CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 64/07
[2008] ZACC 11

AZEEM HASSAN WALELE	Applicant
versus	
THE CITY OF CAPE TOWN	First Respondent
AKBER HOOSAIN ALLIE	Second Respondent
MAYMONA ALLIE	Third Respondent
RAZIA ISMAIL	Fourth Respondent
MOGAMAT SHAFICK ISMAIL	Fifth Respondent
with	
THE CITY OF JOHANNESBURG	Amicus Curiae

Heard on : 21 February 2008

Decided on : 13 June 2008

JUDGMENT

JAFTA AJ:

Introduction

[1] This is an application for leave to appeal against the judgment of the Cape High Court dismissing an application brought by the applicant for an order reviewing and setting aside a decision of the first respondent, the City of Cape Town (the City), in

terms of which the City approved the building plans submitted to it by the second respondent, on behalf of the second to fifth respondents (the respondents).

[2] The central issue in this matter is whether the City properly approved the building plans submitted by the respondents, in terms of which they intend to erect a four-storey block of flats on their property. The applicant contends that the erection of the four-storey building will devalue his own property which adjoins the respondents' site. The underlying dispute is therefore between neighbours, and the facts of this case demonstrate that there is a need to strike the right balance between, on the one hand, the landowner's right to erect a building of his or her own choice on his or her property, and the rights of owners of the neighbouring properties, on the other. The National Building Regulations and Building Standards Act (the Building Standards Act)[1] provides for a framework within which such balance ought to be accomplished.[2]

[3] The Building Standards Act requires building plans to be approved for every building erected within a municipal area and thus prohibits construction of buildings without the prior approval of plans by the local authority within whose area a building is to be erected. The breach of this prohibition constitutes a criminal offence punishable by means of a fine.[3]

[1] Act 103 of 1977.

[2] See section 7 of the Building Standards Act, the text of which is quoted at para 50 below.

[3] Section 4 provides:

Factual background

[4] The respondents are joint owners of erf 168217 situated at Walmer Estate, Woodstock, Cape Town. The applicant is the owner of the adjoining erf 168218. On 2 March 2006 the respondents submitted to the City an application for the approval of building plans for the construction of a four-storey block of flats on erf 168217. Once submitted to the City, the plans were first perused by the Zoning Plans Examiner whose role was to determine whether they complied with the conditions of the zoning scheme before they could be passed to other departments within the establishment of the City. On 2 May the zoning plans examiner expressed the opinion that the plans in question complied with the zoning scheme and that the erf fell within the area where property owners were entitled to erect blocks of flats of up to seven storeys.

[5] The respondents' plans were subsequently passed to various departments for consideration and comment. The comments were made on a pro forma form designed for that purpose. Having considered the plans, each department inserted the phrase "no objection" in the relevant block, either by means of a departmental stamp or in

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"(1) No person shall without the prior approval in writing of the local authority in question, erect any building in respect of which plans and specifications are to be drawn and submitted in terms of this Act.

(2) Any application for approval referred to in subsection (1) shall be in writing on a form made available for that purpose by the local authority in question.

(3) Any application referred to in subsection (2) shall—

(a) contain the name and address of the applicant and, if the applicant is not the owner of the land on which the building in question is to be erected, of the owner of such land;

(b) be accompanied by such plans, specifications, documents and information as may be required by or under this Act, and by such particulars as may be required by the local authority in question for the carrying out of the objects and purposes of this Act.

(4) Any person erecting any building in contravention of the provisions of subsection (1) shall be guilty of an offence and liable on conviction to a fine not exceeding R100 for each day on which he was engaged in so erecting such building."

handwriting. A report of the Chief Fire Officer was annexed to the plans before they were forwarded to the Building Control Officer. The latter officer is under a statutory duty to make recommendations to the City "regarding any plans, specifications, documents and information submitted to such local authority in accordance with section 4(3)" of the Act.[4] On 26 July 2006 the Building Control Officer made an endorsement in the relevant block on the form. His endorsement reads: "BCO recommended in terms of section 6(1)(a) of Act 103/1977" and his signature appears below the endorsement.

[6] The respondents' plans (together with the endorsed form and the report by the Chief Fire Officer) were then forwarded to Mr Clive Griffiths (the decision-maker) who was authorised by the City to consider and approve building plans on its behalf. Mr Griffiths is an employee of the City. On 28 July 2006, he approved the plans and signified this by appending his signature on the form.

[7] On 16 September 2006, the respondents cleared erf 168217 so as to commence construction of the flats. During that process, a wall on the applicant's property was damaged and his attention was drawn to the activities on the respondents' erf. On 18 September the applicant addressed a letter to the City, demanding that he be furnished with reasons for approving the respondents' plans. Two reasons were given. The first was that erf 168217 was in a zoned general residential area (subzone R3) and thus the erection there of a block of flats up to seven storeys was allowed "as of right". The

[4] Section 6 of the Act, the relevant part of which is quoted at para 49 below.

second was that the plans in question complied with the relevant zoning scheme requirements. Dissatisfied with these reasons the applicant asked for a list of the documents which were placed before the decision-maker prior to the approval of the plans.[5] In part, the letter making the request reads as follows:

> "2. In both your e-mails of 18 September 2006, it is stated that since erf 168217 is zoned for general residential purposes, the development proposal is allowed "*as of right*". That, however, is not the end of the enquiry. It is inconceivable that a development proposal can be allowed purely on the basis of the zoning of the relevant property. This aspect will be fully addressed in the appropriate forum in due course.
>
> 3. We now ask you to provide us forthwith with copies of all documents that were before the official who approved the proposed development, including but not limited to:
>
> 3.1 the application for the approval of the building plans for the development of erf 168217;
>
> 3.2 the building plans that were approved;
>
> 3.3 the date on which the building plans were approved;
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> 3.4 all documents submitted by the owner/developer in support of the application;
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> 3.5 all notices (if any) of the proposed development sent by the City to interested or affected parties.
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> 3.6 copies of objections and consent (if any) to the proposed development by interested and affected parties."

[8] In response to the request for information, the City furnished the applicant with two documents on 26 September 2006. They were a copy of the application for the approval of building plans, which included the form endorsed by various departments, and a copy of the document titled "Land Information System – Ratepayers Data". On

[5] The letter asking for information is dated 20 September 2006 and was written by the applicant's wife (a legal practitioner).

28 September the applicant requested the City to confirm that these documents were the only documents placed before the decision-maker. On 2 October the City confirmed this by email.

Proceedings in the High Court

[9] The applicant instituted a review application in the Cape High Court, challenging the validity of the approval of the respondents' plans. He held the view that the erection of the four-storey block of flats on the adjacent erf would devalue his own property. The challenge mounted by the applicant against the approval was based on a number of grounds. To mention the main ones will suffice for present purposes. They are: the alleged lack of authority of the decision-maker to approve the building plans; the City's failure to give the applicant a hearing before the approval, in compliance with section 3 of the Promotion of Administrative Justice Act (PAJA);[6] and non-compliance with the jurisdictional requirements necessary for the exercise of the power to approve the plans. In the context of the last ground, reference was made to the alleged absence of a recommendation, as contemplated in section 6 of the Building Standards Act, and reasonable bases on which the decision-maker could have been satisfied that none of the disqualifying factors in section 7(1)(b)(ii)[7] would be triggered by the erection of the block of flats.

[10] The High Court rejected the meaning placed on the word "recommendation" by the applicant and held that by appending his signature to the form, the Building

[6] Act 3 of 2000.

[7] See para 50 below.

Control Officer had made a positive recommendation as envisaged in section 6 of the Building Standards Act.[8] He held further that none of the disqualifying factors was present in this case.[9]

[11] Regarding the applicant's contention that he was entitled to a pre-decision hearing, the High Court held that the applicant had failed to establish a factual foundation for claiming that he had legitimately expected to be heard before the approval of the plans.[10] Cleaver J declined to follow Wunsh J's judgment in *Erf 167 Orchards CC*[11] (on which the applicant had relied) and preferred the judgment of Lewis AJ in *Odendaal*.[12] He held that in the circumstances of the present case the applicant was not entitled to receive notice nor the opportunity to make representations to the decision-maker before the plans were approved.[13]

[12] The High Court also rejected, as lacking merit, the submission that the decision to approve the plans was irrational and unreasonable.[14] As stated above, he dismissed the application with costs. Applying the rule in *Plascon-Evans*,[15] the High Court concluded that the applicant had failed to prove that the construction of the block of

[8] *The Chairperson of the Walmer Estate Residents' Community Forum and Another v City of Cape Town and Others* Case No 10695/2006 Cape High Court, 20 March 2007, unreported (the High Court judgment) at para 15.

[9] Id at para 32.

[10] Id at para 21.

[11] *Erf 167 Orchards CC v Greater Johannesburg Metropolitan Council* 1999 CLR 91 (W) (*Erf 167 Orchards CC*).

[12] *Odendaal v Eastern Metropolitan Local Council* 1999 CLR 77 (W) (*Odendaal*).

[13] Above n 8 at para 21.

[14] Id at paras 29-30.

[15] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* [1984] ZASCA 51; 1984 (3) SA 623 (A) (*Plascon-Evans*) at 634E-H. The relevant portion is quoted at fn 25 below.

flats would reduce the market value of his property because the views of the applicant's valuer in this regard were sharply disputed by the City's witnesses.[16] The application for leave to appeal was refused and the petition to the Supreme Court of Appeal was also unsuccessful.[17]

Proceedings in this Court

[13] The City of Johannesburg (the amicus) was admitted as amicus curiae and argument both in written and oral form was addressed to this Court on its behalf.

[14] The applicant seeks leave to appeal against the High Court judgment. It is now settled that for the applicant to succeed, he must comply with two threshold requirements. First, the case must raise a constitutional issue or an issue connected therewith so as to fall within the jurisdiction of this Court. Secondly, it must be in the interests of justice that leave to appeal be granted. A two-stage approach is adopted in the enquiry as to whether these requirements are met. The first stage relates to the jurisdiction issue and the second concerns the exercise of a discretion by this Court. The second stage is reached only if the first has yielded a positive finding.

Does the application raise a constitutional issue?

[15] There can be no doubt that the present case raises a constitutional issue. In challenging the City's decision in the High Court, the applicant invoked the provisions of section 6 of PAJA. The interpretation and application of the provisions of PAJA

[16] Above n 8 at para 32.

[17] Harms and Ponnan JJA dismissed the petition with costs and, as is customary, no reasons were given.

raise a constitutional issue. In *Bato Star*[18] this Court held that cases such as the present fall within its jurisdiction. In that case O'Regan J said:

> "The provisions of s 6 divulge a clear purpose to codify the grounds of judicial review of administrative action as defined in PAJA. The cause of action for the judicial review of administrative action now ordinarily arises from PAJA, not from the common law as in the past. And the authority of PAJA to ground such causes of action rests squarely on the Constitution. It is not necessary to consider here causes of action for judicial review of administrative action that do not fall within the scope of PAJA. As PAJA gives effect to s 33 of the Constitution, matters relating to the interpretation and application of PAJA will of course be constitutional matters." (Footnote omitted.)

The interests of justice

[16] Relying on three bases, counsel for the amicus argued that it is not in the interests of justice to grant leave in this matter. First, he submitted that there was no compliance with Rule 16A of the Uniform Rules of the High Court[19] which requires

[18] *Bato Star Fishing* (*Pty*) *Ltd v Minister of Environmental Affairs and Others* [2004] ZACC 15; 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC) (*Bato Star*) at para 25.

[19] Rule 16A provides:

> "(1) (a) Any person raising a constitutional issue in an application or action shall give notice thereof to the registrar at the time of filing the relevant affidavit or pleading.
> (b) Such notice shall contain a clear and succinct description of the constitutional issue concerned.
> (c) The registrar shall, upon receipt of such notice, forthwith place it on a notice board designated for that purpose.
> (d) The notice shall be stamped by the registrar to indicate the date upon which it was placed on the notice board and shall remain on the notice board for a period of 20 days.
> (2) Subject to the provisions of national legislation enacted in accordance with section 171 of the Constitution of the Republic of South Africa, 1996 (Act 108 of 1996), and these rules, any interested party in a constitutional issue raised in proceedings before a court may, with the written consent of all the parties to the proceedings, given not later than 20 days after the filing of the affidavit or pleading in which the constitutional issue was first raised, be admitted therein as amicus curiae upon such terms and conditions as may be agreed upon in writing by the parties.
> (3) The written consent contemplated in subrule (2) shall, within five days of its having been obtained, be lodged with the registrar and the amicus curiae shall, in addition to any other provision, comply with the times agreed upon for the lodging of written argument.

notice of a constitutional issue to be given. Any constitutional issue relied on by the applicants, it was argued, was not properly raised. The Uniform Rules of the High Court, as the title suggests, do not apply to proceedings in this Court. Instead what is required is that evidence supporting a constitutional issue raised must be placed before the court of first instance. But even this principle is not inflexible. This Court permits evidence to be placed before it where there are compelling reasons to do so.[20] However, in this case, the constitutional issue relied on was raised in the applicant's founding papers. It follows that the constitutional issue was properly raised. The objection might possibly have had substance if it was raised in the High Court, but it was not.

[17] Secondly, the amicus submitted that, due to the existence of extensive factual disputes, there can be no proper consideration of the issues on appeal. The factual

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(4) The terms and conditions agreed upon in terms of subrule (2) may be amended by the court.
(5) If the interested party contemplated in subrule (2) is unable to obtain the written consent as contemplated therein, he or she may, within five days of the expiry of the 20-day period prescribed in that subrule, apply to the court to be admitted as an amicus curiae in the proceedings.
(6) An application contemplated in subrule (5) shall—
  (a) briefly describe the interest of the amicus curiae in the proceedings;
  (b) clearly and succinctly set out the submissions which will be advanced by the amicus curiae, the relevance thereof to the proceedings and his or her reasons for believing that the submissions will assist the court and are different from those of the other parties; and
  (c) be served upon all parties to the proceedings.
(7) (a) Any party to the proceedings who wishes to oppose an application to be admitted as an amicus curiae, shall file an answering affidavit within five days of the service of such application upon such party.
  (b) The answering affidavit shall clearly and succinctly set out the grounds of such opposition.
(8) The court hearing an application to be admitted as an amicus curiae may refuse or grant the application upon such terms and conditions as it may determine.
(9) The court may dispense with any of the requirements of this rule if it is in the interests of justice to do so."

[20] *Zondi v MEC for Traditional and Local Government Affairs* [2004] ZACC 19; 2005 (3) SA 589 (CC); 2005 (4) BCLR 347 (CC) (*Zondi*) at para 23.

disputes to which the amicus refers relate solely to the narrow points of whether the applicant has established that the construction of the block of flats will trigger any of the disqualifying factors listed in section 7(1)(b)(ii) of the Building Standards Act. As already stated, the High Court found that the applicant failed to prove this issue in the light of the conflict in the evidence of various experts. The finding was based, I must emphasise, on the application of the *Plascon-Evans* rule. Before us, the applicant did not challenge this finding which is, in my view, for present purposes unassailable. It does not however stand in the way of enquiring into the correctness of the High Court's findings on the right to be heard before the approval of the plans and other issues. It was common cause between the parties that the applicant was not afforded a hearing. Furthermore, the applicant also raised the issue of jurisdictional requirements, which does not depend on any of the disputed facts.

[18] Thirdly, the amicus, relying on section 7 of PAJA[21] read with section 62 of the Local Government: Municipal Systems Act 32 of 2000 (the Municipal Systems Act),[22]

[21] Section 7 of PAJA provides:

"(1) Any proceedings for judicial review in terms of section 6(1) must be instituted without unreasonable delay and not later than 180 days after the date—
  (a) subject to subsection (2)(c), on which any proceedings instituted in terms of internal remedies as contemplated in subsection (2)(a) have been concluded; or
  (b) where no such remedies exist, on which the person concerned was informed of the administrative action, became aware of the action and the reasons for it or might reasonably have been expected to have become aware of the action and the reasons.

(2) (a) Subject to paragraph (c), no court or tribunal shall review an administrative action in terms of this Act unless any internal remedy provided for in any other law has first been exhausted.
  (b) Subject to paragraph (c), a court or tribunal must, if it is not satisfied that any internal remedy referred to in paragraph (a) has been exhausted, direct that the person concerned must first exhaust such remedy before instituting proceedings in a court or tribunal for judicial review in terms of this Act.
  (c) A court or tribunal may, in exceptional circumstances and on application by the person concerned, exempt such person from the obligation to exhaust any internal remedy if the court or tribunal deems it in the interest of justice.

(3) The Rules Board for Courts of Law established by section 2 of the Rules Board for Courts of Law Act, 1985 (Act No. 107 of 1985), must within one year after the date of commencement of this Act, make and implement rules of procedure for judicial review.

(4) Before the implementation of the rules of procedure referred to in subsection (3), all proceedings for judicial review must be instituted in a High Court or the Constitutional Court.

(5) Any rule made under subsection (3) must, before publication in the Gazette, be approved by Parliament."

[22] Section 62 of the Municipal Systems Act provides:

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

(2) The municipal manager must promptly submit the appeal to the appropriate appeal authority mentioned in subsection (4).

(3) The appeal authority must consider the appeal, and confirm, vary or revoke the decision, but no such variation or revocation of a decision may detract from any rights that may have accrued as a result of the decision.

(4) When the appeal is against a decision taken by—
  (a) a staff member other than the municipal manager, the municipal manager is the appeal authority;
  (b) the municipal manager, the executive committee or executive mayor is the appeal authority, or, if the municipality does not have an executive committee or executive mayor, the council of the municipality is the appeal authority; or
  (c) a political structure or political office bearer, or a councillor—
    (i) the municipal council is the appeal authority where the council comprises less than 15 councillors; or

submitted that the applicant was obliged to exhaust internal appeals before approaching the High Court. Since he has not applied in terms of section 7 of PAJA to be exempted from this requirement, so the argument continued, the High Court lacked the authority to entertain his application. This Court must, concluded the argument, refuse to hear the appeal until the internal remedies are exhausted.

[19] This point was abandoned by the City in the High Court, and the judgment of that Court does not deal with it at all. In this Court, the City raised the point in the alternative to the argument that none of the applicant's rights was affected by the impugned decision, and the issue was raised in relation to relief. The question is whether the internal appeal provided for in section 62 of the Municipal Systems Act was available to the applicant, who was not a party to the application for the approval of the plans. The answer to this question lies in the interpretation of section 62(1). The opening words of the section identify the class of persons who are entitled to invoke the appeal procedure. It speaks of persons whose rights are affected by a decision taken by a local authority or some other body or person within it, all of whom are listed in the subsection. This means that for the applicant to qualify as a member of the designated class, it must be shown that he had an identifiable right which was affected by the decision to approve the plans. This has not been established on the papers. The amicus and the other respondents contend that none of the applicant's

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(ii) a committee of councillors who were not involved in the decision and appointed by the municipal council for this purpose is the appeal authority where the council comprises more than 14 Councillors.

(5) An appeal authority must commence with an appeal within six weeks and decide the appeal within a reasonable period."

rights was affected by the approval. Therefore, in view of their stance in this regard, they cannot insist on the obligation to exhaust domestic remedies.

[20] The High Court dealt with the matter on its merits and construed sections 6 and 7 of the Building Standards Act in a particular way. For as long as that judgment stands, it will have to be followed by all municipalities and property owners falling within its area of jurisdiction. As a party to this litigation, the applicant is entitled to appeal against the High Court's judgment, provided the requirements necessary for such an appeal are met. The applicant's attempt to appeal has been unsuccessful in the High Court and in the Supreme Court of Appeal.

[21] What is required at this stage is to weigh all the factors relevant to the exercise of this Court's discretion.[23] The case raises issues of great importance in the field of town planning and development in cities and towns throughout the country. The implicated sections of the Building Standards Act have been construed in conflicting decisions of the High Court. The particular issues that arise in this case have not been considered by this Court or the Supreme Court of Appeal. The latter Court has declined to entertain the appeal. The prospects of success on the merits appear to be good. All these factors weigh in favour of granting leave in the interests of justice.

[23] See *Fraser v ABSA Bank Ltd (National Director of Public Prosecutions as* Amicus Curiae*)* [2006] ZACC 24; 2007 (3) SA 484 (CC); 2007 (3) BCLR 219 (CC) (*Fraser*) at para 48; *Radio Pretoria v Chairperson, Independent Communications Authority of South Africa, and Another* [2004] ZACC 24; 2005 (4) SA 319 (CC); 2005 (3) BCLR 231 (CC) at para 19; *Member of the Executive Council for Development Planning and Local Government, Gauteng v Democratic Party and Others* [1998] ZACC 9; 1998 (4) SA 1157 (CC); 1998 (7) BCLR 855 (CC) at para 32.

The issues

[22] The grounds of review which the applicant pressed in this Court were the following: (a) there was no valid delegation of powers to the decision-maker; (b) the City failed to comply with mandatory procedural requirements prescribed by the Building Standards Act; (c) the decision to approve the plans was procedurally unfair, arbitrary and capricious; and (d) the City failed to act in an open and accountable manner as required by section 195(1) of the Constitution. With regard to relief, the City argued that the applicant was not entitled to an order setting aside the approval because he had failed to exhaust domestic remedies provided for in section 62 of the Municipal Systems Act.[24] I address these issues in turn.

Delegation of power

[23] Section 28(4) of the Building Standards Act authorises a written delegation of powers by a local authority to any of its committees or employees, excluding only the power conferred on the local authority by section 5 of that Act. The latter section deals with the appointment of a Building Control Officer. The power to appoint this officer is reserved to be exercised by the local authority itself. All other powers can be delegated to either committees or employees. It is common cause in this case that the power to approve the building plans was exercised by Mr Griffiths who is an employee of the City.

[24] In raising this point, the applicant alleged (in his founding affidavit):

[24] Above n 22.

> "It is not clear from the documents filed in terms of rule 53 of the Rules, who the decision-maker was; whether he or she possesses the requisite qualifications; and whether he or she was properly delegated to approve the building plans in question. Consequently, it will be argued that the administrative action in question was not authorised [by] the empowering provision; or that the decision-maker acted under a delegation of power which was unauthorised".

[25] When read in context, the above challenge means no more than that the record filed in terms of Rule 53 did not inform the applicant about who the decision-maker was and whether the power had been properly delegated to him or her. In its answering affidavit (deposed to by the Building Control Officer), the City identified Mr Griffiths as the decision-maker to whom the power had been duly delegated. The Building Control Officer alleged:

> "On 28 July 2006, First Respondent approved the plans. Mr Clive Griffiths, duly delegated, appended his signature and approval. In this regard, I refer to the Confirmatory Affidavit of Mr Griffiths, filed of record herewith."

In his affidavit Mr Griffiths confirmed these allegations.

[26] In reply the applicant simply disputed that there was a proper delegation of power to Mr Griffiths. Clearly a dispute of fact arose on the delegation issue and since these are motion proceedings, the City's averments must be taken as correct upon the application of the *Plascon-Evans* rule.[25] Moreover, at the hearing of the

[25] Above n 15. In *Plascon-Evans*, Corbett JA said at 634E-I:

> "The appellant nevertheless sought a final interdict, together with ancillary relief, on the papers and without resort to oral evidence. In such a case the general rule was stated by Van

matter, counsel for the City undertook to furnish the Court with a copy of the delegation. Indeed, shortly after the hearing such copy was furnished to the Court and the other parties. As a result, this complaint has fallen away.

Was the decision to approve the plans procedurally unfair?

[27] There can be no doubt that when approving building plans, a local authority or its delegate exercises a public power constituting administrative action. The normative value system of the Constitution imposes a duty on decision-makers to act fairly towards parties who are affected by their decisions.[26] The most important component of procedural fairness is the one expressed by the audi alteram partem principle (the audi principle) which requires that parties to be affected by an administrative decision be given a hearing before the decision is taken. What gives rise to the right to be heard is the negative impact of the decision on the rights or

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Wyk J (with whom De Villiers JP and Rosenow J concurred) in *Stellenbosch Farmers' Winery Ltd v Stellenvale Winery* (*Pty*) *Ltd* 1957 (4) SA 234 (C) at 235E-G, to be:

> '. . . where there is a dispute as to the facts a final interdict should only be granted in notice of motion proceedings if the facts as stated by the respondents together with the admitted facts in the applicant's affidavits justify such an order . . . Where it is clear that facts, though not formally admitted, cannot be denied, they must be regarded as admitted.'

This rule has been referred to several times by this Court (see *Burnkloof Caterers* (*Pty*) *Ltd v Horseshoe Caterers (Green Point) (Pty) Ltd* 1976 (2) SA 930 (A) at 938A-B; *Tamarillo* (*Pty*) *Ltd v B N Aitkin* (*Pty*) *Ltd* 1982 (1) SA 398 (A) at 430-1; *Associated South African Bakeries* (*Pty*) *Ltd v Oryx & Vereinigte Bäckereien* (*Pty*) *Ltd en Andere* 1982 (3) SA 893 (A) at 923G-924D). It seems to me, however, that this formulation of the general rule, and particularly the second sentence thereof, requires some clarification and, perhaps, qualification. It is correct that, where in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant's affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order. The power of the Court to give such final relief on the papers before it is, however, not confined to such a situation. In certain instances the denial by respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or *bona fide* dispute of fact (see in this regard *Room Hire Co* (*Pty*) *Ltd v Jeppe Street Mansions* (*Pty*) *Ltd* 1949 (3) SA 1155 (T) at 1163-5; *Da Mata v Otto NO* 1972 (3) SA 858 (A) at 882D-H)."

[26] *Masetlha v President of the Republic of South Africa and Another* [2007] ZACC 20; 2008 (1) SA 566 (CC); 2008 (1) BCLR 1 (CC) (*Masetlha*) at para 183.

legitimate expectations of the person claiming to have been entitled to a hearing before the decision was taken. In *Masetlha* Ngcobo J said:

> "The procedural aspect of the rule of law is generally expressed in the maxim *audi alteram partem* (the *audi* principle). This maxim provides that no one should be condemned unheard. It reflects a fundamental principle of fairness that underlies or ought to underlie any just and credible legal order. The maxim expresses a principle of natural justice. What underlies the maxim is the duty on the part of the decision-maker to act fairly. It provides an insurance against arbitrariness. Indeed, consultation prior to taking a decision ensures that the decision-maker has all the facts prior to making a decision. This is essential to rationality, the sworn enemy of arbitrariness. This principle is triggered whenever a statute empowers a public official to make a decision which prejudicially affects the property, liberty or existing right of an individual."[27] (Footnote omitted.)

[28] Regarding the procedural aspect of the right to fairness, the applicant's case was based on the provisions of section 3 of PAJA.[28] This section acknowledges in express terms that the required standard for procedural fairness differs from case to case. The facts and circumstances of a particular case determine the content of procedural fairness required. But the express precondition for the requirement to act fairly, in terms of the section, is that the administrative action must materially and adversely affect the rights or legitimate expectations of the aggrieved person. This requirement is consistent with the common law position referred to by Ngcobo J in *Masetlha*.[29] The audi principle evolved and its scope was expanded under the common law also to cover cases where the impugned decision did not affect rights. If

[27] Id at para 187.

[28] Section 3(1) provides:

> "Administrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair."

[29] Above n 26.

the aggrieved person had a legitimate expectation to be heard, the principle applied. The incorporation of the doctrine of legitimate expectation into South African law was endorsed by Corbett CJ in *Traub*.[30] In terms of the doctrine, the audi principle applies to cases where the aggrieved person's legitimate expectation was affected by the decision reached, even if such person had no antecedent rights affected thereby.

[29] When the legislature enacted PAJA, it sought to codify extensively grounds of review, including the denial of a pre-decision hearing. This Court has held that applications for review of administrative action must ordinarily be based on PAJA.[31] In *New Clicks*,[32] Ngcobo J said:

> "Where, as here, the Constitution requires Parliament to enact legislation to give effect to the constitutional rights guaranteed in the Constitution, and Parliament enacts such legislation, it will ordinarily be impermissible for a litigant to found a cause of action directly on the Constitution without alleging that the statute in question is deficient in the remedies that it provides. Legislation enacted by Parliament to give effect to a constitutional right ought not to be ignored. And where a litigant founds a cause of action on such legislation, it is equally impermissible for a court to bypass the legislation and to decide the matter on the basis of the constitutional provision that is being given effect to by the legislation in question."[33] (Footnote omitted.)

[30] *Administrator, Transvaal and Others v Traub and Others* [1989] ZASCA 90; 1989 (4) SA 731 (A) (*Traub*) at 761E-G.

[31] See *Bato Star* above n 18; *Zondi* above n 20 at para 99.

[32] *Minister of Health and Another NO v New Clicks South Africa* (*Pty*) *Ltd and Others (Treatment Action Campaign and Another as* Amici Curiae*)* [2005] ZACC 25; 2006 (2) SA 311 (CC); 2006 (1) BCLR 1 (CC) (*New Clicks*).

[33] Id at para 437.

[30] It is within the above context that the interpretation of section 3 of PAJA must be approached. Moreover, when Parliament enacted PAJA, it must have been aware of judicial decisions which applied the audi principle in its original and expanded forms, incorporating the doctrine of legitimate expectation. Hence the rights and legitimate expectations referred to in section 3 of PAJA are not defined. The section requires that procedural fairness be adhered to where the administrative action affects materially and adversely "the rights or legitimate expectations of any person". In so doing, the section apparently limits the scope of the right to procedural fairness envisaged in section 33 of the Constitution. The applicant did not challenge its constitutionality but invoked it in its present form, as a basis for his cause of action. We must therefore proceed on the assumption that section 3 is consistent with the Constitution.

[31] On a proper construction of section 3, the applicant's claim to a hearing can only succeed if he establishes that the decision to approve the building plans materially and adversely affected his rights or legitimate expectations. The parties involved in the application for the approval were the respondents and the City. The applicant was not a party to that process nor was he entitled to be involved. The building plans in question were drawn at the instance of the respondents who wanted to erect the four-storey block of flats on their own property. The granting of the approval could not, by itself, affect the applicant's rights.

[32] It will be recalled, however, that the applicant's case is that the erection of the flats will devalue his own property and may trigger other disqualifying factors in section 7(1)(b)(ii) of the Building Standards Act. He does not contend that the approval itself will lead to those consequences. The question is whether "administrative action" as contemplated in section 3 of PAJA should be construed to encompass the subsequent erection of flats. I think not. Such interpretation would not constitute a reasonable reading of the section which requires a pre-existing right or legitimate expectation to be materially and adversely affected by the administrative decision itself. Furthermore, there is no need to read section 3 so widely because section 7 of the Building Standards Act makes the erection of a building in a manner that devalues neighbouring properties, on its own, a ground of review. If the applicant in this case had proved that the erection of the flats devalued his property, he could have succeeded in having the approval of the plans in question set aside on that basis alone. As observed by the Supreme Court of Appeal in *Paola*,[34] a local authority is not authorised to approve plans in circumstances where their execution will diminish the value of neighbouring properties. In that case Farlam JA, writing for the Court, said:

> "Once it is clear, as it is on the facts presently before us, that the execution of the plans will significantly diminish the value of the adjoining property, then, on its plain meaning, [section 7(1)(b)(ii)] prevents the approval of the plans. . . . In the circumstances I am satisfied, on the facts presently before us, that the appellants first ground of attack on the third respondent's approval of the plans must be sustained."[35]

[34] *Paola v Jeeva NO and Others* [2003] ZASCA 100; 2004 (1) SA 396 (SCA) (*Paola*).

[35] Id at para 23.

[33] In the present case the applicant's allegation that the erection of the flats will reduce the value of his property was denied by the City. The parties presented conflicting expert evidence on the issue and since these were motion proceedings the High Court applied the *Plascon-Evans* rule and accepted the City's version on the issue. On the papers, the applicant has failed to prove that his property would be devalued by the erection of the flats.

Did the approval materially and adversely affect the applicant's legitimate expectations?

[34] As indicated above, at common law, before the adoption of the doctrine of legitimate expectation, the audi principle was confined to cases where an administrative decision affected pre-existing rights of the party challenging the validity of the decision on the basis that it was denied a hearing. Upon the realisation that pre-existing rights may be absent but the facts of a particular case may still require compliance with procedural fairness, the courts in South Africa imported the doctrine of legitimate expectation in order to expand the scope of the audi principle. In doing so, the courts underscored the importance of the principle that the question whether there should have been a pre-decision hearing depends on the circumstances of each case.[36]

[36] *Janse van Rensburg NO and Another v Minister of Trade and Industry and Another NNO* [2000] ZACC 18; 2001 (1) SA 29 (CC); 2000 (11) BCLR 1235 (CC) at para 24; *Du Preez and Another v Truth and Reconciliation Commission* [1997] ZASCA 2; 1997 (3) SA 204 (A); 1997 (4) BCLR 531 (A) at paras 31-3.

[35] The doctrine of legitimate expectation, however, has its own limitations. It cannot be precisely defined. In some cases it has been expressed as a—

> "substantive benefit or advantage or privilege which the person concerned could reasonably expect to acquire or retain and which it would be unfair to deny such person without prior consultation or a prior hearing".[37]

The doctrine applies where a person enjoys a privilege or benefit which it would be unfair to deny that person without giving him or her a hearing. A legitimate expectation may arise either from a promise made by the decision-maker or from a regular practice which is reasonably expected to continue.

[36] In *Traub* Corbett CJ cautioned against the danger of freely applying the doctrine in determining whether or not procedural fairness required a pre-decision hearing. The Chief Justice said:

> "There are many cases where one can visualise in this sphere – and for reasons which I shall later elaborate I think that the present is one of them – where an adherence to the formula of 'liberty, property and existing rights' would fail to provide a legal remedy, when the facts cry out for one; and would result in a decision which appeared to have been arrived at by a procedure which was clearly unfair being immune from review. The law should in such cases be made to reach out and come to the aid of persons prejudicially affected. At the same time, whereas the concepts of liberty, property and existing rights are reasonably well defined, that of legitimate expectation is not. Like public policy, unless carefully handled it could become an unruly horse. And, in working out, incrementally, on the facts of each case, where the doctrine of legitimate expectation applies and where it does not, the Courts will, no doubt, bear in mind the need from time to time to apply the curb. A reasonable balance must be maintained between the need to protect the individual from decisions

[37] *Traub*, above n 30 at 758D.

> unfairly arrived at by public authority (and by certain domestic tribunals) and the contrary desirability of avoiding undue judicial interference in their administration."[38]

[37] Since the concept of legitimate expectation referred to in section 3 of PAJA is not defined, it must be given its ordinary meaning as understood over a period of time by the courts in this country. But the difficulty is that administrative action is defined in section 1 of PAJA as a decision which adversely affects the rights of another person.[39] In the definition no reference is made to a decision affecting legitimate expectations. Yet section 3 refers to administrative action that affects legitimate expectations. Applying the definition to the interpretation of section 3 will lead to absurdity. Therefore, I am willing not to apply it and to assume that section 3 of PAJA confers the right to procedural fairness also on persons whose legitimate expectations are materially and adversely affected by an administrative decision. In the context of section 3, administrative action cannot mean what was intended in the definition section. Applying the definition to section 3 would lead to an incongruity or absurdity not intended by Parliament. The general rule is that a definition meaning may not be applied if its application will lead to such consequences.[40] The Supreme

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[38] Id at 761E-G.

[39] The relevant part of section 1 of PAJA reads as follows:

> "In this Act, unless the context indicates otherwise—
> 'administrative action' means any decision taken, or any failure to take a decision, by—
> (a) an organ of state, when—
> (i) exercising a power in terms of the Constitution or a provincial constitution; or
> (ii) exercising a public power or performing a public function in terms of any legislation; or
> (b) a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision,
> which adversely affects the rights of any person and which has a direct, external legal effect".

[40] *Hoban v ABSA Bank Ltd t/a United Bank and Others* [1999] ZASCA 12; 1999 (2) SA 1036 (SCA) at 1044.

Court of Appeal in *Grey's Marine*[41] held that the definition of administrative action in PAJA ought not to be given its literal meaning. In that case Nugent JA said:

> "While PAJA's definition purports to restrict administrative action to decisions that, as a fact, 'adversely affect the rights of any person', I do not think that literal meaning could have been intended. For administrative action to be characterised by its effect in particular cases (either beneficial or adverse) seems to me to be paradoxical and also finds no support from the construction that has until now been placed on s 33 of the Constitution. Moreover, that literal construction would be inconsonant with s 3(1), which envisages that administrative action might or might not affect rights adversely. The qualification, particularly when seen in conjunction with the requirement that it must have a 'direct and external legal effect', was probably intended rather to convey that administrative action is action that has the capacity to affect legal rights, the two qualifications in tandem serving to emphasise that administrative action impacts directly and immediately on individuals."[42] (Footnotes omitted.)

Has the applicant established any legitimate expectation affected by the approval of the plans?

[38] In order to answer this question, it is necessary to look at the test formulated by the courts for determining the existence of legitimate expectation. The enquiry is primarily factual and the focus during this stage is on objective facts giving rise to the expectation. The aggrieved party's state of mind is irrelevant to the enquiry. Once the facts supporting an expectation are established, the enquiry moves to the second stage which is whether, in the circumstances of the case at hand, procedural fairness

[41] *Grey's Marine Hout Bay* (*Pty*) *Ltd and Others v Minister of Public Works and Others* (*Grey's Marine*) [2004] ZASCA 43; 2005 (6) SA 313 SCA; 2005 (10) BCLR 931 (SCA).

[42] Id at para 23.

required a pre-decision hearing. In *SARFU*,[43] this Court applied the test in two stages. In relation to the first stage the Court said:

> "The question then is whether, on the facts outlined above, which were not in material dispute between the parties, the respondents have established any legitimate expectation that the President would not, in conflict with any undertaking which might have been given by the Minister, make the provisions of the Commissions Act applicable to the commission, without first affording the respondents an opportunity of being heard. They did not assert such an expectation in the correspondence addressed to the Department on 26 August 1997, after they had been informed that the Department considered the appointment of a commission to be its only option. Nor did they assert such an expectation in their letter to the President on 29 September 1997 when they sought his reasons."[44]

And later the Court concluded by saying:

> "Indeed, any such expectation could not in the circumstances of this case have been considered to be legitimate, giving rise to a right to be heard by the President. The question whether an expectation is legitimate and will give rise to the right to a hearing in any particular case depends on whether in the context of that case, procedural fairness requires a decision-making authority to afford a hearing to a particular individual before taking the decision. To ask the question whether there is a legitimate expectation to be heard in any particular case is, in effect, to ask whether the duty to act fairly requires a hearing in that case. The question whether a 'legitimate expectation of a hearing' exists is therefore more than a factual question. It is not whether an expectation exists in the mind of a litigant but whether, viewed objectively, such expectation is, in a legal sense, legitimate; that is, whether the duty to act fairly would require a hearing in those circumstances."[45]

[43] *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* [1999] ZACC 11; 2000 (1) SA 1 (CC); 1999 (7) BCLR 725 (CC) (*SARFU*).

[44] Id at para 211.

[45] Id at para 216.

[39] In this case, the legitimate expectation sought to be invoked is not founded upon an express representation made by the decision-maker but on an alleged practice. The requirement is that the conduct underlying the expectation must reasonably lead to the belief that the aggrieved party would be given a hearing before the decision is taken. In *Traub* Corbett CJ cited with approval the following statement from the speech of Lord Fraser in *Council of Civil Service Unions and Others v Minister for the Civil Service*:[46]

> "But even where a person claiming some benefit or privilege has no legal right to it, as a matter of private law, he may have a legitimate expectation of receiving the benefit or privilege, and, if so, the courts will protect his expectation by judicial review as a matter of public law. . . . Legitimate, or reasonable, expectation may arise either from an express promise given on behalf of a public authority or from the existence of a regular practice which the claimant can reasonably expect to continue."[47]

[40] The applicant bases his legitimate expectation claim on two facts. First, he alleges that in a similar application for approval of plans for the erection of a building in the same area, the City invited interested parties to inspect the plans and make representations, before the plans were considered for approval. Secondly, the fact that the applicant was the owner of the adjoining property on which "the block of flats would cast a large shadow in winter."

[41] The fact that the City had afforded interested parties a hearing in one application does not constitute a regular practice which the applicant could reasonably

[46] [1984] 3 All ER 935 (HL).

[47] Id at 943-4.

expect to be extended to him. That was an isolated case which could hardly amount to a general practice necessary to found a reasonable expectation. Moreover, we do not have full facts relating to the case relied upon. We do not know if the City had the authority to make such invitation in the first place. For, if it lacked the power to do so, reliance thereon could not be legitimate because the invitation would have been incompetent and unlawful.[48]

[42] I fail to appreciate how the second fact could have given rise to a legitimate expectation. Being the owner of the neighbouring property cannot give rise to an expectation to be heard in circumstances such as the present, let alone a reasonable expectation. A legitimate expectation may arise from an express promise or a regular practice. It cannot arise from ownership of a neighbouring property. It follows that the applicant has failed to establish that he had a right or a legitimate expectation materially and adversely affected by the approval of the plans. Absent an affected right or a legitimate expectation, the applicant cannot challenge the approval on the basis that he ought to have been heard and was denied a pre-decision hearing.[49]

Conflicting decisions of the High Court

[43] Before I leave the audi principle, I must briefly comment on the conflicting decisions of the Johannesburg High Court. In *Erf 167 Orchards CC,*[50] Wunsh J,

[48] *South African Veterinary Council and Another v Szymanski* [2003] ZASCA 11; 2003 (4) SA 42 (SCA) at para 19.

[49] Section 3 of PAJA.

[50] Above n 13.

relying on the decision of the Supreme Court of New South Wales in *Porter*,[51] held that owners of adjoining properties have a right to be heard before building plans are approved by a local authority. However, he did not clarify whether his conclusion was based on a finding that the approval affected the rights or legitimate expectations of such owners. Following a quotation from *Porter*, Wunsh J said:

> "So that seems either that the right of inspection is conferred by the statute in accordance with the general rules relating to the audi alteram partem doctrine or that the applicant justifiably had a legitimate expectation that it would be given notice of any application and an opportunity to make representations. As it seems to me that the rule applies by reason of potential prejudice to the applicant's property, I decline to consider whether any curbs should be imposed on its rights. The second respondent's counsel argued that the audi rule did not apply in the instant case because the first respondent was not exercising powers but discharging duties. This distinction is not material. The principles of natural justice apply where an administrative organ makes a decision affecting the interests of parties in the circumscribed manner in fulfilling a statutory duty."[52]

[44] The concluding sentence in the above dictum adds to the confusion created. Since Wunsh J dealt with the issue under the common law, regard to the common law requirements is necessary for determining the correctness of the dictum. As stated above, under the common law, the audi principle originally applied where the decision affected the "liberty, property or existing rights" of the claimant, and it was later extended to decisions affecting legitimate expectations of claimants. Thus, even before the present constitutional order, courts in this country did not apply the audi principle to administrative decisions which affected interests falling short of rights or

[51] *Hornsby Shire Council v Porter* (1990) 70 LGRA 175.

[52] Above n 13 at 115.

legitimate expectations. Presently, section 3 of PAJA makes it clear that the right to a hearing is available to persons whose rights or legitimate expectations are affected by administrative action.

[45] The Building Standards Act does not confer on owners of adjoining property the right to inspect building plans lodged with a local authority for approval. Therefore, Wunsh J's finding in this regard was incorrect and so was the allied finding that "the applicant justifiably had a legitimate expectation that it would be given notice of any application and an opportunity to make representations."[53] The requirements for establishing the existence of a legitimate expectation were not met and the Judge omitted to consider this issue in his judgment. In *Odendaal*[54] Lewis AJ refused, correctly in my view, to follow the decision in *Erf 167 Orchards CC* on the basis that it was wrong, and held that the owner of a neighbouring property has no right to be heard in an application for the approval of building plans.

Failure to comply with mandatory procedural requirements

[46] Two major submissions were made by the applicant under this ground of review which was based on section 6(2)(b) of PAJA.[55] First, it was argued that the decision-maker did not have before him a recommendation as contemplated in sections 6(1) and 7(1) of the Building Standards Act, prior to approving the plans. It

[53] Id.

[54] Above n 14.

[55] Section 6(2)(b) reads:

> "A court or tribunal has the power to judicially review an administrative action if—
> (b) a mandatory and material procedure or condition prescribed by an empowering provision was not complied with".

was submitted that the word "recommendation" in the context of these sections means motivated advice which covers the merits and demerits of the application for approval. Second, it was submitted that section 7(1)(b)(ii) of the Building Standards Act enjoins the decision-maker to be satisfied, prior to approving the plans, that the erection of the building to which the plans apply will not disfigure the area; be unsightly or objectionable; be dangerous to life or property; or derogate from the value of adjoining properties. The existence of any one of these factors, it was contended, disqualifies the plans concerned from approval. As the consideration of these issues requires a proper interpretation of the relevant sections of the Building Standards Act, it is convenient to commence with an overview of those provisions, which is set out hereafter.

[47] The Building Standards Act, as the long title proclaims, promotes uniformity in the law relating to the construction of buildings within municipal areas, by prescribing general requirements and building standards which must be adhered to. Section 4 of the Building Standards Act requires approval by a local authority of building plans before any construction can commence. Section 5 obliges every local authority to appoint a Building Control Officer whose powers and functions are specified in the Building Standards Act. This Officer is given extensive powers and plays a critical role towards achieving the objectives of this Act. Once an application for the approval of plans is lodged with a local authority, the Building Standards Act authorises the Building Control Officer to enter the land to which the plans in question

apply, prior to the approval of the plans by the decision-maker.[56] He or she is entitled to inspect the site in preparation for consideration of the application for the approval of the plans by the relevant decision-maker. Any person who prevents the Building Control Officer from entering such land or in any other way hinders or obstructs him or her from performing his or her duties, commits a criminal offence punishable by a fine not exceeding R4 000 or imprisonment for a period not exceeding 12 months.[57]

[48] The Building Control Officer must make recommendations on all plans submitted to the local authority in terms of section 4. Such recommendations must, where necessary, incorporate reports relating to fire protection plans. Once the plans are approved and the building is under construction, the Building Control Officer is mandated to inspect it in order to determine whether the plans and conditions under which they were approved are followed. Where there is non-compliance he or she

[56] Section 15 of the Building Standards Act provides:

> "(1) Any building control officer or any other person authorized thereto by the local authority may enter any building or land at any reasonable time with a view to inspection in connection with the consideration of any application submitted in terms of section 4, or to determine whether the owner of the building or land complies with any provision of this Act or any condition imposed by the local authority in terms of this Act.
>
> (2) Any person who hinders or obstructs any building control officer or person authorized by the local authority in question in the exercise of his powers in terms of subsection (1), shall be guilty of an offence.
>
> (3) Any building control officer shall, at the request of any person affected by the execution of any of his powers, duties or activities in terms of this Act, produce his certificate of appointment issued to him in the form prescribed by national building regulation."

[57] Section 24 of the Building Standards Act provides:

> "Any person convicted of an offence under this Act in respect of which a fine or imprisonment is not expressly provided for, shall be liable to a fine not exceeding R4 000 or to imprisonment for a period not exceeding 12 months."

must report it to the local authority.[58] He or she is also empowered to exempt from the obligation to submit plans, persons who undertake minor building work.[59]

[49] Quite a number of the Building Control Officer's functions are contained in section 6, which is one of the two sections that the applicant contended were not complied with during the approval of the plans in the instant case. In part, section 6 provides:

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

[58] This is done in terms of section 6 of the Building Standards Act.

[59] Section 13 provides:

> "(1) Any building control officer may in respect of the erection of a building defined in the national building regulations as a minor building work, in writing—
>
> (a) exempt the owner of such building from the obligation to submit a plan in terms of this Act to the local authority in question for approval;
>
> (b) grant authorization for the erection of such building in accordance with the conditions and directions specified in such authorization.
>
> (2) Any authorization granted in terms of subsection (1)(b) shall lapse if after the expiry of a period of 6 months the erection of the building has not commenced, but the building control officer may from time to time extend such period at the written request of the owner of such building or any person having an interest therein if such building control officer is satisfied that there are sound reasons therefor.
>
> (3) If any building control officer refuses to extend in terms of subsection (2) any period of 6 months referred to in that subsection, any person who feels aggrieved may in writing request the local authority in question to consider such refusal and thereupon such local authority may confirm such refusal or extend such period on such conditions as it may think fit."

(2) When a fire protection plan is required in terms of this Act by the local authority, the building control officer concerned shall incorporate in his recommendations referred to in subsection (1)(a) a report of the person designated as the chief fire officer by such local authority, or of any other person to whom such duty has been assigned by such chief fire officer, and if such building control officer has also been designated as the chief fire officer concerned, he himself shall so report in such recommendations."

[50] The process of approving building plans is governed by section 7 of the Building Standards Act. It provides:

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

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

(b) (i) is not so satisfied; or

(ii) is satisfied that the building to which the application in question relates—

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

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

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

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

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

such local authority shall refuse to grant its approval in respect thereof and give written reasons for such refusal:

Provided that the local authority shall grant or refuse, as the case may be, its approval in respect of any application where the architectural area of the building to which the application relates is less than 500 m^2, within a period

of 30 days after receipt of the application and, where the architectural area of such building is 500 m^2 or larger, within a period of 60 days after receipt of the application.

(2) . . . .

(3) When a local authority has granted its approval in accordance with subsection (1)(a) in respect of any application, such approval shall be endorsed on at least one of the copies of the plans, specifications and other documents in question returned to the applicant.

(4) Any approval granted by a local authority in accordance with subsection (1)(a) in respect of any application shall lapse after the expiry of a period of 12 months as from the date on which it was granted unless the erection of the building in question is commenced or proceeded with within the said period or unless such local authority extended the said period at the request in writing of the applicant concerned.

(5) Any application in respect of which a local authority refused in accordance with subsection (1)(b) to grant its approval, may, notwithstanding the provisions of section 22, at no additional cost and subject to the provisions of subsection (1) be submitted anew to the local authority within a period not exceeding one year from the date of such refusal—

(a) (i) if the plans, specifications and other documents have been amended in respect of any aspect thereof which gave cause for the refusal; and

(ii) if the plans, specifications and other documents in their amended form do not substantially differ from the plans, specifications or other documents which were originally submitted; or

(b) where an application is submitted under section 18.

(6) The provisions of this section shall not be construed so as to prohibit a local authority, before granting or refusing its approval in accordance with subsection (1) in respect of an application, from granting at the written request of the applicant and on such conditions as the local authority may think fit, provisional authorization to an applicant to commence or proceed with the erection of a building to which such application relates.

(7) (a) An application which is substantially the same as an application referred to in this Act and which before the date of commencement of this Act has been lodged with a local authority for its consideration and in respect of which such local authority on that date has not yet

granted or refused its approval, shall be considered by such local authority as if this Act had not been passed.

(b) Approval granted by a local authority before the date of commencement of this Act in respect of an application substantially the same as an application referred to in this Act, shall be deemed to have been granted in terms of this section if the erection of the building in question has not been commenced with before the said date."

The context in which sections 6 and 7 must be construed

[51] Since section 7 authorises the exercise of public power, the starting point in determining the relevant context is that the Building Standards Act must be read consistently with PAJA. All statutes which authorise the making of administrative action must now be read with PAJA unless their provisions are inconsistent with it. PAJA was intended to interface with all statutes (whether enacted before or during the current constitutional order) which authorise administrative action. In *Zondi*,[60] Ngcobo J, writing for the Court said:

> "PAJA was enacted pursuant to the provisions of section 33, which requires the enactment of national legislation to give effect to the right to administrative action. PAJA therefore governs the exercise of administrative action in general. All decision-makers who are entrusted with the authority to make administrative decisions by any statute are therefore required to do so in a manner that is consistent with PAJA. The effect of this is that statutes that authorise administrative action must now be read together with PAJA unless, upon a proper construction, the provisions of the statutes in question are inconsistent with PAJA."[61] (Footnotes omitted.)

[60] *Zondi* above n 20. See also *Islamic Unity Convention v Minister of Telecommunications and Others* [2007] ZACC 26; 2008 (4) BCLR 384 (CC) at para 59 and *MEC: Department of Agriculture, Conservation and Environment and Another v HTF Developers* (*Pty*) *Ltd* [2007] ZACC 25; 2008 (4) BCLR 417 (CC) at para 75.

[61] *Zondi* id at para 101.

[52] As noted earlier, the Building Standards Act prohibits landowners from erecting buildings on their land without prior approval by the local authority, which may also impose conditions for the exercise of the landowner's rights over his or her own property. While the approval of the plans itself cannot affect the rights of other parties, the subsequent execution thereof may result in the erection of a building which might affect the rights of the owners of neighbouring properties. This necessitates that the relevant provisions of the Building Standards Act be construed in a manner that promotes the implicated rights, consistently with the obligation imposed on courts by section 39(2) of the Constitution.[62] This Court has held in a long line of cases that section 39(2) applies to the interpretation of all statutes.[63] In *Fraser*,[64] Van der Westhuizen J described this requirement as a "mandatory constitutional canon of statutory interpretation".[65] Elaborating on the point Van der Westhuizen J said:

> "The question raised by this application is whether the Supreme Court of Appeal's interpretation of s 26 has failed to promote the spirit, purport and objects of the Bill of Rights in terms of s 39(2). This differs from an attack on an allegedly wrong factual finding or incorrect interpretation or application of the law, as in the cases referred to earlier. Section 39(2) requires more from a court than to avoid an interpretation which conflicts with the Bill of Rights. It demands the promotion of the spirit, purport and objects of the Bill of Rights. These are to be found in the matrix and

[62] Section 39(2) states:

> "When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights."

[63] *Phumelela Gaming and Leisure Ltd v Grundlingh and Others* [2006] ZACC 6; 2007 (6) SA 350 (CC); 2006 (8) BCLR 883 (CC) (*Phumelela*) at paras 26-27; *First National Bank of South Africa t/a Wesbank v Commissioner, South African Revenue Service and Another* [2002] ZACC 5; 2002 (4) SA 768 (CC); 2002 (7) BCLR 702 (CC) at para 31; *Investigating Director: Serious Economic Offences and Others v Hyundai Motor Distributors and Others: In re: Hyundai Motor Distributors* (*Pty*) *Ltd and Others v Smit NO and Others* [2000] ZACC 12; 2001 (1) SA 545 (CC); 2000 (10) BCLR 1079 (CC) at para 21.

[64] Above n 23.

[65] Id at para 43.

> totality of rights and values embodied in the Bill of Rights. It could also in appropriate cases be found in the protection of specific rights, like the right to a fair trial in s 35(3), which is fundamental to any system of criminal justice, and of which the rights to legal representation and against unreasonable delays are components. The spirit, purport and objects of the protection of the right to a fair trial therefore have to be considered."[66]

[53] Sections 6 and 7 of the Building Standards Act must also be construed in the context of the other provisions of the Building Standards Act. The two sections must be read together. This approach ties in neatly with the "mandatory constitutional canon of statutory interpretation" referred to above.[67] I begin with construing section 7.

[54] The language employed in section 7 reveals four key issues relating to the process of exercising the power to approve building plans. First, the decision-maker must consider the Building Control Officer's recommendation made in terms of section 6. Secondly, if he or she is satisfied that the application for approval complies with the requirements of the Building Standards Act and other applicable law, he or she must grant the approval unless he or she is also satisfied that the erection of the building to which the plans apply will trigger one of the disqualifying factors in section 7(1)(b)(ii). Thirdly, if the decision-maker is satisfied that the disqualifying factors will be triggered, he or she "shall refuse to grant [his or her] approval in respect thereof and give written reasons for such refusal". Lastly, if the decision-

[66] Id at para 47.

[67] Id at para 43.

maker is not satisfied that the application complies with the necessary requirements, he or she shall refuse to grant approval and give reasons for the refusal.

[55] Accordingly the decision-maker must be satisfied of two things before granting approval. The first is that he or she must be satisfied that there is compliance with the necessary legal requirements. Secondly, he or she must also be satisfied that none of the disqualifying factors in sections 7(1)(b)(ii) will be triggered by the erection of the building concerned. This is so because any approval of plans facilitating the erection of a building which devalues neighbouring properties, for example, is liable to be set aside on review.[68] An approval can be set aside on this ground irrespective of whether or not the decision-maker was satisfied that none of the disqualifying factors would be triggered. All that is needed for an applicant to succeed is to prove to the satisfaction of the reviewing court that the erection of the building will reduce the value of his or her property. The legislature could not have intended to authorise an invalid exercise of power. In order to avoid this consequence, the decision-maker must at least be satisfied that none of the invalidating factors exist before he or she grants approval. This interpretation is consistent with the obligation to promote the spirit, purport and objects of the Bill of Rights. It demonstrates that it is not only the landowner's right of ownership which must be taken into account, but also the rights of owners of neighbouring properties which may be adversely affected by the erection of a building authorised by the approval of the plans in circumstances where they were not afforded a hearing. The section, if construed in this way, strikes the right balance between the

[68] *Paola*, above n 34 at para 23.

landowner's entitlement to exercise his or her right of ownership over property and the right of owners of neighbouring properties. The interpretation promotes the property rights of the landowners and those of its neighbours.[69]

[56] Indeed the construction that section 7(1)(b)(ii) requires that the decision-maker must be satisfied that none of the disqualifying factors will be triggered before approving plans, was adopted by the High Court in the instant matter and was supported by the parties before us. In its judgment, the High Court said:

> "While the local authority is entrusted with the power to approve plans, it must, in a manner of speaking, act on behalf of the neighbours by ensuring that the disqualifying factors mentioned in s 7(1)(b) are not present before approving plans which otherwise comply with all applicable laws."[70]

On this interpretation, section 7 creates an adequate self-contained protection which safeguards the rights of owners of neighbouring properties. As a result it becomes unnecessary for such owners to be heard before the approval is granted. The presence of a disqualifying factor precludes the granting of the approval and where the approval is granted despite a disqualifying factor, the process becomes invalid and can be set aside on that ground. Therefore the entitlement to a pre-decision hearing will not arise in such a case, as nobody is entitled to claim a hearing prior to an invalid exercise of public power. Construing the provision in a manner that allows the decision-maker to

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[69] In *Phumelela* (above n 51) at para 37, Langa CJ observed that the section 39(2) exercise must involve consideration of all rights relevant to it and where there is competition between some of them, a balancing exercise should be undertaken. In this regard he said:

> "It is not permissible for a litigant to simply carve out those provisions that are favourable to it in the application of s 39(2). The interests of other holders of rights must also be taken into account in the balancing exercise."

[70] Above n 8 at para 26.

infer from the recommendation that the disqualifying factors will not be triggered undermines the protection afforded to owners of neighbouring properties by the section. The section requires that the decision-maker himself or herself must be satisfied that the protection requirements are met. The word "recommend" used by the Building Control Officer in this matter cannot be a sufficient basis for the required state of mind on the part of the decision-maker. The relevant section requires the decision-maker to bring his or her mind to bear on the non-existence of the disqualifying factors.

[57] Although the High Court held that the decision-maker was required to make certain that none of the disqualifying factors was present before approving the plans, it did not determine whether the decision-maker did that in the present instance. Instead, it approached the matter on the basis that there was no proof that the decision-maker did not take into account the relevant provisions. In this regard, the High Court said:

> "Finally, it was submitted that the decision of the first respondent was otherwise unconstitutional or unlawful since it was alleged that the only documents before the decision maker were the documents comprising the application in terms of s 4(2) of the Act and a document titled *"Land Information Systems Ratepayers Data"*. Based on this, it was submitted that the decision maker could not have taken into account the provisions of s 7(1)(b) of the Act and more specifically, the factors in 7(1)(b)(ii). I have already referred to the process which was undertaken in examining the application before it received approval and recommendation from the building control officer and having regard to the affidavit filed by the latter, there is no reason to

> conclude that the decision maker did not take into account the provisions of s 7(1)(b) of the Act."[71]

[58] It appears to me that the High Court misunderstood the issue when it dealt with the question as to whether the impugned decision was unlawful. In outlining the grounds of review, the High Court stated that one such ground was that the City had failed to comply with a mandatory and material procedure prescribed by sections 6 and 7 of the empowering Act. Having found that, on a proper construction, section 7(1)(b) required the decision-maker to ensure that none of the disqualifying factors was present before approval, the High Court should have determined on the papers before it, whether it could be found that the decision-maker had so ensured.

[59] In this case, the City asserts that the decision-maker was satisfied before approving the plans that none of the disqualifying factors would be triggered. The difficulty with this contention is that it is not borne out by the objective facts provided by the City itself. As mentioned earlier, when asked to furnish the list of documents placed before the decision-maker, the City mentioned the application for the approval of plans, the form endorsed by various departments and a document titled "Land Information System – Ratepayers Data". It was asked to confirm if these were the only documents placed before the decision-maker and the City confirmed this to have been the position.

[71] Id at para 31.

[60] There can be no doubt that these documents could not reasonably have satisfied the decision-maker that none of the disqualifying factors would be triggered. None of these documents refers to those factors. If indeed the decision-maker was so satisfied on the basis of these three documents, his satisfaction was not based on reasonable grounds. The documents fall far short as a basis for forming a rational opinion. Nor does the mere statement by the City to the effect that the decision-maker was satisfied suffice. In the past, when reasonableness was not taken as a self-standing ground for review, the City's ipse dixit could have been adequate.[72] But that is no longer the position in our law. More is now required if the decision-maker's opinion is challenged on the basis that the subjective precondition did not exist. The decision-maker must now show that the subjective opinion it relied on for exercising power was based on reasonable grounds.[73] In this case, it cannot be said that the information, which the City admitted had been placed before the decision-maker, constituted reasonable grounds for the latter to be satisfied.

[61] The determination of whether the decision-maker was satisfied that the disqualifying factors will not be triggered by the erection of the block of flats concerned entails a factual enquiry. The fact that the Building Control Officer had considered those factors is irrelevant to this enquiry unless it is established that this fact was communicated to the decision-maker. There is no evidence in the record showing that such communication took place. Consequently, it is not correct in my

[72] *Sachs v Minister of Justice; Diamond v Minister of Justice* 1934 AD 11 at 37; *South African Defence and Aid Fund and Another v Minister of Justice* 1967 (1) SA 31 (C) at 35.

[73] *Camps Bay Ratepayers and Residents Association and Others v Minister of Planning, Culture and Administration, Western Cape, and Others* 2001 (4) SA 294 (C) at 320-1.

view, for the City to assert that, since the relevant factors had been considered by the Building Control Officer, it must be accepted that the decision-maker had also considered them.

[62] The word "recommendation" on its own, does not objectively indicate what was considered by the Building Control Officer before he reached the decision to recommend approval of the plans. Accordingly, the decision-maker was not entitled to assume, from the use of this word alone, that the Building Control Officer had considered the issue of the disqualifying factors, and that he reached the opinion that they did not exist.

[63] The fact that the Building Control Officer (who deposed to the City's main affidavit which was confirmed by the decision-maker) had extra information in his possession which could, when taken together with the documents in question, have formed an adequate basis for the opinion, does not cure the defect. Such additional information as the Building Control Officer had was not placed before the decision-maker. Therefore, the reasonableness of the decision-maker's satisfaction can be determined with reference only to the information he had before him at the time he considered the building plans in question. An evaluation of such information reveals that it was inadequate. It follows that the decision-maker had failed to properly determine that none of the disqualifying factors would be triggered by the erection of the block of flats. I proceed to consider whether the decision-maker had the necessary recommendation before granting the approval.

The meaning of "recommendation" in the context of sections 6 and 7 of the Building Standards Act

[64] Relying on *Ex parte Porritt*,[74] counsel for the applicant argued, both in the High Court and this Court, that "recommendation" as contemplated in section 7, entails the weighing of the merits and demerits of the subject matter with a view to giving advice on the course to be taken by the decision-maker. He submitted that the grounds supporting the advice given must appear in the body of the recommendation for the benefit of the decision-maker, so that he or she can be in the position to independently assess the cogency of the advice. In this case, the endorsement and signature of the Building Control Officer, it was argued, did not constitute a recommendation contemplated in the section. Without such recommendation, continued the argument, the necessary jurisdictional fact was lacking and consequently the approval of the plans was invalid.

[65] Counsel for the City argued that, since "recommendation" is not defined in the Building Standards Act, it must be given its ordinary meaning within the context and purpose of the relevant provisions. I agree with this proposition. Counsel then referred us to the dictionary meaning of "recommendation". He submitted that "recommendation" means "a suggestion or proposal as to the best course of action, especially one put forward by an authoritative body". Invoking this definition,

[74] *Ex parte Porritt* 1991 (3) SA 866 (N) at 870H-871A.

counsel for the City submitted that all that is required by the relevant provisions is a proposal or suggestion that the building plans be approved.

[66] The interpretation proposed by the City attaches prominence to the literal meaning of the term with no regard to the context and purpose of sections 6 and 7. For the proper making of recommendations and performance of other functions listed in the Building Standards Act, section 5 requires that the Building Control Officer be suitably qualified. Section 6(2) requires the recommendation to incorporate the report of the Chief Fire Officer where a fire protection plan is needed. The section does not require that such report be annexed to the recommendation, but that it be incorporated as an integral part of the recommendation. In addition, section 7 does not only make the recommendation a jurisdictional fact, but it also obliges the decision-maker – in express terms – to consider the recommendation before he or she takes the decision to approve or refuse to grant an approval of particular plans. The structure of section 7 is such that the ultimate decision by the decision-maker depends on the opinion he or she reaches following a consideration of the recommendation. If he or she is satisfied that the application for approval complies with the necessary requirements and that none of the disqualifying factors will be triggered, the decision-maker has no choice but to approve the plans. If, on the other hand, he or she is satisfied that one or more disqualifying factors will be triggered, he or she must refuse to grant approval. He or she must also refuse the application if not satisfied that there was compliance with the necessary requirements.

[67] The discretion conferred on the decision-maker is highly circumscribed because the decision taken is reliant upon the antecedent opinion reached. The opinion of being "satisfied" or "not satisfied" is reached upon a consideration of the recommendation. This emerges from the opening words employed in section 7(1) which in part reads:

> "If a local authority, having considered a recommendation referred to in section 6(1)(a) . . . is satisfied that the building to which the application in question relates— is to be erected in such a manner or will be of such nature or appearance that . . . it will probably or in fact derogate from the value of adjoining neighbouring properties . . . such local authority shall refuse to grant its approval . . . and give reasons for such refusal."

For section 7(1)(b)(ii) to make sense, it must be read in this way. The part of the section dealing with the disqualifying factors is inextricably linked to the opening part, which requires the decision-maker to be satisfied, following a consideration of the recommendation.

[68] What emerges from this interpretation is that the purpose of the recommendation is to furnish the decision-maker with a basis for his or her opinion, one way or the other. This much was conceded by counsel for the City. In its written argument they submitted:

> "The decision-maker would be aware of the provisions of section 7(1), and would know that the Building Control Officer (a specialist official) would be aware of them. The recommendation of the Building Control Officer can only mean that the application complied with the requirements of the Act and any other applicable law,

> that it had not been found that any of the disqualifying factors was present, and that the decision-maker was accordingly advised to approve the application."

[69] The decision-maker must, however, assess and be satisfied of these issues himself or herself. He or she is not expected to accept without more the proposal of the Building Control Officer. Nor is he or she expected to infer from the word "recommend" that none of the disqualifying factors will be triggered. Section 7(1) requires the decision-maker to be "satisfied" before making a decision on whether to grant or refuse the application. In a different but not unrelated context, in *New Clicks*,[75] Ngcobo J stated:

> "The Minister is required to make regulations based on the recommendation of the Pricing Committee. The Minister does not merely rubber stamp the recommendation of the Pricing Committee. She is required to apply her mind to the recommendation and make a decision whether to accept such recommendation. She cannot therefore accept the fees proposed by the Pricing Committee simply because they have been proposed by the Pricing Committee. She must satisfy herself that the fees proposed by the Pricing Committee are appropriate within the meaning of s 22G(2). She can only do this if she is furnished with an explanation as to how the fees were arrived at. Without such information, the Minister cannot properly evaluate the appropriateness or otherwise of the fees proposed by the Pricing Committee."[76]

[70] If the purpose of the recommendation is merely to inform the decision-maker of the Building Control Officer's attitude or view on the approval, as argued by the City's counsel, it is difficult to imagine why the recommendation is made a jurisdictional fact, when the decision-maker can investigate on his or her own, matters

[75] Above n 32.

[76] Id at para 542.

relating to compliance with requirements and the disqualifying factors. It is equally difficult to find the reason why the legislature would oblige the decision-maker to consider the recommendation before forming an opinion as to whether he or she was satisfied about a particular state of affairs, if the recommendation was not intended to be the primary source of information leading to being satisfied. The facts of the present case demonstrate that the Building Control Officer had information concerning the very issues which the decision-maker was required to consider, but this information was not placed before the decision-maker. As a specialist the Building Control Officer is best suited to advise the decision-maker about disqualifying factors. This is so because the determination of these factors involves a prediction of what may happen in the future as a result of the erection of the building to which the plans apply.

[71] The recommendation therefore is the proper means by which information on disqualifying factors can be placed before the decision-maker. I am satisfied that the endorsement and signature of the Building Control Officer in this case did not constitute a recommendation as envisaged in sections 6 and 7 of the Building Standards Act. Although the Building Standards Act does not strictly require this, it will be helpful and enhancing to the process if the Building Control Officer, at the stage of compiling the recommendation invites, from owners of neighbouring properties, representations about the impact the proposed building might have on their properties. Such approach would help in dealing with issues relating to disqualifying factors. This would significantly reduce chances of approval of plans in cases where

some of the disqualifying factors exist but were not discovered by a local authority. As we now know, the existence of such factors, if proved, constitutes a valid ground for setting aside the approval after it had been acted upon and at high cost to all parties concerned.

[72] The above finding does not subtract anything from the rigorous and impressive process followed by the amicus and the City up to the stage when the application for the approval is placed before the Building Control Officer. Most of the steps taken during that process are not even required by the Building Standards Act but they constitute a salutary procedure which must be encouraged. No matter how impressive the process might be, it is no substitute for the mandatory requirements of the Building Standards Act. The Building Control Officers must ensure that adequate information is placed before decision-makers so that they can consider applications for approval of building plans properly and in a balanced way. The recommendations they make must serve this purpose. The approval of plans in the absence of such recommendation in this matter means that the necessary jurisdictional fact was lacking. It follows that the approval is invalid and must be set aside. This being the view I take on the matter, it becomes unnecessary to consider the other issues raised by the applicant.

Relief

[73] Counsel for the City argued that the applicant is not entitled to any relief, because he had failed to exhaust internal remedies provided for in section 62 of the

Municipal Systems Act. I have already found that this section does not apply to the applicant's case. In the event of this Court setting aside the approval, counsel for the City submitted that a just and equitable remedy is to remit the matter to the City. I agree.

Costs

[74] The applicant has been successful and therefore he is entitled to his costs. The City is responsible for the defect in the impugned decision. Although the respondents defended the decision, both in the High Court and this Court, it would be unfair to order them to pay costs arising from their defence of the decision. Fairness will best be served if the City is ordered to pay the applicant's costs. The amicus and the respondents must pay their own costs.

Order

[75] The following order is made:

1. The application for leave to appeal is granted.
2. The appeal is upheld with costs, including costs of two counsel.
3. The City of Cape Town is ordered to pay the applicant's costs in this Court, and in the Supreme Court of Appeal, and the costs occasioned by the application for leave to appeal in the High Court.
4. The order of the High Court is set aside and replaced with the following order:

(a) The decision of the City of Cape Town, in terms of which it approved the respondents' building plans, is hereby set aside.

(b) The matter is remitted to the City of Cape Town for consideration afresh.

(c) The City of Cape Town is ordered to pay the costs of the application, including costs consequent upon the employment of two counsel.

Madala J, Mokgoro J, Ngcobo J, Nkabinde J and Skweyiya J concur in the judgment of Jafta AJ.

O'REGAN ADCJ

[76] I have had the opportunity of reading the judgment prepared in this matter by my colleague, Jafta AJ. I disagree with him that the appeal should be allowed. Although my disagreement with him is only on some of the issues in the case, the issues in this matter are so tightly intertwined that it has been necessary to set out my approach to the application for leave to appeal fully.

[77] The facts are set out in the judgment of Jafta AJ. For ease of reading, I shall repeat only the key facts here. Mr Walele, the applicant, owns a property adjacent to a

property owned by the second to fifth respondents (the joint owners). Both properties are situated in an inner city residential suburb of Cape Town, known as Walmer Estate. The joint owners had applied to the City of Cape Town for approval in terms of the National Building Regulations and Building Standards Act 103 of 1977 (the Building Standards Act) for the building of a four-storey block of flats on their property, and the City approved those plans. Mr Walele objects because he considers that the proposed building will impair the value of his property and mar the general character of the surrounding neighbourhood. He thus seeks an order setting aside the City's decision to approve the building plans submitted to it by the joint owners.

[78] It is common cause that the proposed building falls within the terms of the zoning scheme applicable to the area. The applicable zoning scheme is titled "general residential: subzone R3" and permits the erection of apartment blocks up to a maximum of seven storeys. The applicant's objection, therefore, is not based on the fact that the proposed building breaches zoning regulations. It is based on nine other grounds of review under the Promotion of Administrative Justice Act 3 of 2000 (PAJA). These grounds are:

(a) that the power to approve building plans had not been duly conferred on the decision-maker, Mr Griffiths, by the City;[1]

(b) that the decision-maker had not complied with a mandatory condition[2] of the Building Standards Act in four respects:

[1] Section 6(2)(a)(i) of PAJA provides that administrative action is susceptible to judicial review where the administrator who took it "was not authorised to do so by the empowering provision".

[2] Section 6(2)(b) of PAJA provides that administrative action is susceptible to judicial review where "a mandatory and material procedure or condition prescribed by an empowering provision was not complied with".

(i) that he had not exercised an independent discretion to approve the plans;

(ii) that he did not have a recommendation of a Building Control Officer before him as section 7 of the Act requires;

(iii) that the report of the Chief Fire Officer as contemplated in section 6(2) of the Act had not been incorporated in the recommendation; and

(iv) that he failed to have regard to the factors listed in section 7(1)(b)(ii) of the Act;

(c) that the approval by the decision-maker was a result of the unauthorised dictates of another person,[3] being the Building Control Officer;

(d) that the approval was arbitrary or capricious[4] in that the decision-maker adopted the view that the owners of neighbouring property did not have a right to be heard prior to the approval being granted;

(e) that the grant of the approval was procedurally unfair and therefore in breach of section 3 and section 6(2)(c) of PAJA,[5] because owners of neighbouring properties were not given an opportunity to be heard prior to the approval being granted;

[3] Section 6(2)(e)(iv) of PAJA provides that administrative action is susceptible to judicial review where it was taken "because of the unauthorised or unwarranted dictates of another person or body".

[4] Section 6(2)(e)(vi) of PAJA provides that administrative action is susceptible to judicial review if it was arbitrary or capricious.

[5] Section 6(2)(c) of PAJA provides that administrative action is susceptible to judicial review if "the action was procedurally unfair".

(f) that the grant of the approval was unreasonable[6] in that the decision-maker failed, inter alia, to have regard to the provisions of section 7(1)(b)(ii) of the Act or to the impact of the approval on Mr Walele's property;

(g) that the grant of approval fell to be set aside because the decision-maker took into account irrelevant considerations and ignored relevant ones – these being the requirements of section 6(1) and (2) and section 7(1) of the Act;[7]

(h) that the approval was not rationally connected to the purpose for which it was taken, the purpose of the empowering provision, the reasons given for the decision or the information placed before the City;[8] and

(i) that the approval was unconstitutional and unlawful.[9]

[79] These grounds overlap significantly. In particular, grounds (b)(i) and (c) – that the decision-maker did not make an independent decision and that he acted under the unauthorised dictates of another – are not materially distinguishable and I shall deal

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[6] Section 6(2)(h) of PAJA provides that administrative action is susceptible to judicial review if—

> "the exercise of the power or the performance of the function authorised by the empowering provision, in pursuance of which the administrative action was purportedly taken, is so unreasonable that no reasonable person could have so exercised the power or performed the function".

See *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others* [2004] ZACC 15; 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC) at paras 44-5.

[7] Section 6(2)(e)(iii) of PAJA provides that administrative action is susceptible to judicial review if irrelevant considerations are taken into account in reaching a decision or relevant ones ignored.

[8] Section 6(2)(f)(ii) of PAJA provides that administrative action is susceptible to judicial review if the action is not rationally connected to the purpose for which it was taken, the purpose of the empowering provision, the information before the administrator or the reasons given for it by the administrator.

[9] Section 6(2)(i) of PAJA provides that administrative action is susceptible to judicial review if the administrative action is "otherwise unconstitutional or unlawful."

with them together. Similarly, grounds (d) and (e) – both of which challenge the decision for want of procedural fairness – will be dealt with together; as will grounds (b)(iv), (f) and (g), all of which raise the question of the failure by the decision-maker to consider the factors set out in section 7(1)(b)(ii) of the Building Standards Act.

[80] The judgment therefore identifies the following separate arguments for consideration:

(a) whether Mr Griffiths was properly delegated to approve the plans;

(b) whether the Building Control Officer made a recommendation as contemplated by section 6(1)(a) of the Building Standards Act;

(c) whether the report of the Chief Fire Officer was properly included in any recommendation made to Mr Griffiths by the Building Control Officer;

(d) whether Mr Griffiths failed to exercise an independent discretion or acted under unlawful dictation;

(e) whether Mr Griffiths' decision should be set aside because he failed to have regard to the factors mentioned in section 7(1)(b)(ii) of the Building Standards Act;

(f) whether the decision falls to be set aside because neighbours were not given an opportunity to be heard; and

(g) whether the decision falls to be set aside because it was not rationally connected to the information before the City or was otherwise unlawful or unconstitutional.

[81] Before dealing with each of these arguments, I address two matters that will have a bearing on the rest of the judgment: the process for the approval of building plans in terms of the Building Standards Act and a brief factual description of the manner in which the approval was granted by the City in this case.

The process for the approval of building plans: sections 4, 5, 6 and 7 of the Building Standards Act

[82] It is important in any application for judicial review of administrative action to start with an analysis of the empowering provisions. Many, if not all, of the grounds for judicial review are context-specific, so whether administrative action in any particular case falls to be reviewed will depend upon the context within which the administrative action took place.

[83] Section 4(1) of the Building Standards Act provides that no person may erect any building in a municipal area[10] without the prior approval of plans by the relevant local authority.[11] Subsections 4(2) and (3) provide that applications for approval must

[10] Section 2 of the Act provides for exemptions from the provisions of the Act; those provisions are not of application in this case.

[11] Section 4(1) provides:

> "No person shall without the prior approval in writing of the local authority in question, erect any building in respect of which plans and specifications are to be drawn and submitted in terms of this Act."

The text of the provision is in slightly imprecise terms but it has consistently been interpreted by the courts to impose an obligation to obtain approval in writing of buildings from the relevant local authority before they are erected. See, for example, *Sandton Town Council v Gourmet Property Investments CC* 1994 (4) SA 569 (A) at 571D-E; *Muller NO and Others v City of Cape Town* 2006 (5) SA 415 (C) at para 23. It was not suggested in argument before us that this interpretation of the provision is incorrect.

be made in writing and stipulate the information required in the application.[12] Section 4(3)(b) of the Act is supplemented by the National Building Regulations promulgated in terms of section 17 of the Act[13] which set out carefully the precise information required.[14] So, an application must contain, for example, a site plan, layout drawings, water and drainage installation drawings and particulars of existing buildings.[15]

[84] Section 5 of the Building Standards Act provides for the appointment of a Building Control Officer by every local authority and stipulates that a Building Control Officer may not be appointed without the permission of the Minister if he or she does not have the prescribed qualifications. The appointment of the Building Control Officer may not be delegated by the local authority.[16] The fact that the power is not delegable emphasises the importance vested in the employment of a suitable and qualified Building Control Officer. The qualifications of Building Control Officers are set out in the National Building Regulations. The current Regulations provide for the qualifications of a Building Control Officer as follows:

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[12] Section 4(3) provides:

> "Any application referred to in subsection (2) shall—
>
> (a) contain the name and address of the applicant and, if the applicant is not the owner of the land on which the building in question is to be erected, of the owner of such land;
>
> (b) be accompanied by such plans, specifications, documents and information as may be required by or under this Act, and by such particulars as may be required by the local authority in question for the carrying out of the objects and purposes of this Act."

[13] Section 4(3)(b) read with section 17(1) of the Building Standards Act.

[14] See Part A2 of Regulations under the Building Standards Act, GN R2378 RG4565, 12 October 1990 (the National Building Regulations).

[15] Id.

[16] See section 28(4) of the Act.

> "The minimum qualification of any building control officer appointed in terms of section 5 of the Act shall be of a standard equivalent to a senior certificate plus three years tertiary education, as evaluated by the Human Sciences Research Council, in one of the following building disciplines:
>
> (a) Civil engineering;
> (b) structural engineering;
> (c) architecture;
> (d) building management;
> (e) building science;
> (f) building surveying; or
> (g) quantity surveying."[17]

The Act and the Regulations provide that the Building Control Officer in each local authority must be a specialised and skilled official. The reason for this becomes plain when the powers and functions of Building Control Officers are considered.

[85] Section 6(1)(a) provides that a Building Control Officer shall make recommendations to the local authority regarding any plans submitted to the local authority in terms of section 4(3) of the Act. (I shall return to the question of what the recommendation should entail below.) The Building Control Officer is responsible for ensuring that there is compliance with instructions given by the local authority in terms of the Act.[18] She or he is also required to inspect buildings when they are being erected[19] and to report to the local authority regarding any non-compliance with conditions it has imposed.[20]

[17] Part A16 of the National Building Regulations above n 14.

[18] Section 6(1)(b) of the Act.

[19] Section 6(1)(c) of the Act.

[20] Section 6(1)(d) of the Act.

[86] In understanding these powers, it is important to recognise that many applications for the approval of building plans are received by large municipalities every day. Indeed, the City of Johannesburg, which was admitted as an amicus curiae, told the Court that it receives 2000 applications per month. The number of applications will obviously vary depending on the size of the municipality and its rate of economic growth at any given time, but it is clear that the number of applications can be very high. The Building Control Officer is a key official in a municipality. A municipality may not function without one, and it may not approve building plans without having received the recommendation of a Building Control Officer.[21]

[87] The Building Control Officer must furnish a recommendation to the local authority. Thereafter, section 7(1)(a) of the Building Standards Act provides that, if the local authority is satisfied that the application complies with the requirements of the Act and any other applicable law, it shall grant the application. Section 7(1)(b) then provides for the circumstances in which approval should be refused. For ease of reference, I set out the full text of section 7(1):

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

[21] See *Paola v Jeeva NO and Others* 2004 (1) SA 396 (A) at paras 12-6.

> (aa) is to be erected in such manner or will be of such nature or appearance that—
>
> (aaa) the area in which it is to be erected will probably or in fact be disfigured thereby;
>
> (bbb) it will probably or in fact be unsightly or objectionable;
>
> (ccc) it will probably or in fact derogate from the value of adjoining or neighbouring properties;
>
> (bb) will probably or in fact be dangerous to life or property,
>
> such local authority shall refuse to grant its approval in respect thereof and give written reasons for such refusal:
>
> Provided that the local authority shall grant or refuse, as the case may be, its approval in respect of any application where the architectural area of the building to which the application relates is less than 500 m^2, within a period of 30 days after receipt of the application and, where the architectural area of such building is 500 m^2 or larger, within a period of 60 days after receipt of the application."

[88] The provision thus contemplates that the municipality must refuse an application if it considers that the proposed building will probably or in fact (a) disfigure the area; (b) be unsightly or objectionable; (c) derogate from the value of adjoining or neighbouring properties; or (d) be dangerous to life or property. It should be emphasised that the Building Standards Act requires not merely a risk or possibility of the harmful consequences occurring. The bar is higher: the proposed building must probably or in fact result in one of the identified harmful consequences.

[89] The question that now needs to be considered is the recommendation required of a Building Control Officer in terms of section 6(1). Put differently, what are the considerations a Building Control Officer should take into account when preparing a

recommendation for the municipality, and in what form should his or her recommendation be conveyed? This question needs to be answered by an understanding of the proper role of the Building Control Officer discussed above. As discussed in paragraphs 84 and 85, the prescribed qualifications for Building Control Officers and their powers and functions show that the Building Control Officer is an essential official in all municipalities tasked with overseeing building and development in the area of jurisdiction of the municipality. This is underscored by the very title of the post.

[90] In making recommendations to a municipality on an application for the approval of building plans, a Building Control Officer must consider two primary issues. He or she must have regard to all the requirements in the Building Standards Act and other applicable legislation which might have a bearing on whether or not the plans should be approved. Section 7(1)(a) makes plain that if the plans do not comply with the Act or other applicable legislation, the municipality may not approve them.[22] Similarly, the Building Control Officer must pay regard to the requirements set out in section 7(1)(b) of the Act and consider whether the proposed building will probably or in fact: disfigure the area; be unsightly or objectionable; derogate from the value of adjoining or neighbouring properties; or be dangerous to life or property. All of these matters must be considered by the Building Control Officer. The Building Control Officer may not recommend the approval of the plans if he or she is not satisfied that the proposed building does comply with the Act and all applicable legislation, or if he

[22] See *Muller NO and Others v City of Cape Town* above n 11.

or she thinks that the proposed building will have or probably have any of the harmful effects mentioned in section 7(1)(b).

[91] The final question that arises is the nature of the task imposed upon the decision-maker by section 7(1) of the Building Standards Act. In this regard, it is important to understand the nature of the decisions in question. The Act requires that the erection of all buildings[23] be approved by a municipality before they are built. As stated above, in many municipalities this will involve a large number of applications on a monthly basis. It would therefore be impractical to expect a municipality to consider each and every application for building approval. It is not surprising, then, that the Act permits a municipality to delegate its power to approve plans to a committee or to one of its employed officials.[24] It is also clear that it is the Building Control Officer who has the expertise to determine whether the proposed building will be unlawful, or whether it will, probably or in fact, result in the harmful consequences adverted to in section 7(1)(b). The ultimate decision-maker may not have the expertise to assess these matters at all, and it will not be inappropriate or unlawful for the ultimate decision-maker to rely on the recommendation of the Building Control Officer in this regard. This is a matter to which I return later.

The process of approval in this case

[23] Other than those exempted. Section 13 of the Act provides for the Building Control Officer to exempt owners who intend to undertake minor building works from the requirement of submitting a plan. What constitutes a minor building work is defined in Part AZ2 of the National Building Regulations, above n 14.

[24] See section 28(4) of the Act.

[92] The record before us shows that, despite the large number of building plans that have to be considered, the process of determining whether the Building Control Officer should approve a particular set of plans in the City of Cape Town is complex and careful and involves a range of differently skilled officials.

[93] In this case, the Building Control Officer of the City of Cape Town, Mr Moir, explains in his affidavit that the plans were first considered by a Zoning Plans Examiner to determine whether the plans complied with the relevant zoning scheme. This required the Examiner to consider which zoning scheme was relevant, and then to consider whether the site abutted a main road or a divisional road, then to consider amongst other things the building lines, height of the buildings, land coverage, proposed use, and the open space to the side and rear of the proposed building. The Examiner then had to state whether the plans should be approved on the basis that they complied with the zoning scheme.

[94] The plans were then considered, amongst others, by the Director of Survey and Land Information, the Health Directorate, the Chief of Fire and Emergency Services, the Sewage Department, the Water Management Department, the Transport and Roads Department and the City Engineer's Department. Each of these departments considered the plans and then each affixed their stamp to or made a note on a document titled "Building Development Management". At the end of this process, this single document bore the stamps or notes of each of the departments stating that they had no objection to the plans being approved.

[95] In addition to the individual departmental scrutiny of the plans, Mr Moir states that a meeting of the Building Plans Liaison Team was held (which comprises representatives from the departments of Land Use Management, Traffic Engineering, Roads and Survey). This meeting approved the plans. Once Mr Moir had received back the plans from all the separate departments and the document titled "Building Development Management", he knew from the latter document that each department had considered the plans in the light of their specific areas of expertise and that, despite some having imposed certain conditions, there was no objection to the plans being passed provided that the imposed conditions would be observed.

[96] Mr Moir then signed the "Building Development Management" document in the space allotted to the Building Control Officer, which states "BCO recommended in terms of section 6(1)(a) of Act 103/1977". In his affidavit, he states that in so doing he made a positive recommendation that the plans be approved and that, in reaching this decision, he had had regard not only to the absence of objections from all the relevant municipal departments, but also to the question whether the proposed building would be lawful and whether it would give rise to the harmful effects described in section 7(1)(b) of the Building Standards Act. He specifically states that in his view the proposed building would be lawful and would not give rise to the harmful effects that section 7(1)(b) seeks to avoid. In this regard, he states that he is familiar with the area where the building was to be erected, and that in his view, the building would not destroy the sense of scale or streetscape in the area and would not

cause risks to life because of increased traffic flow. He points out that the zoning scheme for the area has always contemplated the erection of blocks of flats and asserts that the building in question will not be the only multi-storey building in the area.

[97] Once he had attached his positive recommendation to the plans, he forwarded the recommendation, together with the "Building Development Management" document, the Chief Fire Officer's report and the plans to the decision-maker, Mr Griffiths, who approved them in terms of sections 6 and 7 of the Building Standards Act.

[98] I turn now to consider the specific grounds of review raised by the applicant.

Delegation of power to approve plans to Mr Griffiths

[99] It is common cause that the final decision to approve the plans in this case was taken by Mr Griffiths, a building development manager in the employ of the City. The applicant disputes that Mr Griffiths had the delegated authority to approve the plans, as Jafta AJ sets out in paragraphs 23 – 26 of his judgment. At the hearing before this Court, the City offered to lodge the document in terms of which Mr Griffiths was delegated the power to approve plans. It has since done so. This ground of attack therefore falls away. I deal with the question of the implications of this argument for costs at the end of this judgment.

Did the Building Control Officer make a "recommendation" as contemplated in section 6(1)(a)?

[100] As appears from the description of the process followed, the documents before Mr Griffiths were the set of building plans, the document titled "Land Information System – Ratepayers Data" and the document titled "Building Development Management", which bore the approval of all the separate municipal departments and which had been signed by the Building Control Officer under a printed section stating "BCO recommended in terms of section 6(1)(a) of Act 103/1977". Mr Moir also enclosed the Chief Fire Officer's report. The High Court held that this constituted a recommendation "as evidenced" by the signature of the Building Control Officer.[25] The applicant argues, however, that in addition to the plans and the document containing his signature, section 6(1)(a) of the Building Standards Act requires the Building Control Officer to prepare a report giving reasons for his recommendation and that, to the extent that he did not do so, the document forwarded by him did not constitute a recommendation as required by the Act.

[101] The applicant relies on *Ex parte Porritt*.[26] That case concerned the rehabilitation of an insolvent. Section 124(2) of the Insolvency Act 24 of 1936 provides that an insolvent may not be rehabilitated within four years of his or her insolvency, save upon the recommendation of the Master. The question in that case was whether the report prepared by the Master supporting the rehabilitation of the

[25] *The Chairperson of the Walmer Estate Residents' Community Forum and Another v City of Cape Town and Others* Case No 10695/2006 Cape High Court, 20 March 2007, unreported (High Court judgment) at paras 12-5.

[26] 1991 (3) SA 866 (N) (*Porritt*) at 870H-871A.

insolvent did in fact constitute a "recommendation" within the meaning of the Insolvency Act. The Court held:

> "Bearing in mind that 'to recommend' is to name or speak of a person as worthy of a particular attention or consequence — see *The Shorter Oxford Dictionary* sv 'recommend 4(b)', recommendation is the action of commending someone or something as worthy or desirable for such a result. Implicit in that, to my mind, is the notion of considering and weighing the merits and demerits of the subject of recommendation in relation to what is recommended, particularly when the word is considered in the context of the subsection in question."[27]

[102] The judge then considered the recommendation presented by the Master and noted that it did not list the factors adverse to the insolvent. The court thus concluded that the Master had not engaged in the exercise of "weighing the merits and demerits" of the application for rehabilitation and held that the recommendation from the Master did not constitute a recommendation as contemplated in the empowering statute.[28]

[103] The power under consideration in *Porritt* is quite different to the power at issue here. In that case, the Master was asked to apply his mind to essentially the same question that the court which hears the application for rehabilitation has to decide – whether an insolvent should be rehabilitated. This question involves a careful consideration of whether the insolvent is likely to manage his affairs properly in future and requires the exercise of judgement in the light of all the relevant facts. The Master's views on that matter must form the subject matter of the recommendation

[27] Id at 870H-I.

[28] See also *Ex parte Anderson* 1995 (1) SA 40 (SECLD) (*Anderson*) at 46G-I where the court was concerned with the same provision as had been considered in *Porritt*.

which is required before the rehabilitation application can be made. As Leach J noted in *Anderson*, the Master might well have more knowledge than the court in a particular case, and it is thus important for the Master to consider all the facts, adverse and favourable to an insolvent, in making his or her recommendation.[29] The question whether an insolvent should be rehabilitated, however, is a nuanced and difficult one upon which the considered view of the Master will be of great assistance to the court, which must decide whether to grant rehabilitation or not. Its importance flows from the fact that the decision to be made is a difficult one that involves the exercise of judgement based on a wide range of considerations, some of which will favour the decision and some of which will not. A report analysing all these factors and weighing them one against the other will be of value to the court deciding the rehabilitation application.

[104] In this case, on the other hand, we are concerned with a recommendation in relation to the approval of building plans. In considering what constitutes a recommendation in this regard, the first meaning of "recommend" as contained in the *Concise Oxford English Dictionary* seems appropriate. That meaning is "to suggest as fit for some purpose or use". In this case, the Building Control Officer is asked to suggest to the local authority that a set of building plans are "fit" for approval. There is nothing in this meaning which suggests that a written report is necessary in order to recommend approval. Indeed, the ordinary use of the word makes clear that one can recommend without written reasoning. The question is whether the word should be

[29] Id at 45H.

interpreted to impose a written report as a requirement or not. In my view, this turns on an understanding of the context within which this legislation operates.

[105] In most municipalities, one can assume that numerous applications for building plans are received each year. Requiring that not only plans and approval documents, but also a report from the Building Control Officer setting out the factors favourable and adverse to the approval of the plans, be placed before the ultimate decision-maker would impose a heavy burden on municipalities. It is not an interpretation of the legislation which one would adopt unless one were persuaded that written reports would serve an important function as they do in the context of applications for rehabilitation.

[106] In deciding whether a recommendation should entail a written report, it is necessary to analyse carefully what the Building Control Officer must do in deciding whether to recommend the plans for approval or not. Her or his task is twofold. First, she or he must decide whether the plans comply with the legal rules regulating building development. This, in turn, requires a consideration of the zoning and other requirements to see whether the plans comply with them. If they do, then the plans comply with the law and that is the end of the matter. The second set of considerations are those set out in section 7(1)(b) of the Building Standards Act. These require the Building Control Officer to consider whether the threshold set by section 7(1)(b) has been met. If in her or his view it has not, that too is the end of the matter. If the Building Control Officer concludes that the building will be unlawful or

likely to produce an effect contemplated in section 7(1)(b), she or he will not recommend the plans for approval.

[107] In neither case is it likely that many countervailing considerations will need to be weighed. Either the plans do comply with local zoning regulations or they do not. Either the proposed building will in fact or probably give rise to the harmful consequences contemplated by section 7(1)(b) or it will not. The Building Control Officer, unlike the Master considering an early rehabilitation, will not have to weigh a range of countervailing considerations. The questions that the Building Control Officer will have to decide are relatively straightforward and susceptible to "yes" or "no" answers. In these circumstances, it cannot be said that the preparation of a report by the Building Control Officer would be of great assistance to the ultimate decision-maker. In addition, reading section 6(1)(a) of the Building Standards Act to require the preparation of a report would unduly burden the task of the administration.

[108] As long as the decision-maker has the plans for which approval is sought as well as the recommendation of the Building Control Officer, the decision-maker will know that it is the view of the Building Control Officer that the proposed building is lawful and that it will not in fact or probably present the harmful consequences proscribed by section 7(1)(b). I am not persuaded that this case can be compared to *Porritt*,[30] as it does not seem evident that a report will play an important role in assisting the ultimate decision-maker. I conclude, therefore, differently from my

[30] See above at paras 101-3 and n 26.

colleague, Jafta AJ, that the word "recommendation" in section 6(1)(a) should not be read to require a report of the Building Control Officer.

[109] What the Building Control Officer did here was to forward to the decision-maker a copy of the plans together with the evidence that those plans had been considered by all the key municipal departments concerned with building and planning. He had also affixed to the covering document his signature indicating that he recommended the approval of the plans. In considering whether this constitutes a "recommendation" as contemplated by the section, it is important to note that the decision-maker has the crucial information to hand – the plans themselves – together with the evidence that they have been considered not only by all the relevant departments in the city but also by the Building Control Officer himself or herself. In these circumstances, the applicant's argument that these documents did not constitute a "recommendation" within the meaning of section 6(1)(a) must be rejected.

Fire control report: failure to comply with section 6(2) of the Building Standards Act

[110] Another of the applicant's submissions concerning the alleged failure to comply with a mandatory condition of the legislation is that the City did not comply with section 6(2) of the Building Standards Act. Section 6(2) provides:

> "When a fire protection plan is required in terms of this Act by the local authority, the building control officer concerned shall incorporate in his recommendations referred to in subsection (1)(a) a report of the person designated as the chief fire officer by such local authority, or of any other person to whom such duty has been assigned by such chief fire officer, and if such building control officer has also been designated as the chief fire officer concerned, he himself shall so report in such recommendations."

[111] The applicant argues that this provision required a fire control report to be included in a written recommendation prepared by the Building Control Officer. It is common cause that the Chief Fire Officer's report was obtained and was annexed to the plans and the "Building Development Management" document furnished to Mr Griffiths. I have already dismissed the applicant's argument that a full written recommendation needed to be prepared by the Building Control Officer. This argument falls to be dismissed on the same grounds. It is clear that Mr Griffiths had before him the report of the Chief Fire Officer when he approved the plans, and that is all that section 6(2) requires.

Failure to exercise an independent discretion/unlawful dictation

[112] The applicant's next argument was that Mr Griffiths failed to exercise an independent discretion when approving the plans. This argument is closely allied to the argument he makes that Mr Griffiths acted under unlawful dictation. I consider both arguments together. The evidence on the record is that the plans and the "Building Development Management" document (containing the approval of the separate municipal departments and Mr Moir's recommendation) were forwarded to Mr Griffiths on or about 26 July 2006 and that Mr Griffiths then approved the plans on 28 July 2006.

[113] The applicant relied on the following dictum of Ngcobo J in a minority judgment in *New Clicks*:

> "The Minister is required to make regulations based on the recommendation of the Pricing Committee. The Minister does not merely rubber stamp the recommendation of the Pricing Committee. She is required to apply her mind to the recommendation and make a decision whether to accept such recommendation. She cannot therefore accept the fees proposed by the Pricing Committee simply because they have been proposed by the Pricing Committee. She must satisfy herself that the fees proposed by the Pricing Committee are appropriate . . . . She can only do this if she is furnished with an explanation as to how the fees were arrived at. Without such information, the Minister cannot properly evaluate the appropriateness or otherwise of the fees proposed by the Pricing Committee."[31]

That case concerned the Minister's power to make regulations to regulate the prices of medicines. What needs to be understood is that, in determining whether a decision-maker in any particular case has failed to exercise an independent discretion or acted under unlawful dictation, the context of the power in question and the manner of its exercise are all important. It is impossible to lay down a general rule as to what will be required.

[114] Thus, to decide whether an official has failed to exercise an independent discretion or acted under unlawful dictation will require an understanding of the context of the legislation in question. The importance of context was recognised by Scott JA in *Minister of Environmental Affairs and Tourism and Another v Scenematic Fourteen (Pty) Ltd*:

> "A functionary in whom a discretionary power is vested must himself exercise that power in the absence of the right to delegate.

[31] *Minister of Health and Another v New Clicks SA (Pty) Ltd and Others (Treatment Action Campaign and Another as* Amici Curiae*)* [2005] ZACC 25; 2006 (2) SA 311 (CC); 2006 (8) BCLR 872 (CC) at para 542.

> . . . .
> But it does not follow that a functionary such as the DDG in the present case would have to read every word of every application and may not rely on the assistance of others. *Indeed, given the circumstances,* Parliament could hardly have intended otherwise. What the functionary may not do, of course, is adopt the role of a rubber stamp and so rely on the advice of others that it cannot be said that it was he who exercised the power. If in making a decision he were simply to rely on the advice of another without knowing the grounds on which that advice was given the decision would clearly not be his. But, by the same token, merely because he was not acquainted with every fact on which the advice was based would not mean that he would have failed properly to exercise his discretion.
> . . . .
> *Whether, therefore, there has been an abdication of the discretionary power vested in the functionary is ultimately a question that must be decided on the facts of each case*."[32] (My emphasis.)

[115] It is necessary then to consider the context of this case. There are three elements of the legislative scheme regulating the approval of building plans which are relevant to a consideration of the unlawful dictation argument made by the applicant. First, the Building Standards Act contemplates a two-stage process: a recommendation by the Building Control Officer, followed by an approval by the municipality or its duly appointed delegate. Secondly, the skills of the Building Control Officer are considered essential, and municipalities may not approve plans without the recommendation of a Building Control Officer.[33] It is clear that it is the Building Control Officer who has the expertise to decide whether the plans are lawful or not and whether they will probably or in fact produce the harmful consequences described in section 7(1)(b). Finally, the extent of the discretion conferred upon the

[32] [2005] ZASCA 11; 2005 (6) SA 182 (SCA) at para 20.

[33] See above n 21.

ultimate decision-maker is narrow: it is clear that if the proposed building is lawful[34] and will not probably or in fact give rise to the harmful consequences contemplated in section 7(1)(b),[35] the decision-maker has no discretion to refuse the application.[36] Once he or she knows that the plans are lawful and will not probably or in fact give rise to a section 7(1)(b) harmful consequence, both issues upon which he or she will have received a recommendation from the Building Control Officer, the plans must be approved.

[116] The question that arises then is how much weight the decision-maker may place on the recommendation of the Building Control Officer. In my view, the decision-maker is entitled to place considerable weight on that recommendation. There are two issues to which the recommendation is primarily directed: the lawfulness of the plans and the question of whether the proposed building will probably or in fact produce the section 7(1)(b) harmful consequences. The Building Control Officer is a skilled expert responsible for building development in an area. If the proposed building is lawful and there are no probable section 7(1)(b) harmful consequences in the view of the Building Control Officer, and the decision-maker does not take a different view, then the decision-maker is required to approve the plans. There is little room for the exercise of discretion. There is accordingly nothing wrong with the decision-maker following the recommendation of the Building Control Officer. This is not to say that the decision-maker must always follow the advice of the Building Control Officer.

[34] See section 7(1)(a) of the Act above at para 87.

[35] Section 7(1)(b) above at para 87.

[36] Section 7(1)(a) states that in such circumstances the decision-maker "shall grant its approval". See above at para 87.

The decision-maker may, upon a perusal of the plans, form a different opinion to that of the Building Control Officer, and if she or he does so, may decide to refuse to approve the plans. But if, upon a perusal of the plans, the decision-maker concludes that the recommendation of the Building Control Officer is correct, then the decision-maker must approve the plans.

[117] There is nothing on the facts of this case to suggest that the decision-maker did not consider the documents forwarded to him. It cannot be said that it was improper for the decision-maker to conclude that the Building Control Officer's recommendation was correct, and so this argument of the applicant must also fail.

Failure by the decision-maker to have regard to the section 7(1)(b) factors

[118] The final argument that the applicant raises relating to the failure to comply with a material condition of the empowering provision was his submission that Mr Griffiths had no regard to the section 7(1)(b) factors when approving the plans. It is clear on the record before us that Mr Moir, the Building Control Officer, had regard to these considerations when making his recommendation. As I have explained above, Mr Moir was required, as a matter of law,[37] to have regard to these considerations and Mr Griffiths was entitled to assume that he had done so.

[119] Mr Griffiths' affidavit is a simple confirmatory affidavit. It makes no express averments in this regard but does confirm the contents of Mr Moir's affidavit insofar

[37] See above at para 90.

as it refers to him. Mr Moir states in his evidence, in response to an averment on behalf of the applicant that the City had not taken the considerations in section 7(1)(b) into account, that "due regard was also had to the factors listed in section 7(1)(b)(ii)." Mr Griffiths confirms this. That is sufficient to confirm that Mr Griffiths did take the considerations listed in section 7(1)(b)(ii) into account. The question that arises is whether Mr Griffiths' failure to state in so many words that he had regard to the factors set out in section 7(1)(b) before making his decision renders the decision reviewable. In my view, it does not. There is nothing to suggest that Mr Griffiths did not consider the section 7(1)(b)(ii) considerations in the light of the documentation before him, which comprised the building plans, the Chief Fire Officer's report, the evidence that all the municipal departments had approved the plans as well as Mr Moir's recommendation that the plans be approved. This was sufficient information for Mr Griffiths to take the view that he was satisfied that the plans should be approved.

[120] As stated above, Mr Griffiths was entitled to rely upon Mr Moir's conclusion that the proposed building was lawful and would not cause the harmful consequences contemplated by section 7(1)(b). To find differently would be to impose an undue burden of duplication upon the process of the approval of building plans. Mr Griffiths was entitled to disagree with Mr Moir's recommendation but did not.

[121] It follows that I disagree on this score with the conclusion of my colleague, Jafta AJ.

Right to be heard

[122] The next question that arises is whether Mr Walele, as the owner of a neighbouring property, had the right to be notified of the plans before they were approved. He argues that as he was not notified of the proposed building nor given an opportunity to be heard in relation to it, the administrative action was procedurally unfair, and also arbitrary and capricious, and falls to be set aside for these reasons. Section 3(1) of PAJA provides that "[a]dministrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair."

[123] We must be careful, in construing section 3(1), to bear in mind that it is the key provision in PAJA that gives effect to the right entrenched in section 33(1) of the Constitution, which provides that "[e]veryone has the right to administrative action that is lawful, reasonable and procedurally fair." There is no challenge to the constitutionality of section 3(1) of PAJA in this case. Yet even in the absence of a challenge, our duty is to interpret section 3(1) in a manner that is consistent with the constitutional right. Section 39(2) of the Constitution requires a court, when interpreting legislation, to do so in a manner that promotes the spirit, purport and objects of the Bill of Rights. That administrative action be procedurally fair is therefore an important constitutional right which we should seek to protect. Yet, the Constitution does not require a knee-jerk response of affording a right to a hearing in every case regardless of the context or the circumstances of those affected. There are

countervailing considerations of equal importance to the interpretation both of section 33 of the Constitution and section 3(1) of PAJA as I mentioned in *Premier, Mpumalanga and Another v Executive Committee, Association of State-Aided Schools, Eastern Transvaal*:

> "In determining what constitutes procedural fairness in a given case, a court should be slow to impose obligations upon government which will inhibit its ability to make and implement policy effectively (a principle well recognised in our common law and that of other countries). As a young democracy facing immense challenges of transformation, we cannot deny the importance of the need to ensure the ability of the Executive to act efficiently and promptly."[38]

[124] The first difficulty with interpreting section 3(1) is that "administrative action" is defined in section 1 of PAJA as follows:

> "'administrative action' means any decision taken, or any failure to take a decision, by—
>
> (a) an organ of state, when—
>
> (i) exercising a power in terms of the Constitution or a provincial constitution; or
>
> (ii) exercising a public power or performing a public function in terms of any legislation; or
>
> (b) a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision,
>
> *which adversely affects the rights of any person* and which has a direct, external legal effect . . . ". (My emphasis.)

[125] The difficulty is that the definition of "administrative action" appears to narrow the scope of the concept only to action which adversely affects rights, while section

[38] [1998] ZACC 20; 1999 (2) SA 91 (CC); 1999 (2) BCLR 151 (CC) at para 41.

3(1) of PAJA states that administrative action which materially affects the rights *or legitimate expectations* of a person must be procedurally fair. A straight-forward reading of these two provisions produces the enigma that administrative action is, as defined, not action which affects legitimate expectations, yet section 3(1) suggests that there is administrative action which will affect legitimate expectations and which must accordingly be procedurally fair. The enigma has generated considerable academic comment.[39] A court must give effective meaning to the provisions of statutes, and all the more so where the purpose of the statute is to give protection to constitutional rights.[40]

[126] In this case a more general provision (the definition) is in conflict with a specific provision (section 3(1)). The specific provision is aimed at giving direct effect to the constitutional right to administrative action that is procedurally fair. The apparent contradiction between the two provisions should be resolved by giving effect to the clear language of section 3(1) which expressly states that administrative action which affects legitimate expectations must be procedurally fair. Thus, the narrow definition of "administrative action" in section 1 must be read to be impliedly supplemented for the purposes of section 3(1) by the express language of section 3(1). If this were not to be done, the clear legislative intent to afford a remedy to those

[39] For a full discussion, see Hoexter *Administrative Law in South Africa* (Juta, Cape Town 2007) at 199 and 358-9. See also Currie and Klaaren *The Promotion of Administrative Justice Benchbook* (SiberInk, Cape Town 2001) at para 3.4 and De Ville *Judicial Review of Administrative Action in South Africa* (LexisNexis Butterworths, Durban 2003) at 222-3.

[40] See the preamble of PAJA, which makes it clear that the Act was enacted to give effect to section 33 of the Constitution.

whose legitimate expectations are materially and adversely affected would be thwarted.

[127] The proper interpretation of the word "rights" in section 3(1) was considered by the Supreme Court of Appeal in *Grey's Marine Hout Bay (Pty) Ltd and Others v Minister of Public Works and Others*, where Nugent JA reasoned as follows:

> "While 'rights' may have a wider connotation in this context, and may include prospective rights that have yet to accrue, it is difficult to see how the term could encompass interests that fall short of that."[41] (Citations omitted.)

[128] The question that arises is whether Mr Walele has shown that he has a "right" that has been affected such that he was entitled to be accorded the form of procedural fairness he argued was appropriate in this case. In considering this, we need to recall that Mr Walele is the owner of property in an inner city residential suburb where the zoning scheme permits the erection of blocks of flats up to seven storeys. It is true that his enjoyment of his property may well be affected by the erection of a block of flats next door; indeed, one of his arguments is that the fact that the block of flats will cast a shadow on his property entitles him to be heard. Can it be said that the fact that the use and enjoyment of his property may be affected by the proposed building means that Mr Walele has shown that his rights or legitimate expectations have been materially or adversely affected within the meaning of section 3(1) of PAJA? I address the question of rights first.

[41] [2005] ZASCA 43; 2005 (6) SA 313 (SCA) (*Grey's Marine*) at para 30.

[129] At common law, property owners have full rights (dominium) to determine the manner in which their property is used. But these rights have for practical purposes never been unfettered. They have been limited by the common law and legislation to ensure that land ownership is regulated in a manner that is in the interest of all.[42] In congested urban spaces, this need for regulation is particularly acute. Zoning or town-planning schemes are one of the key ways in which the rights of property owners are limited.[43] They often provide for the maximum height of buildings in an area. They also often limit where a building may be built on an erf and the use to which properties may be put in urban areas. These are all limitations on the right of ownership.

[130] The result of a zoning scheme is thus to restrict the rights of all owners in an area. Yet zoning schemes also confer rights on owners, because owners are entitled to require that neighbouring owners comply with the applicable zoning scheme. Where an owner seeks to depart from the scheme, the rights of neighbouring owners are affected and they are entitled to be heard on the departure. Owners in the area are also entitled to be heard when land is re-zoned. A zoning scheme is therefore a regulated system of give and take: it both limits the rights of ownership but also confers rights on owners to expect compliance by neighbours with the terms of the mutually applicable scheme. The result is that where an owner seeks to use his property within

[42] Section 25 of the Constitution recognises that the right to property is not absolute. Section 25(1) provides that "[n]o one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property."

[43] See the discussion by Van den Heever JA in *Broadway Mansions (Pty) Ltd v Pretoria City Council* 1955 (1) SA 517 (A) at 523B, noting: "[A] town-planning scheme is to provide for the co-ordinated and harmonious development of the municipality to which it relates."

the terms of the zoning scheme, it cannot be said that the rights of surrounding owners are affected materially or adversely.

[131] The purpose of zoning schemes and the Building Standards Act was aptly described by Lewis AJ in *Odendaal v Eastern Metropolitan Local Council*:

> ". . . both the Act and the [town-planning] Scheme are legislative instruments for ensuring the harmonious, safe and efficient development of urban areas. . . . Local authorities are given considerable powers under both Act and Scheme. Onerous duties are imposed on them by both instruments. The essential purpose of the powers afforded and the duties imposed is to ensure that the objectives of the legislative instruments are achieved; that there is a balance of interests within a geographical community. The local authorities are in effect the guardians of the community interest. They are entrusted with ensuring that areas are developed in as efficient, safe and aesthetically pleasing a way as possible. They are required to safeguard the interests of property owners in the areas of their jurisdiction. That is why the powers and rights of owners of immovable property are restricted. Power over one's property has never, under our legal system, been unfettered. The rights of an owner of land have always been limited by the common law in the interests of neighbours. But the rapid urbanization of countries worldwide and the inevitable need for regulation that has accompanied it has had the effect of restricting full dominium even further than the common law ever did."[44]

[132] The High Court was therefore correct to conclude that the applicant's rights in this case had not been materially or adversely affected. It is true that the use and enjoyment of his property may be affected, but that is not the same as saying that the applicant's rights have been materially or adversely affected. Our use and enjoyment of property is affected by many things. To hold that, whenever the use and enjoyment

[44] 1999 CLR 77 (W) (*Odendaal*) at 84-5.

of our property is affected by an administrative decision, that will constitute the "material and adverse" affect on our rights as contemplated by section 3(1) of PAJA may well cause great disruption to the administration of urban spaces. It would also be inconsistent both with the overall purpose of PAJA and with section 33 of the Constitution.

[133] The next question that arises is whether Mr Walele had a legitimate expectation of a hearing. The concept of legitimate expectation, as Jafta AJ notes, is open-textured. In *Administrator, Transvaal and Others v Traub and Others*,[45] Corbett CJ, after a careful analysis of English law, adopted the formulation of Lord Fraser in *Council of Civil Service Unions and Others v Minister for the Civil Service*[46] in which Lord Fraser identified two circumstances in which a legitimate expectation could be said to arise:

> "Legitimate, or reasonable, expectation may arise either from an express promise given on behalf of a public authority or from the existence of a regular practice which the claimant can reasonably expect to continue."[47] (Emphasis by Corbett CJ in *Traub* removed.)

From time to time, our courts have taken the view that a legitimate expectation may also arise simply because the administrative action in question constitutes a dramatic impairment of interests less than rights.[48] It may well be that the concept of legitimate

[45] 1989 (4) SA 731 (A) (*Traub*).

[46] [1984] 3 All ER 935 (HL) at 943j-944a.

[47] Above n 45 at 756H-I.

[48] See *Nortje en'n Ander v Minister van Korrektiewe Dienste en Andere* 2001 (3) SA 472 (SCA) (*Nortje*) at para 14 ("'n ingrypende inkorting teweeggebring het van die voorregte en vergunnings wat appellante tot op daardie

expectation in PAJA is not limited to the narrow requirement of a promise or a practice as set out in Lord Fraser's reasoning. Indeed, a broader understanding of "legitimate expectation" may be appropriate given the language of section 33 of the Constitution that "[e]veryone has the right to administrative action that is . . . procedurally fair." That is not a matter that needs to be finally decided in this case.

[134] There can be little doubt that the concept of "legitimate expectation" in section 3(1) of PAJA needs to be interpreted in the light of the understanding of the concept as described in *Traub* and as followed by our courts since.[49] The applicant asserted that he had a legitimate expectation to be heard in this case and relied heavily on the judgment of Wunsh J in *Erf 167 Orchards CC v Greater Johannesburg Metropolitan Council*[50] in which the court held that a neighbour did have a legitimate expectation to be heard prior to the approval of building plans, even where those plans were in compliance with the building scheme. However, that judgment was departed from by Lewis AJ in *Odendaal* where she disagreed with Wunsh J. She concluded after an analysis of the zoning scheme and the Building Standards Act that no legitimate expectation to be heard arose.

[135] The first question is whether there was a past practice that gave rise to a reasonable expectation on the part of Mr Walele that he would be heard or whether he

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stadium geniet het"). See also *Bullock NO and Others v Provincial Government, North West Province, and Another* 2004 (5) SA 262 (SCA) at para 22.

[49] See, for example, *Grey's Marine* above n 41 at para 32. See also *National Director of Public Prosecutions v Phillips and Others* 2002 (4) SA 60 (W) at para 28 and *South African Veterinary Council and Another v Szymanski* 2003 (4) SA 42 (SCA) at para 19.

[50] 1999 CLR 91 (W) (*Erf 167 Orchards CC*).

had an expectation arising from a promise. He does not assert the latter; for the former, he can point to only one circumstance where the City afforded neighbouring owners an opportunity to be heard on a proposed building development. The facts of that occasion are not clear on the record before us, but whatever they may have been, it cannot be said that the existence of one occasion upon which neighbouring owners were given a right to be heard constitutes a practice that would give rise to a reasonable expectation that it would be followed in future.

[136] Nor can it be said that the approval of the building plans in this case constituted so significant an invasion of Mr Walele's interests or existing privileges that, on a more generous approach, it could be said to have given rise to a legitimate expectation (to the extent that a legitimate expectation can arise in this fashion).[51] As I have reasoned above, an owner of property in an urban setting knows that his or her neighbours will be entitled to develop their property in line with the relevant zoning plans. It cannot be said therefore that the approval of building plans that are consistent with the applicable town-planning scheme is such as would give rise to a legitimate expectation of a hearing. In this regard I should add that I do not think the judgment in *Erf 167 Orchards CC* convincingly demonstrates that a legitimate expectation had arisen in that case either. I agree with Lewis AJ that that judgment cannot be correct. It follows that I am in agreement with Jafta AJ that the applicant

[51] See *Nortje* above n 48 at para 14.

has not shown that he had a legitimate expectation to be afforded a hearing prior to the approval of the plans.[52]

Whether the decision falls to be set aside because it was not rationally connected to the information before the City or was otherwise unlawful or unconstitutional

[137] These were catch-all challenges made by the applicant. Once it is shown that the approval of the building plans followed upon a proper and considered recommendation of the Building Control Officer, it cannot be said that the approval was not rationally connected to the information placed before Mr Griffiths. Nor was any other basis proffered to bolster the argument that the decision was otherwise unconstitutional or unlawful. These arguments therefore also fall to be rejected.

[138] In the light of the foregoing, I conclude that the applicant's application for the setting aside of the decision to approve the plans in this case must fail.

Section 62 of the Local Government: Municipal Systems Act 32 of 2000

[139] One last issue falls to be considered. Jafta AJ points out that section 62 of the Local Government: Municipal Systems Act 32 of 2000 (the Municipal Systems Act) must be interpreted to afford a right of appeal only to a person whose rights have been affected by the decision against which the appeal is lodged.[53] He concludes that the applicant has not established that he had such a right in this case. Section 62(1) provides as follows:

[52] Above at paras 40-1 of Jafta AJ's judgment.

[53] Id at para 19.

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

For clarification, it should be noted that "political structure" is defined in section 1 of the Municipal Systems Act to mean—

> "in relation to a municipality . . . the council of a municipality or any committee or other collective structure of a municipality elected, designated or appointed in terms of a specific provision of the Municipal Structures Act".

[140] Section 62 thus provides that "a person whose rights are affected" by a decision of a municipality or other structure may appeal against that decision. It is important to note that, given the provision in section 7(2) of PAJA, no court may review an administrative action in terms of that Act unless any internal remedy has first been exhausted.[54] Given that the applicant did not seek to pursue an appeal in terms of section 62, the question in this case is: is the applicant prevented from seeking the judicial review of the decision?

[54] Section 7(2) provides as follows:

> "(a) Subject to paragraph (c), no court or tribunal shall review an administrative action in terms of this Act unless any internal remedy provided for in any other law has first been exhausted.
>
> (b) Subject to paragraph (c), a court or tribunal must, if it is not satisfied that any internal remedy referred to in paragraph (a) has been exhausted, direct that the person concerned must first exhaust such remedy before instituting proceedings in a court or tribunal for judicial review in terms of this Act.
>
> (c) A court or tribunal may, in exceptional circumstances and on application by the person concerned, exempt such person from the obligation to exhaust any internal remedy if the court or tribunal deems it in the interest of justice."

[141] To answer that question it is necessary to determine whether the applicant is a person whose rights have been affected as contemplated by section 62. Jafta AJ concludes that the applicant has not established that he is a person whose rights have been affected and therefore concludes that it was not necessary for the applicant to pursue an appeal in terms of section 62 of the Municipal Systems Act before launching an application for judicial review.[55] It is interesting that he concludes, somewhat contrastingly, when considering the effect of the approval of plans, that such approval "might affect the rights of the owners of neighbouring properties".[56]

[142] Our system of administrative justice seeks to encourage internal remedies to resolve disputes that arise out of administrative action. That is the very purpose of section 7(2) of PAJA. In my view, section 62 should be read in the light of this commitment, as it establishes an internal remedy. It may mean, therefore, that the section only applies where a person *alleges* that his or her rights have been affected by the decision in question. However, in the light of the conclusion I have reached – that the applicant has not established a ground for judicial review of the approval of the building plans – it is not necessary for me to consider the proper interpretation of section 62 in this judgment. I would prefer to reserve this question for another day.

Costs

[55] Above at para 19 of Jafta AJ's judgment.

[56] Id at para 52.

[143] The last issue that needs consideration is costs. This is an application in which the applicant has sought to raise constitutional issues. In my view, the appeal should fail, but it would not be appropriate to order costs against the applicant. One issue, the question of whether Mr Griffiths was duly delegated to make the decision to approve the plans, was only clarified in this Court when the first respondent tendered proof of that delegation after the hearing. In my view, that should not affect the overall costs order, as the City has successfully defended its decision on all the grounds raised by the applicant. All the parties should therefore bear their own costs.

[144] The order I would propose is that the application for leave to appeal is granted but the appeal is dismissed.

Langa CJ, Kroon AJ, Van der Westhuizen J and Yacoob J concur in the judgment of O'Regan ADCJ.

For the Applicant:	Advocate A Schippers SC and Advocate MC Solomon instructed by TR Cloete & Associates.
For the First Respondent:	Advocate G Budlender and Advocate T Masuku instructed by Nongogo Nuku Inc.
For the Second to Fifth Respondents:	Advocate M O'Sullivan instructed by Parkers Inc.
For the Amicus Curiae:	Advocate J Gauntlett SC and Advocate D Wood instructed by Moodie & Robertson.