant with the restrictions imposed by law, such interference could not 'in itself' be regarded as derogating from the value of the surrounding properties.[70]

49. Insofar as the issue of possible derogation from value in terms of s 7(1)(b)(ii) is concerned, as we explained earlier the fact that plans for a proposed building are legally compliant with zoning, planning and building requirements, does not mean that the building which is to be erected in terms thereof should, on this account alone, be permitted to be erected by a local authority, particularly if the negative attributes of the proposed building are considered not to have been within the legitimate expectations of the notional informed parties to a hypothetical sale. As such, it is not whether the height or size of the building on the subject property was within the legally permitted parameters that was the issue to be postulated and determined by the Building Control Officer, but whether the erection of the proposed building hard-up on the common boundary, abutting the balconies on the 8th floor (in such a manner as would render them essentially useless),[71] and the units on the 9th-10th floors of the Four Seasons building, fell within the notional contemplation of the aforesaid hypothetical parties. On this score too, it is apparent that he failed signally to appreciate the nature of what the proper legal test was, and misunderstood it. Given that the Building Control Officer himself recognized that the 'proposed' building was intrusive and affected the privacy and light of neighbouring Four Seasons units, what he needed to ask himself was whether a construction on the common boundary of erf 5284, which had such an effect could reasonably be expected to have been one of the unrealized risks in the minds of informed parties to a notional sale, or whether it

[69] *Id,* para 35.
[70] In terms of s 7(1)(b)(ii)(ccc) of the Act.
[71] Paras [62] and [68] of the judgment.

was too remote, in which case derogation from value would have been established.

50. Even if the Building Control Officer only had regard for the decision in *True Motives* he should have realized that the 'development rights' of an owner in regard to the maximum permissible size or height of a building which he might put up, could not trump the restrictions imposed on such rights in terms of s 7(1), as was clearly illustrated in *True Motives.* As Heher JA put it: [72]

> "Take, for example, the case of a developer who builds to maximum bulk in reckless disregard of market opinion. Such a person might well find that his development, although falling within the strict confines of existing development controls, derogates from the value of an adjoining property because the hypothetical purchaser and seller of that property would have regarded the likelihood of such a development as too remote to influence their price."

51. Finally, and consistent with his earlier approach, in the concluding paragraphs of his report the Building Control Officer again stated that in his view there was 'no basis to be satisfied' that any of the disqualifying factors set out in s 7(1)(b) were present or were likely to occur, which again confirms that he incorrectly applied the *True Motives* test instead of that in *Walele*.

(ii) <u>The memorandum by the Head: Building Development Management</u>

52. We now turn to deal with the memorandum by the Head: Building Development Management, which is all of a single page long. He stated therein that he received the application forms together with the full set of plans, 'Land Use documentation', and the detailed submissions made by the various parties, as well as the Building Control Officer's report, duly considered these and concluded that he could find no reason not to approve the application. According to his answering affidavit, all of this was done on one and the same day, 25 February 2015. This alone is cause for alarm, given the volume of paperwork concerned and the thorny issues raised by the parties.

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[72] At para [30].

53. The submissions which were made by the affected owners and the Four Seasons body corporate were in the order of 13 pages, and those made in response by the Trust comprised a memorandum from counsel of 13 pages, a report from a valuer comprising 23 pages and an 8 page report from an erstwhile town planner, as well as an album of photographs and presumably also the papers in the demolition application (which were not included as part of the papers in the review, but which on their own were likely to be voluminous). And no doubt there would also have been a file of sorts in respect of the previous application for the approval of plans for erf 5284, and the legal challenge thereto, which he would have had regard to. If one considers that in addition to all of this, in order to arrive at a properly considered decision he was also required to have careful regard for the contents of the report by the Building Control Officer and to find his way around complex and sometimes conflicting legal principles (set out in the various Constitutional Court and Supreme Court of Appeal judgments which we have referred to above), which were expounded upon in the report and in the parties' respective submissions, than it is inconceivable that he could have read all the papers and given the matter the kind of careful consideration it required in order to arrive at a reasoned and balanced decision, on one and the same day, even if this was the only such application which he was required to attend to on that day.

54. The impression which one gets from a reading of the memorandum which he supplied, which appears also to have been drafted on the same day that he made his decision, is that he had a cursory and uncritical look at the report of the Building Control Officer and simply endorsed the general approach which it adopted and its conclusions. As the court a *quo* rightly pointed out,[73] although in his answering affidavit[74] he claimed that the reasons for his decision were set out in his memorandum, in fact apart from certain comments which he made as an aside, and a "*not altogether coherent reference*" to his understanding of certain case law, the memorandum does not furnish any reasons, as such, for the

[73] At para [59] of its judgment.
[74] At para [41].

conclusions which he arrived at. If we are correct in this regard the decision which he ultimately arrived at was therefore not one made in the course of a proper, reasoned and independent application of the mind, and amounted to little more than a rubber-stamping exercise.

55. The memorandum adopted the same categorisation which the Building Control Officer did, and divided the assessment into 3 categories: Firstly, whether or not the plans were legally compliant and secondly, whether or not if implemented they would result in a building which would disfigure the area or which would be unsightly or objectionable and finally, whether or not they would result in additions which would derogate from the value of adjoining properties.

56. It is noticeable that it is only in regard to the first issue that the Head: Building Development Management said that he considered the recommendations by the Building Control Officer, and after assessing the plans and the specifications annotated thereon he was satisfied that they were compliant. In marked contrast to this, when he dealt with the other two aspects he was required to consider he did not state that he had regard for the contents of the report of the Building Control Officer at all. In this regard he pertinently stated in respect of the second issue, that having assessed the plans and having regard for the submissions by both parties he was "*not satisfied*" that the area would be disfigured, nor was he satisfied that the building would be unsightly or objectionable. Similarly, in regard to the issue of derogation from value he said that having considered the application 'in its context' and the parties' submissions, and having regard for the decisions in various cases, he was "*not satisfied*" that the additions would derogate from the value of adjoining properties.

57. It is thus apparent that the decision which the Head: Building Development Management arrived at, insofar as the material essence of the s 7(1)(b)(ii)(bbb) and (ccc) objections by the affected owners and the body corporate were concerned, was made without regard for the views and recommendations of the

Building Control Officer, and on this ground alone the decision which he arrived at was fundamentally flawed and liable to be set aside.[75]

58. But even if it were to be assumed (on the basis of the 'catch-all' statement in the first paragraph of his memorandum), that he did in fact have some regard for the entire contents of the report of the Building Control Officer and the full recommendations made therein, when considering the s 7(1)(b)(ii) issues, the difficulty which we have is that it is not apparent that notwithstanding the errors which the Building Control Officer made in regard to his understanding and application of the relevant legal principles, the Head: Building Development Management sought to apply the correct test to what he was required to determine. In fact, from the language used by him in his memorandum it is equally apparent that he also wrongly applied the test in *True Motives*, rather than that in *Walele*. Instead of 'positively' satisfying himself, on a balance of probabilities, that the relevant s 7(1)(b)(ii) factors would not probably occur in the future, as in the case of the Building Control Officer he simply said he was not satisfied that they *would* eventuate. Contrary to what the appellants assert, these are not one and the same tests, which are simply stated from opposite ends. In the words of Heher JA in *True Motives*[76] the approach adopted by the Head: Building Development Management allowed him to have a 'level of concern' about whether the building works would be objectionable (because they were unduly intrusive) and would result in a derogation of value (albeit that in his mind it was not enough of a concern for him to be satisfied, on balance, that such negative consequences would in fact eventuate). It follows axiomatically that, if this was the case, he was not able to exclude the likelihood that one or more of such disqualifying factors would manifest themselves in future, and would therefore not have been able to say that he was *positively* satisfied that they *would not* occur. On this basis, in terms of the prevailing authority of *Walele* and

[75] On the basis of a failure to have regard for materially relevant considerations, contrary to the provisions of s 6(2)e)(iii) of the Promotion of Administrative Act ('PAJA'), Act 3 of 2000.
[76] As set out In para 28 above.

Turnbull-Jackson he was therefore obliged to refuse the application and not to approve it.

59. In addition, that the basic premise from which the Head: Building Development Management proceeded to consider the application suffered from the same fundamental flaw as that on which the Building Control Officer based his report, is evident from the remarks which he made as an aside, and those he made with reference to what he called the "*Mill Row*" case.[77] In this regard he said that the notion that any person would have an expectation that the City would not permit a property owner to develop a property to the extent permitted by the zoning scheme was "*absurd*", and that the "*Mill Row*" case had confirmed that views, light and privacy may be impinged upon by a neighbouring building, provided that such building was 'otherwise' permitted.

60. In the first instance the remarks he made in his aside constitute a fundamental misapprehension of the objectors' case. They were not alleging that they had any expectation that the City would compromise or restrict the Trust's *development rights* in terms of the zoning scheme. Their claimed expectation was that the City would never approve plans for construction works which would abut hard-up on the common boundary at zero set-back, in a manner that would result in an unduly intrusive ('over-bearing') structure which rendered the balconies on the 8th floor of the Four Seasons building utterly useless ('confined between towering walls' as the court a *quo* put it). In this sense their claim was that the Trust never had any such development rights to exercise. Put simply, their claim was that the Trust had no legal right to develop its property in a way that would result in harmful and unlawful consequences, either at common law or in the context of s 7 of the Building Standards Act.

61. Secondly, as in the case of the Building Control Officer the flaw in this reasoning is that it is predicated on the invalid assumption that simply because the Trust was entitled to build up and onto the common boundary, the owners of

[77] This is a reference to the decision by a single judge as upheld by a full bench of the WCHC (reported *sub nom Gerstle & Ors v City of Cape Town & Ors* n 59), in respect of the approval of plans for additions to townhouses in the Mill Row group housing development in Sunset Beach, Cape Town.

neighbouring properties were obliged to tolerate whatever the Trust wanted to build in fulfilment of this right. Once again, this is not the legal position, either at common law (where ownership rights are not absolute and may only be exercised reasonably and without causing a nuisance) or in terms of s 7(1)(b) jurisprudence, which directs local authorities to refuse an application for the approval of building plans where it will result in an unsightly, objectionable or dangerous structure, or one which impermissibly diminishes the market value of an adjoining property, as explained in *Camps Bay Ratepayers*.[78] Furthermore, the assertion that the decisions in the 'Mill Row' case constitute authority for the impingement of views, light and privacy provided that the building works are 'otherwise permitted', is also not correct, and no such bald generalization is to be found therein.

62. As the court a *quo* pointed out [79] the decision(s) in the 'Mill Row' case were not germane to the facts of the instant matter, and were not helpful at all with a view to resolving the questions which the Head: Building Development Management was required to consider, and to answer. Those matters concerned the review of approval which had been granted for the erection of upper storeys on top of two single storey townhouses in a group housing development. In upholding the judgment of the court a *quo* a full bench of this division held[80] on appeal (in contradistinction to the findings of the court a *quo* in this matter), that the report of the Building Control Officer contained a "*carefully considered and justifiable set of recommendations*" and the City's decision-maker had set out "*detailed, plausible and justifiable*" reasons for why he had approved the plans in question, and in the light of the deference which courts were required to show[81] to 'polycentric' and policy-laden decisions which are made by persons with specific expertise in a certain area, which require a balance to be struck between a range of competing interests or considerations, there was no warrant for it to interfere.

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[78] Note 5.
[79] At para [66] of its judgment.
[80] *Gerstle* n 59 paras [36] and [37].
[81] In terms of the decision in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 (4) SA 490 (CC) at para [48].

But neither the court a *quo* nor the court of appeal in that matter held that views, light and privacy may be violated, simply because an application for approval of building plans is compliant with building, planning and zoning legislation.

63. Of course, as much as deference must be shown where it is due, so too in *Bato Star*[82] the Constitutional Court also held that this does not mean that where an administrative decision is not reasonably supported on the facts (or is not reasonable in the light of the reasons given for it) a court may not review it, nor should a court 'rubber-stamp' a decision which is unreasonable (or irrational) simply because of its complexity or the identity of the decision-maker.[83]

64. As they did in the court a *quo*, the appellants make much of the fact that in his answering affidavit the Head: Building Development Management postulated the correct legal test as laid down in *Walele,* and not that in *True Motives,* and fervently declared that both he and the Building Control Officer had applied this test in their evaluation of the application as well as when he ultimately arrived at his decision to approve it. Without being unduly cynical, one would expect that having received guidance and assistance from his legal representatives in the preparation and drafting of his answering affidavit the Head: Building Development Management would postulate the correct test therein. However, whether we can accept his assurance that this was the test which was applied by him and the Building Control Officer, is in issue. The difficulty we have is that notwithstanding their avowed application of the correct test, and as we have indicated above, in both the report of the Building Control Officer as well as in the memorandum by the Head: Building Development Management there are numerous indications that they were under a misapprehension as to the test which was to apply, and that they in fact wrongly adopted the interpretation espoused in *True Motives*, instead of that in *Walele*. In the circumstances, at the very least there is a large question mark to be placed behind the credibility of their assertions, given the inconsistency between their affidavits and their report and memorandum.

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[82] *Id*.
[83] *Id*.

65. A similar situation faced the Constitutional Court in *Walele*. In that matter too, the decision-maker asserted in his answering affidavit that he had been satisfied, before approving certain plans, that none of the disqualifying factors in s 7(1) would be triggered. As in this matter, the Court pointed out that the difficulty it had with this assertion was that it was not borne out by the objective contents of the underlying documents which the local authority furnished in support thereof, and as a result the decision-maker could not have been truly satisfied of the conclusion he asserted, and if he was, his 'satisfaction' was not based on reasonable grounds, as the underlying documents fell short of constituting a basis for a rational opinion.[84] In our view these remarks are equally apposite in this matter.

(iii) The challenge a *quo*

66. The respondents challenged the second decision to approve the plans for erf 5284 on the grounds that it was 1) materially influenced by an error of law[85] 2) not rationally connected to the information which was before the decision-maker at the time[86] 3) taken because relevant considerations were not taken into account[87] and 4) so unreasonable that no decision-maker could have arrived at it. The court a *quo* upheld the challenge on the first and third grounds.

67. It concluded, after evaluating the evidence, that the decision in question had been made because of the functionaries' 'misdirected opinion' that any structure erected within the applicable land use restrictions had to be factored in by a party to the notional purchase of a unit in the Four Seasons building, irrespective of its effect, a view which it held was based on a misapprehension of the law.[88]

68. The court a *quo* further held[89] that the decision had been arrived at because the Head: Building Development Management had failed to take into account certain

[84] *Walele* n 5 at paras [59] and [60].
[85] In terms of s 6(2)(d) of PAJA.
[86] In terms of s 6(2)(f)(ii)(cc) of PAJA.
[87] In terms of s 6(2)(e)(iii) of PAJA.
[88] At para [68] of the judgment.
[89] *Id*.

materially relevant considerations including, most importantly, whether in the particular factual circumstances the construction of building works hard-up against the balconies on the 8th Floor of the Four Season building and 'close to' the windows on the 9th and 10th floors, gave rise to any of the disqualifying factors listed in s 7(1)(b).

69. In this regard the court was of the view that both the Head: Building Development Management and the Building Control Officer had failed in particular to consider whether the reasonable and informed notional purchaser would have contemplated that, having approved balconies for the Four Seasons building along the common boundary, the local authority would permit the development of a building on the adjoining erf flush against it, in such a manner as would "*effectively destroy the utility of such balconies with the degree of overbearing intrusiveness that allowing a 3 storey solid wall to be built hard against them would unavoidably occasion*" (sic).[90]

70. The appellants contend that in making the remarks it did about the effect of the building works on the balconies the court a *quo* acted as a court of appeal instead of review[91] and went too far, in that it made findings which were not common cause and which amounted to a pronouncement on the merits of the application, something which fell within the exclusive domain of the decision-maker who was required to make a value-based polycentric determination, based on his technical and specialized expertise.

71. In our view, even if there is merit in these submissions (and nothing we have said herein is to be understood as constituting a determination in this regard), the court a *quo* cannot be faulted in regard to its findings that both the principal functionaries who were responsible for determining the outcome of the application laboured under a mistaken apprehension as to the relevant legal

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[90] *Id*, at para [68].

[91] Appellants refer to the well-established principle that a review is not concerned with the correctness of a decision which is made by a functionary, but whether he performed the functions with which he was entrusted, and where such functions involve the exercise of a discretion it is not open to a court to 'second-guess' him: *vide MEC for Environmental Affairs and Development Planning v Clairison's CC* 2013 (6) SA 235 (SCA) at para [18].

principles and erred in numerous respects in regard to their application thereof.[92] By way of a summary: they both incorrectly applied the test laid out in *True Motives* instead of that in *Walele*, and both erred in their fundamental premise that development rights of the Trust in terms of zoning, building and planning legislation reigned absolute and supreme over the rights of adjoining affected owners of units in the Four Seasons building, irrespective of the effect of what was to be built. In addition, both failed to perform the necessary 'statutorily prescribed contextual assessment'[93] which s 7(1) required, of the building plans which were the subject of the application. Such an assessment required them to evaluate the likely effect of the erection of the building in terms of the plans, on the adjoining properties in the Four Seasons building, and not only to consider the plans, on a one-sided basis, from the point of view of the 'development rights' of the owners of the adjoining property.

72. Furthermore, in having regard for the findings and recommendations of the Building Control Officer only in respect of the issue of compliance in terms of s 7(1)(a) and not in respect of the disqualifying factors raised in terms of s 7(1)(b)(ii), the Head: Building Development Management misdirected himself fundamentally and failed to take into account materially relevant considerations, and this failure also rendered the decision he arrived at reviewable[94] (as per the decisions in *Walele* and *Turnbull-Jackson*[95]). As the decision-maker he was obliged to have regard for all the recommendations of the Building Control Officer, in arriving at his decision, and not just some of them.

73. In terms of the language of review set out in PAJA, it is but a short and inevitable hop to finding that, inasmuch as the decision which is the subject of this appeal was predicated on a failure to have regard for material considerations (in terms of s 6(2)e)(iii) of PAJA) and was the result of numerous material errors of law (in

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[92] In *Long Beach Homeowners Association v Department of Agriculture, Forestry and Fisheries* [2017] ZASCA at para [16] the SCA confirmed that where in making a decision a public official misconstrues the powers and the discretion he is required to exercise because he is materially influenced by an error of law, the decision is reviewable in terms of s 6(2)(d) of PAJA.

[93] *Vide* paras [45]- [49] of the judgment a *quo*.

[94] In terms of s 6(2)(e)(iii) of PAJA.

[95] *Turnbull-Jackson* n 5 at para [75].

terms of s 6(2)(d)), it was not rationally connected to the information which was before the decision-makers (in terms of s 6(2)(f)(ii)(c)). Put differently, because of their failure to have regard for a number of material considerations they were supposed to take into account, and because of their misapprehension as to the relevant legal principles and their incorrect application thereof, the decisions which they arrived at were not rational in relation to the information which was before them.[96] In our view, it must therefore follow that in addition to the two grounds on which the respondents succeeded they could equally have succeeded on this further ground as well.

(iv) Grounds of challenge on appeal

74. The appellants contend that the court below 'inappropriately' extended the test for derogation of value, as developed by the Constitutional Court in *Camps Bay Ratepayers*[97] in relation to s 7(1)(b)(ii)(ccc), to the disqualifying factors referred to in subsections (aaa) and (bbb), which deal with disqualification on the grounds that either the area will be disfigured, or that the building to be erected will be unsightly or objectionable. As we understand their argument, it is predicated on the submission that it is not in every instance of potential disfigurement, unsightliness or objectionableness that there will necessarily be a derogation of value, and the subsections of s 7(1)(b) must not be read as if this is so. With such a submission as to the meaning to be afforded to the provisions in question there can be no disagreement. There may well be instances where a building is objectionable or unsightly, or disfigures an area,[98] but does not necessarily result in derogation of value to a building which adjoins it. Similarly, there may be instances where a proposed building, if erected, may constitute a danger to life or property (in terms of s 7(1)(b)(ii)(bb)), without there being any derogation to the value of an adjoining building.

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[96] *Democratic Alliance v President of South Africa & Ors* 2013 (1) SA 248 (CC) at para [39], explained it as follows: "*If in the circumstances of a case, there is a failure to take into account relevant material that failure would constitute part of the means for which the power was conferred. And if that failure had an impact on the rationality of the entire process, then the final decision may be rendered irrational and invalid by the irrationality of the process as a whole*."

[97] Note 5 at paras [38] – [40].

[98] As to what this would constitute *vide* the remarks of Madlanga J in *Turnbull-Jackson* as set out at n 109 below.

75. But this does not mean that what the court below did was to wrongly conflate or extend the test for derogation of value to the disqualifying factors referred to in subsections (bbb) and (ccc). In this matter the respondents contended that because the building works on erf 5284 were unduly and unreasonably intrusive, they were objectionable and the plans should therefore be refused on the grounds of s 7(1)(b)(ii)(bbb), but they also contended that as a result of this they had suffered a derogation of value in terms of the provisions of subsection (ccc), and that this constituted a further ground for disqualification. So, inasmuch as derogation of value and not only objectionableness *per se* was expressly raised, the test for determining whether there was such a derogation, as laid down in *Camps Bay Ratepayers*, was clearly of application.

76. Where derogation of value is raised in such a context, the cause of it can range from "*aesthetics, intrusion and overshadowing*"[99] to invasion of privacy, amongst others. In *True Motives* the SCA held[100] that in every case involving assessment of value under s 7(1)(b) the local authority is "*entitled and, indeed obliged to take into account adverse aspects of this nature where the informed willing buyer and seller would factor them into their purchase price*". That is done in order to arrive at market value. Derogation from such value only commences when "*the influence of such aspects exceeds the contemplation of the hypothetical informed parties*".[101] So the nub of it is that already in 2009 the SCA held that where disqualifying factors are raised in a s 7 matter, in the context of a derogation in value, the 'legitimate expectations' test (as it was described a year later in the decision in *Camps Bay Ratepayers*), applies. And in *Camps Bay Ratepayers* the Constitutional Court similarly adopted the position that where features such as 'unattractiveness' or 'intrusiveness' are raised in the context of a derogation in value, the question which must be answered is what would have been in the contemplation of the minds of parties to a hypothetical sale. In the circumstances there is no merit in the appellants' submissions in this regard.

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[99] *True Motives* n 4 para [30].
[100] *Id*.
[101] *Id.*

77. The City further criticized the decision of the court a *quo* on the basis that inasmuch as it requires functionaries (seized with applications for the approval of building plans) to consider what might reasonably be anticipated to be the possible future use of neighbouring properties, it requires them to engage in conjecture and speculation, which it said was untenable, because it places 'too great a burden' on them as they would have to evaluate "*the possible impact of each individual feature of every proposed building on each adjacent or adjoining property*"(sic). In our view, as was said by the court a *quo* in this regard, the City has misconstrued what is required of its officials, and has exaggerated the duty which lies upon them.

78. A similar argument was raised in *Turnbull-Jackson.*[102] In dismissing it the Constitutional Court pointed out that the level of scrutiny required from a decision-maker dealing with an application for the approval of building plans will depend on the facts of each case. Where the characteristics of a proposed development (such as its bulk, height, general aesthetic character, placement and coverage) compare favourably with existing developments in the area, this will usually warrant the approval of building plans "*without much effort*".[103] In such instances there will be no need or cause to engage in any speculation or conjecture as to what may happen on adjoining properties sometime in the future. By far and large the overwhelming majority of applications for the approval of building plans probably fall into this category and are likely to be uncontentious and easily approved (or rejected) on the papers before the decision-maker. On the other hand, where a proposed development may be so out of character in relation to what exists in the area (one might describe the Four Seasons development in such terms), a 'heightened' level of scrutiny will be required.[104] In situations where the requisite information which the decision-maker needs in order to determine an application is absent, he can interact with the Building Control Officer and make use of the extensive resources he has at

[102] Note 5 at paras [77] –[82].
[103] *Id* at para [81].
[104] *Id.*

his disposal in order to obtain it and if necessary, may even engage an expert such as a valuer to assist him.[105] In addition, as was stated in *True Motives*,[106] where necessary the Building Control Officer should engage with the applicant or his representative or potentially affected parties, or conduct an inspection in *loco,* to obtain the information he needs. Again, no speculation or conjecture need be resorted to.

79. In this matter the court a *quo* did nothing more than to set out what the applicable law was, which as we have pointed out above required the decision-makers to conduct a 'contextual assessment' of the likely effect of the implementation of the plans on the neighbouring Four Seasons properties, and to consider whether the decision-makers had complied with their obligations in this regard, or whether they had failed to do so. Its judgment does not, as was submitted, constitute a 'radical change' in the manner in which building plans are to be assessed, nor will it place "*impossible burdens*" (sic) on planning authorities or "*introduce a measure of uncertainty*" (sic) into this area of the law.

80. The court a *quo* set out very clearly, with reference to the various Constitutional Court and Supreme Court of Appeal decisions we have referred to above, and decisions which were referred to therein, what such an assessment entailed. One such decision (which was referred to with approval in *Walele* and *True Motives*) is that in *Odendaal v Eastern Metropolitan Local Council*[107] which serves as a lodestar in matters such as these. Lewis AJ held therein that the Building Standards Act and the applicable zoning scheme are legislative instruments for ensuring the "*harmonious, safe and efficient development of urban areas*" and they require local authorities, when carrying out the duties imposed upon them, to ensure that there is a balance of interests within a geographical community, as they are in effect the guardians of the community interest and are required to "*safeguard"* the interests of property owners in the areas of their jurisdiction, and to ensure that such areas are developed in as "*efficient, safe and aesthetically*

[105] *Id* at paras [82] and [84]. See also *True Motives* n4 at para [31].
[106] *Id*.
[107] 1999 CLR 77 (W) at 84-85 .

pleasing a way as possible". These are onerous responsibilities indeed, which require a contextual assessment having regard not only for the subject property, but also for the neighbourhood in which they are located, but in order to discharge them in accordance with what is required in terms of the prevailing case law there is no need to indulge in speculation or conjecture, all the more so in a matter such as this, where the building in respect of which the plans needed to be considered had already been partially erected and the effects of its construction were plain for all to see, on photographs and on site.

81. Usually a building envisaged by plans which are under consideration will not yet have been built and in such a case the local authority must, as the court a *quo* put it, take account of how the proposed structure would fit in with the existing developments on neighbouring properties and "*what might reasonably be anticipated to be the possible future use of such properties*".[108] Such an exercise hardly requires conjecture or speculation, and is not unduly onerous. A simple look at the zoning restrictions and the general structure and characteristics of buildings in the area, either by looking at their approved plans or by using aerial or street-view photographs (in this regard free software applications such as Google Maps are in common every-day use), or by means of an inspection of the area, if necessary, will surely do. Such an exercise also does not require the local authority to consider the possible effect of every 'feature' of every proposed building on neighbouring properties. It is the effect of the proposed building works *as a whole* that will ordinarily need to be considered, not each and every feature thereof.[109] At worst it will surely only be features which may adversely impact on the rights of the owners or occupiers of neighbouring properties, or which may have an adverse effect on their market value (outside of the range of 'legitimate expectations'), that will require consideration. To an experienced and appropriately qualified Building Control Officer such features will no doubt be manifest from a simple consideration of the plans, which ordinarily require views

[108] Para [45] of the judgment.

[109] In *Turnbull-Jackson* n 5 at paras [79]-[80] Madlanga J held that 'unattractiveness' and 'intrusiveness' and other disqualifying factors such as 'disfigurement', 'unsightliness' and 'objectionableness' are (largely) matters of fact "*on which it should not be difficult to make a judgment call*".

from different elevations. One must remember that before the matter comes to the Building Control Officer it will pass through the hands of a number of other persons with specialized skills, such as plan examiners, who will consider the plans in the light of the zoning scheme and will have regard for matters such as where the site on which the building is to take place is located with reference to nearby roads, as well as the boundaries, building lines and coverage, and the proposed placement, height and earmarked use of the building.[110]

82. The fact of the matter is that already from the decision in *Walele*[111] in 2008 it was made clear by the Constitutional Court that in giving effect to their duties in terms of s 7(1)(b), local authorities are required to strike a balance between the rights of the owner of the subject property for which building plan approval is sought, and the rights of the owners of neighbouring properties. This cannot be done by the simple expedient of having regard only for the building plans under consideration, in isolation, and without any regard for what exists, and what might reasonably be anticipated is likely to be put up in the future, on neighbouring properties. And whether or not a proposed building will disfigure an area, be unsightly or objectionable, or derogate from the value of adjoining properties requires a judgment call that can only properly be made if it has regard for the area concerned and the neighbouring buildings in it.

Conclusion

83. In the result, and for the reasons set out above, there is no merit in the appeal and it must fail. We make the following Order:

The appeal is dismissed with costs, including the costs of two counsel where so employed.

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[110] *Vide* the remarks by O'Regan ADCJ in *Walele* n 5 para [93], in regard to the process of approval of plans in the City of Cape Town.

[111] Note 5 paras [2] and [55].

HLOPHE JP

FORTUIN J

SHER J

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