IN THE KWAZULU-NATAL HIGH COURT, PIETERMARITZBURG
REPUBLIC OF SOUTH AFRICA

CASE NO: 7929/2009

TREVOR TURNBULL-JACKSON **APPLICANT**

and

HIBISCUS COAST MUNICIPALITY **FIRST RESPONDENT**

PEARL STAR INVESTMENTS CC **SECOND RESPONDENT**

MEC FOR AGRICULTURE AND ENVIROMENTAL AFFAIRS, PROVINCE OF KWAZULU-NATAL **THIRD RESPONDENT**

JUDGMENT

SISHI J

Introduction

[1] The applicant and the second respondent are the owners of the two pieces of immovable properties situated adjacent to each other in Margate, South Coast. On 20 February 2007 the first respondent ("the municipality) approved a set of building plans for two three storey blocks of flats on the second respondent's premises ("the 2007 plans"). These two three storey blocks of flats, were to be built upon Lot 3371 Margate, a property owned by the second respondent. In this review, the applicant seeks to review and set aside that approval.

The Parties

[2] The applicant is the owner of immovable property described as the remainder of Erf 75, Ramsgate, Registration Division ET, Province of KwaZulu-Natal, measuring 4195 square metres in extent. The applicant runs a guest house in the said premises.

[3] The first respondent is Hibiscus Coast Municipality, a local government municipality, which has its address at Civic Offices, Connor Street, Port Shepstone, KwaZulu-Natal.

[4] The second respondent is Pearl Star Investments 14 CC, a close corporation duly registered and incorporated in terms of the laws of the Republic of South Africa. The second respondent is the property developer.

[5] The third respondent is the MEC for Agriculture and Environmental affairs, Province of KwaZulu-Natal, joined in these proceedings by virtue of the direct and substantial interest he has in the matter. No relief is sought against the third respondent.

The location of the properties

[6] The applicant is the owner of remainder of Erf 75 Ramsgate. A portion of the eastern boundary of which is a common boundary with lot 3371, which is the property owned by the second respondent (hereinafter referred to as "the developer") to which the subject plans relate. The applicant's property is situated at the higher level than that of the second respondent.

[7] To the south west of both the applicant and the second respondent's properties and adjacent to Erf 3378 is the Indian Ocean. To the sea side of both properties and to the boundary with the second respondent's property is Erf 3378 which is owned by the Municipality.

[8] Applicant's property has 180º sea views whilst overlooking lot 3371 Margate. The sea is situated to the south of the applicant's property.

[9] The second respondent's property was developed many years ago by the construction of a dwelling house and associated structures including a retaining wall. The original dwelling house has since been demolished but the retaining structures remain in situ.

Background

[10] After the approval of plans on 20 February 2007, applicant lodged an appeal against the approval of the building plans in terms of section 62(1) of the Local Government Municipal Systems Act, No.32 of 2000. The applicant's appeal was dismissed by the Hibiscus Coast Municipality Appeals Board on 7 November 2007.

[11] Under Case Number 9105/2008, in this court, applicant applied to review and set aside the decision of the Hibiscus Coast Municipality Appeals Board. Under that case, the proceedings and decision of the Appeal's Board were set aside by the High Court of KwaZulu-Natal, Pietermaritzburg on 31 August 2009 and applicant was granted leave to institute review proceedings,

to review and set aside the approval by the first respondent of the second respondent's plans on 20 February 2007. Applicant complied with the terms of the Court Order, granting it leave to institute these proceedings.

[12] The appeals noted by the applicant against the approval of both the 2005 and the 2007 plans were finalised before the decisions of the Constitutional Court in *Welele v City of Cape Town 2008(6) SA 129 (CC) and of the Supreme Court of Appeal in City of Cape Town v Reader and Others 2009(1) SA 555 (SCA)*.

[13] These decisions found that persons such as the applicant never actually had *locus standi* to note an appeal against the approval of the building plans. Thus, the so-called appeals hearings which were conducted by the municipality in ignorance of this fact were legally of no force and effect.

Provisions of the Town Planning Scheme

[14] Properties within the Municipal Area of jurisdiction fall within various planning schemes for different areas. These schemes make provision for properties to be zoned into different categories. The zoning of a property determines the uses to which it may be put and the uses which may be permitted with the consent of the neighbours or with special consent. The scheme clauses also prescribe matters such as height of buildings permitted in each zone and other building controls such as the site space and the building line which are the lines from the edge of the property which building must ordinarily be contained.

[15] Applicant and the second respondent's properties both fall within the provisions of the Margate Town Planning Scheme. The scheme permits six storey developments without any form of special consent or other permission. The developer's property is zoned general residential and the Margate Scheme provides that in such zoning development consisting more than three storeys require the building be recessed away from the normal building lines and side spaces on the lot by a specified distance for each additional storey. The scheme also contains provisions relating to basements. This aspect will be dealt with later on in this judgment. But, in terms of the planning scheme, the lowest floor of the building may qualify as the basement if it meets the criteria set by the scheme. These criteria relate both to the use to which the floor is put and to the volume thereof which is below ground. If both of these criteria are met then the floor does not count as the storey for the purposes of the height limitations in the scheme. It is consequently possible to have three storeys and a basement without special consent.

The history of the plans, approvals, appeals and litigation

[16] It is common cause or not in dispute that as at 14 November 2006 and at the time that the second respondent submitted plans to the first respondent to erect two three-story blocks of flats comprising a total of 9 flats upon Lot 3371 Margate, which is owned by second respondent; the position was that:

(a) In 2003, second respondent had applied to construct a six storey block of flats on Lot 3371 Margate. In February 2004, first respondent approved the plans, applicant appealed the approval and the approval was set aside on appeal.

(b) Between the approval and the setting aside of the approval, second respondent had nevertheless commenced construction. Applicant had to apply to Court under Case Number 11103/04, to hold construction but the lower elements of the proposed six storey block of flats had already been constructed. The construction was substantial.

[17] In 2005 second respondent lodged plans to construct two blocks of flats, of three storeys each nine flats upon Lot 3371 Margate. In these plans ("2005 plans") second respondent, sought to incorporate and justify the three storey construction of one block, block "A" which already existed on site. Applicant objected to the 2005 plans, but they were approved by Mr Van der Walt of the first respondent.

[18] The applicant immediately launched an appeal against the approval of the 2005 plans in which applicant contended that the building control officer of the first respondent was not appropriately qualified and was incorrectly appointed; that the so called basements of the two proposed blocks, especially that of block "A", (which had already been constructed, was above the ground and was a storey and not a basement; that the erection of the flats would disfigure the area, would be unsightly and affect the views, would be overbearing and affect applicant's privacy and would derogate and diminish the value of the applicant's property. The first and the second respondent were furnished by the applicant with and expert witness opinion by skilled and experienced property evaluator which stated that the construction of two blocks of flats on Lot 3371 Margate would diminish the value of the applicant's

property between 20% and 30%.

[19] As it had previously done, second respondent continued construction upon Lot 3371 Margate between the plans being approved and the appeal lodged by the applicant against the approval being heard.

[20] In the time between the plans being approved and the appeal lodged by the applicant against the approval being heard under Case Number 11723/05 applicant launched proceedings in the Durban High Court against first and second respondents for multifacet relief which included an interdict to stop construction on Lot 3371 Margate and a *declarator* that the basements of the second respondent's proposed blocks (and in particular block "A" – which had already been constructed in 2004) were in fact not basements at all but storeys. The challenges to the first respondent and second respondent's status and conduct and the complaints raised by applicant are the same as those raised in the appeal set out above and were placed before the Court under Case Number 11735/05.

[21] After Case Number 11723/05 was launched and in September 2005, the approval of the 2005 plans by Van der Walt of the first respondent was set aside on appeal.

[22] According to the first respondent, the applicant's appeal against the approval of 2005 plans was upheld on the basis that the second applicant's wall encroached into the side space and no special consent had been

obtained for this encroachment. The first respondent contended that it was consequently unnecessary to determine the other issues raised in the appeal.

[23] In October 2005 and in the context of Case Number 11723/05 (and the Declarator sought therein concerning the basement/storey dispute which it was agreed would be pursued and was still pending) so that the question of the interpretation of the scheme could be resolved because there was likely to be at issue at any subsequent plans which the developer submitted.

The undertaking

[24] It appears from the correspondence which has passed between the parties and affidavits filed in this and other proceedings that the applicant contented that the second respondent gave him an undertaking that it would not lodge any plans for development of Lot 3371 whilst the issue of the scheme relating to basement was being resolved by the Courts in the 2005 application. The developer on the other hand contends that what was agreed was that it would not submit any plans until the time that it showed these to applicant and he had had a chance to comment.

[25] The applicant contends that the second respondent gave an undertaking, recording in writing by the Attorneys acting for both applicant and second respondent that second respondent would not lodge fresh plans with first respondent in respect of Lot 3371 Margate, until the Court had determined the issue of the basement under Case Number 11723/05. The first respondent was aware of the undertaking.

[26] Notwithstanding the aforegoing, and on 14 November 2006 second respondent lodged fresh plans with the first respondent to construct two blocks of flats comprising nine flats upon Lot 3371 Margate and Van der Walt, the same person who had approved the plans in 2004 and the 2005 for the second respondent and whose approval for those plans had been set aside on appeal on both instances, apparently approved these building plans on the 20 February 2007.

[27] The contention by the applicant is that the 2005 plans are substantially the same plans submitted by the second respondent to the first respondent on 14 November 2006.

[28] According to the applicant, the first plans submitted on 14 November 2006 by the second respondent, differ from the 2005 plans only in the following respects:

1) The contours of the land upon which the proposed structures are depicted had been altered/literally manipulated;

2) Block “B” (whilst still of the same, “footprint”, size and dimensions as in the 2005 plans) had been positioned differently on the plan;

3) Block “A” (which seeks to justify and incorporate the existing structure on site) whilst being of the same “footprint”, size and dimensions as Block “A” in the 2005 plans has been adjusted in one minor respect by the inclusion of a fire escape – the “footprint” and dimensions of the building are otherwise identical.

[29] The contention by the second respondent which was made in the context of challenging the legal effect of an undertaking given by the applicant was that plans submitted on 14 November 2006 by the second respondent are “completely different”.

[30] The first respondent has contended that the applicant has avoided stating in these proceedings that the applicant’s attorneys sought an undertaking from the Municipality that it would not consider any plans which might be lodged by the developer pending the determination of the issue of the basement by the Court dealing with the 2005 application. The Municipality refused to give such an undertaking because it was of the view that it was not permitted to contract out of its statutory obligation to consider any plans submitted. This is stated by the applicant himself to be the position in paragraph 31 of the affidavit in the 2007 application.

The fate of the 2005 Application

[31] It came to the attention of the first respondent that the Court might be reluctant to grant a *declarator in vacuo* and consequently that if the question of basement were to be determined in 2005 application, it would be necessary for further affidavits to be filed in those proceedings once new plans had been drafted by the developer so that a determination can be made on relevant facts.

[32] The 2005 application was adjourned sine die on the basis of the

understanding between the applicant and the second respondent that if necessary in due course, further papers would be filed in the 2005 application to have the basement issue resolved. If that did not occur, then these affidavits would have to be served on the first respondent as a party to the 2005 application, but as far as the first respondent was concerned, the matter was adjourned sine die and there was nothing which affected its duty to consider the plans.

The 2007 plans

[33] On 20 February 2007, the Municipality approved the new set of plans again for two three storey blocks of flats. These are referred to as "2007 plans" although N Naidu filed an affidavit in this Court stating that he had approved the plans, Van der Walt has alleged in his affidavit that this was an error, it was him who had recommended the approval of the 2007 plans. The applicant noted the internal appeal against the approval of the 2007 plans and launched an application in the Durban High Court under the case number of the 2005 application for an interdict prohibiting construction in accordance with 2007 plans until his appeal had been finalised. On 17 August 2007, the application for an interim relief was adjourned sine die and an order was granted by consent in terms of which the developer undertook not to perform any further construction work until the expiry of three days after the date upon which the decision in the appeal was handed down.

The 2007 application

[34] The appeal was dismissed on 7 November 2007. On 5 December 2007, the applicant launched subsequent litigation at the Durban High Court under Case Number 14748/2007. This is referred to as "the 2007 application". In the 2007 application, the applicant sought an order interdicting the developer from carrying on with the building operations on the strength of the 2007 plans pending the determination of the review relief sought in the 2005 application and giving him leave to supplement its founding papers of the earlier application to take account events which had occurred since its launch.

[35] The tenure of the applicant's affidavit in the 2007 application appears to be that he sought to enforce a contractual right he claimed to have against the developer arising out the undertaking. The applicant contended that the undertaking had been breached.

The 2008 application

[36] This, notwithstanding, and apparently pursuant to the position he adopted in the 2007 application that fresh proceedings were desirable, the applicant launched a review application under case number 9105/2008 ("the 2008 application") in which he sought to review and set aside not the initial approval of the 2007 plans but the dismissal of his appeal. The 2008 application was served on the municipality on 4 June 2008, by that time the decision in Walele had been handed down but the decision in Reader had not. It appears that there was some confusion as to the important meaning of the judgment in Walele and the municipality consequently nonetheless filed such

record as it was able to on 2 September 2008 which it augmented on 20 October 2008.

[37] Thereafter, and on 14 November 2008, the decision in Reader, was handed down and it became plain that the applicant had never had an appeal and indeed had no right to be involved in the approval process and to object during that process.

[38] The applicant was, however, undeterred by this authority and in the 2008 application launched an interlocutory application to compel the municipality and the official who had heard the appeal to furnish *"a complete and coherent record of the appeal proceedings"* as the applicant contended that the record provided was deficient.

[39] The municipality responded by pointing to the effect of the judgments in Walele and Reader and contending that in the light thereof the 2008 application was ill-founded. Indeed, the municipality's attorneys had written to those acting on behalf of the applicant inviting them to withdraw the 2008 application for a review and the application interlocutory thereto so as to avoid unnecessary costs being incurred but the applicant refused to do this. Instead, at the hearing of the 2008 application before Swain J on 31 August 2009, the applicant's counsel sought to distinguish his situation from that in *Walele* and *Reader* and persisted in seeking an order in terms of the interlocutory application.

[40] Swain J agreed with counsel who argued on behalf of the municipality

that the effect of the decisions in *Walele* and *Reader* was to render the domestic appeal *non est* but was of the opinion that in light of the principles enunciated in Oudekraal Estates v City of Cape Town, it would be proper for the sake of good order to set aside that decision so that there could be no confusion about whether it did or did not have consequences although legally it was a nullity. It was on this basis and this basis alone that an order was made setting aside the decision of the appeal tribunal.

[41] The first respondent submitted correctly that the applicant does not disclose any of this to this Honourable Court and instead seeks to create the impression in his affidavits that the order of Swain J amounts to a decision on the merits of the appeal and vindicates his contentions as to the irregularities which he alleges beset the approval process. This is quite simply not the case.

[42] With the decision of the appeals tribunal having been set aside, the approval of the 2007 plans remained and it was clear that the applicant would need to institute a fresh review to set that approval aside. Counsel for the municipality indicated to Swain J that because the entire appeal process had proceeded with all parties under the common misunderstanding that the applicant had the right to an internal appeal, the delay in launching a review against the plans approval was not something upon which the municipality would seek to rely. It was consequently for this reason that part of the order made by Swain J permitted the applicant to launch the present review proceedings within a particular time frame. This was to avoid wasting any

further time or ink on questions of condonation.

Grounds of review

[43] The applicant relies on six grounds of review in support of this application, namely;

1. That Mr Van der Walt of the first respondent ought to have recused himself as the decision maker;

2. That no decision could be taken involving an issue already before Court and as yet undetermined. (The 2005 application precluded the approval of the plans).

3. That the building control officer (B.C.O.) ought to have given the applicant a pre-recommendation hearing (pre-recommendation hearing).

Grounds of review 4, 5 and 6 are based on the first respondent's alleged failure properly to apply the provisions of the National Building Regulation and Buildings Act 103 of 1977 "(the Building Standards Act)".

2. That the BCO failed to make a recommendation within the meaning of Section 7(1)(a) of the Building Standards.

3. That the decision is not in compliance with Section 7(1)(a) of the Building Standards Act.
4. That the decision is not in compliance with Section 7(1)(b)(ii) of the Building Standards Act.

[44] It has been contended on behalf of the applicant that any one of these ground alone is sufficient to warrant the granting of the review, and the setting

aside of the decision to pass the plans.

[45] It is appropriate at this stage to deal with each the grounds of review:

First ground of review: Mr Van der Walt should have recused himself as a decision maker.

[46] In essence, the applicant contended that he entertained a reasonable suspicion that Mr Van der Walt was biased against him as a result of which Mr Van der Walt ought to have recused himself and not considered the 2007 plans. This ground of review that Mr Van der Walt should have recused himself in approving the plans must be seen in the context that Mr Van der Walt had been involved and had been aware of and involved in the earlier plans and the litigation which arose around them.

[47] The applicant bears the onus to show on a balance of probabilities that a reasonable person in his position would have had a subjective apprehension bias. The applicant contends that this onus has been discharged because it is common cause that on two previous occasions the plans submitted by the second respondent were approved by Mr Van der Walt and his approval was overturned on appeal. These plans were the 2004 plans for the six storey building and the July 2005 plans, there were obvious infringements of the town planning requirements in respect of both plans.

[48] It is clear from the papers that Mr Van der Walt was the only person in the first respondent who was qualified and appointed to make the final

decision as to whether to pass the plans. The first respondent has contended correctly in my view, that the setting aside of the earlier plans was based on an interpretation of the town planning scheme, provisions relating to side space and does not in any way relate to Mr Van der Walt's integrity. Furthermore, Mr Van der Walt was also aware of the applicant's contentions and objections which had been raised earlier so that he could take these into account in the proceedings. In his affidavit he has stated that he has taken these into account.

[49] Mr Van der Walt was the person best placed to deal with the approval and that there was no other person properly qualified within the Municipality to do so. In this regard, applicant has contended that a decision maker could have been seconded from another Municipality. The applicant's suggestion that a decision maker could simply be seconded from another Municipality is not something which the National Building Regulations and Building Standards Act, No. 103 of 1977 (the Building Standards Act) counternancies nor has the applicant referred to any specific provisions of the Act, which permits the cause of action he has suggested should be followed. Section 28(4) of the Act allows the delegation of Municipalities powers only to Municipalities own committees or employees. A person seconded from another section would manifestly not fall within either of these categories and any of such delegation would have been *ultra vires* and invalid. The section reads as follows:

> "Any local authority may in writing delegate any power confirred upon it by or under this Act, other than a power referred to in Section 5, to any

committee appointed by it or to any person in his employ".

[50.] A further ground advance by the applicant is that the Municipality was attempting to hide the fact that it was Mr Van der Walt who had passed the plans and that it was for this reason that Mr Naidoo claimed under oath that he had approved them when deposing to an affidavit in July 2010. Applicant contends that an adverse inference can be drawn from this, clearly the first respondent knew that Mr Van der Walt ought not to have been the decision maker and attempted to hide the identity of the decision maker. Obviously this cannot be true in the light of the information available on the papers. First because the applicant had stated plainly the Mr Van der Walt had been the approving officer and denied Mr Naidoo's allegation that he had approved the plans. Secondly, in his affidavit, Mr Van der Walt stated at the outset that Mr Naidoo had made this statement and had done so erroneously and Mr Naidoo himself deposed to an affidavit explaining this.

[51] Furthermore, it is also not correct that there is no reference to Mr Van der Walt as being the decision maker on the record supplied as his name is evident from the plans themselves as the person who approved them.

[52] The allegations by the applicant in this regard cannot be true. It is also clear from the papers that the applicant had a copy of the full set of plans prior to the institution of these review proceedings and when the 2007 application was launched the full plans were an annexure to those proceedings.

[53] Mr Van der Walt in his supplementary answering affidavit has stated the following (Volume 4(a) page 626-627 par 158.6) *'It is correct for the applicant to say that the plans themselves were not part of the record. They are item 29 of the record and because of their bulky nature are in possession of the Municipalities attorneys, they will off course form part of the record before this honourable Court when the matter is adjudicated. The applicant has these plans and indeed annexed copies of them to the 2007 application where they were dealt with at some length and refers to the detail in the plans in his affidavit under reply'.*

[54] The applicant further contends that the reasonable suspicion of bias is further confirmed by Mr Van der Walt's admission, and possibly even the soliciting of additional documents supportive of second respondent after the 2007 plans had been launched.

[55] In this regard, the second respondent submitted, correctly in my view, that the applicant's criticism of Mr Van der Walt for possibly even soliciting additional documents regarding the calculation relating to the basement is likewise misplaced, more particularly in the light in the dicta in *Walele and Camps Bay Ratepayers*, in terms of which our Courts have held that municipal decision maker is obliged positively to satisfy himself as to certain matters. The two cases referred to in this matter are the following:

1. *Walele vs City of Cape Town and Others 2008 (6) SA 129 (CC) at para 55 and;*

2. *Camps Bay Rate Payers and Residents Association and*

Another vs Harrison and Another 2011 (4) SA 42 (CC) at para 33.

[56] Mr Van der Walt's approach has been specifically endorsed by the Supreme Court of Appeal in the matter of *True Motives 84 (Pty) Ltd v Madhi & Another 2009 (4) SA 153 (SCA) at para [31] page 166 A to B where the Court stated that if the primary facts are not apparent from the document submitted to the decision maker, the decision maker will seek clarification in writing by discussion with the applicant or his representative, or on the ground by physical inspection.* In the light of this decision, Mr Van der Walt can therefore not be criticised for calling for addition documentation or information to enable him to make a decision.

[57] A reasonable suspicion of bias is also said to be grounded on Mr Van der Walt's allegedly entertaining the developer's visit to nullify concerns that an updated environmental report was necessary. In this regard, the first respondent submitted, correctly in my view, that this criticism completely ignored what had been stated, not only by Mr Van der Walt but also by Magabela that the department itself had advised the Municipality that an updated environmental report was not necessary, which evidence of the conversation with the department is confirmed by document in the record (a letter from department dated 15 December 2007.)

[58] The applicant also based his suspicion on an allegation that Mr Van der Walt had passed other large developments for the second respondent to its obvious satisfaction. The respondents contend correctly in view that there

is no factual basis for this submission on the record and particularly not at the portion of the record to which the applicant refers, as the basis for this submission.

[59] The applicant also relies on the contention that Mr Van der Walt entertained a misrepresentation that there was no existing building on site at the time that the plans were approved. It is clear from the papers that there is no dispute whatsoever that the lower elements of block "A" had been constructed in accordance with previous planning approval which was subsequently set aside on appeal and there is *in situ* on the ground at present an incomplete structure. Nobody on behalf of the first respondent has ever suggested anything on the contrary. Mr Van der Walt has, however, explained that in considering plans one takes into account what is envisaged on those plans themselves. The fact that the existing structure was not taken into account for the purpose of determining the plan submission fee is due to the fact that the whole development was to be considered in accordance with the 2007 plans and this is not and cannot be suggestive or bias on the part of the Municipality in fact, it leans the other way. The fact that the deposit had been paid in respect of previous building plans which had been set aside and which deposit had not been repaid into the developer and was consequently still in position of the Municipality although it could be strictly speaking had been demanded by the developer, is likewise something that re-downs to the Municipality's credit and does not demonstrates bias. This submission is in my view correct.

No access Road

[60] The applicant complains that Panorama Parade extension which provides road access to the development does not exist and so the plans should not have been approved. There is undisputed evidence that Panorama Parade Road exists and has been in existence for more than 30 years. This road provides the only access to the second respondent's property and other bordering properties on the Admiralty Reserve. The allegation that Mr Van der Walt ignored the absence of the legally declared road and condoned the continued use of Panorama Road Extension, notwithstanding that it is in the Admiralty Reserve, ignoring his duty to uphold the law and not to condone non-compliance, has no substance.

[61] *In BRT Industries South Africa (Pty) Ltd and Others v Metal and Allied Workers' Union and Another 1992(3) SA 673 (A),* the Court held that the test to be adopted in recusal applications in involving the appearance of bias is whether there exist a reasonable suspicion of bias on the part of the decision maker. Provided that the suspicion partiality is one which might reasonably be entertained by lay litigant, a reviewing Court cannot be called upon to measure in a nice balance the precise extent of the apparent risk. If suspicion is reasonably apprehended, then that is the end of the matter. *(Page 694H-695A).*

[62] There is no doubt that there has been a history of previous litigation between the parties in this matter and that Mr Van der Walt of the first respondent passed the 2004 and the 2005 plans. It is common cause that

there were obvious infringement of the town planning requirements in these plans which resulted in their being set aside on appeal. The fact that these plans were set aside on appeal does not necessarily establish that Mr Van der Walt was biased against the applicant. The issue is whether the suspicion of bias is reasonably apprehended in the circumstances of this case.

[63] *Having considered all the material placed before me in this regard, I am satisfied that the applicant's grounds are not such as to establish a reasonable suspicion of bias.*

[64] The applicant has failed to establish that Mr Van der Wal*t's approach was not both rational and reasonable.*

Second Ground: Whether the 2005 application precluded the approval of the plans

[65] As indicated above in Case Number 11723/05, the applicant sought the declarator concerning the basement/story dispute. The second respondent gave an undertaking to the applicant that it would not lodge fresh plans with the first respondent in respect of Lot 3371 Margate until the Court had determined the basement issue under Case Number 11723/05.

[66] Under the second ground, the applicant's contentions are based on two other considerations:

1. The first is the notion that in the 2005 application, the Court would be called upon to decide whether the lowest level of block "A", which had already been constructed in accordance with earlier approved plans, was or was not basement for the purposes of the

applicable Town Planning Scheme. This was a question the applicant stated that he and developer had reserved for determination by the Court.

2. The second is the undertaking which the second respondent gave to the applicant. The applicant's contention is that the 2005 and 2007 plans were substantially the same. The applicant thus argues that all his objections to and the claimed deficiences in the 2005 plans also beset the 2007 plans.

The first consideration

[67] The applicant contends that the fact the first respondent was a party to ligation in which the basement issue was pertinently alive means that the first respondent's making a determination on the basement issue would have the effect of pre-empting the Court's decision, and rendering academic the specific issue which had been expressly reserved by two of the parties, for determination by the Court.

[68] One of the recurrent themes throughout the applicant's affidavits and his heads of argument is his contention that the 2005 and 2007 plans were for all intent purposes the same, the only difference being that in the 2005 plans, block "B" had been moved "slightly further" down the slope on the second respondent's property and closer to block "A". It is therefore important to first determine whether there are any significant differences between the two plans.

[69] The first respondent has annexed LCM3, the site plan sheet for the 2005 plans and HCM4 the site plan sheet for the 2007 plans to its affidavit for

comparison. A comparison of the two site plan sheets reveals the following:

Firstly: The encroachment into the side space next to block “A” had been removed. This was the feature of the 2005 plans that had led to the approval being overturned on appeal.

Secondly: The section to the front block “A” is now an open porch and so excluded from calculations to determine whether the lowest level was a basement.

Thirdly: Block “B” was moved 12 metres down the slope, significantly impacting the basement calculation and the issue of the view.

[70] The applicant himself stated in an affidavit in the 2007 application that “the design of block “A” had been altered in two quite material respects. In paragraph 56 of his founding affidavit in that application, the applicant himself pointed out that the portion of block “A” which had intruded into 4.5 meter side space no longer appeared in the plans and of significance to the question of whether the bottom story of the development constituted the basement was the fact that a section to the front of the building that is the seaward side, had now become an open porch or veranda which had the effect of excluding it from calculations made in order to determine whether the lowest level of the building complied with the test for a basement in so far as the matter of volume is concerned.

[71] These changes were in my view significant particularly in so far as the applicant's contentions regarding his views were concerned and also in relation to whether the lowest level of block "B" could be regarded as a basement for the purposes of the scheme. It also removes the problems relating encroachment into the side space which had been a feature of the 2005 plans. It can therefore not be correct to state, as the applicant does, that the plans were the same and the same considerations applied across the board.

The second consideration

[72] Despite being common cause that the Municipality did not give any undertaking, the applicant contends that because it was aware of the undertaking given to him by the developer, the Municipality was precluded from approving the plans.

[73] In order to determine whether this undertaking was binding on the Municipality, it is necessary to contrast the applicant's claim in these proceedings with what was said in the 2007 application.

[74] The Municipality has pointed out in this application that in 2007 application the applicant stated:

(a) He had a contractual right only against the developer, to enforce the undertaking.

(b) The Municipality had been asked to give an undertaking that it would not consider building plans pending determination of the issue of basement by the Court in the 2005 application, but that

Municipality refused to give such an undertaking which, the applicant was advised, was probably due to reluctance on its part to contract out of its statutory obligation to consider any plan submitted.

(c) The developer's attorney contacted other Counsel on the way forward and was advised that the Court might be reluctant to deal with declaratory order in the absence of any plans and so a proposal was made that the 2005 application be adjourned sine die and that further affidavits be exchanged duly with new plans if the applicant still had difficulty therewith, which proposal the applicant accepted.

(d) The applicant had no contractual right it could enforce against the Municipality.

(e) The applicant understood that it might be more convenient for fresh review proceedings to be lodged. This is evident from paragraph 133 of the applicant's founding in the 2007 application. It is inexplicable why the applicant has denied that this is what he said in the 2007 application.

[75] Furthermore, although the compliance with the undertaking with the second respondent is a matter of some dispute, it is of no relevance for the purposes of this application as the undertaking did not and could not prevent the first respondent from complying with its statutory obligations.

[76] Counsel for the second respondent submitted, correctly in my view, that the applicant had alternative remedies at his disposal which he could have invoked against the second respondent but clearly elected not to do so.

a) It is not disputed that the applicant was well aware of the

submission of 2007 building plans prior to their approval. Despite this knowledge, the applicant elected not to institute any legal proceedings, relying on the undertaking prior to the approval of the new plans.

b) The applicant participated in the approval process.

c) The applicant does not claim any prejudice for the so called breach of the undertaking.

[77] In my view, the applicant's submissions relating to an undertaking have no substance and ought to be rejected and are accordingly rejected.

[78] The applicant accepted in the 2007 application that rather than proceed with the 2005 application, a fresh review would be instituted in terms of which all the relevant questions would be determined. Although the applicant denies this, in the 2007 application his approach was to agree with Mr Van der Walt's suggestion that it would be appropriate for the applicant to institute entirely fresh proceedings in relation to the review rather than burdening another Court with having to read through a great deal of entirely irrelevant material in the 2005 application, much of which had been overtaken by events.

[79] It would be convenient to specifically refer to the applicant's founding affidavit in the 2007 application. In paragraph 133 of the said affidavit the applicant stated the following:

"However, I was advised that it may be more convenient both to the Court and the practise if fresh proceedings were launched, although I acknowledge that I have no contractual right as against the first respondent to insist that such course be followed. In the event of the parties agreeing, and with the permission of this Honourable Court, the order which I seek pending the

determination of the 2005 application could be suitably modified to accommodate the fresh review application, on the understanding that the costs incurred in the 2005 application would be reserved for decision of the Court in the new application."

[80] In paragraph 99 of the applicant's replying affidavit in the 2007 application, the applicant stated the following:

"I am in respectful agreement with Mr Van der Walt and the second respondent that the best course would be to commence fresh review proceedings. I do not agree that the dispute about the proper construction of the provisions relating to "basement" no longer arises and respectfully refer in this regard to what I have already said about Mr Van der Walt's over simplification of the issues. However, our dispute on that point does not appear to be relevant in the present context."

[81] What is therefore clear is that the present proceedings before this Court are the fresh proceedings which were envisaged and that the applicant foresaw reliance on the 2005 application. That application, apart from the question of costs, is no longer alive and could not and did not serve to preclude the Municipality's consideration of the 2007 plans as the applicant well understood that at that time.

[82] Furthermore, Counsel for the second respondent has submitted correctly in my view, that the 2005 application would not have determined whether the lower level of block "A" was a basement because:

(1) It related to the 2005 plans and not to the 2007 plans.

2) The declarator sought by the applicant related to the interpretation of the scheme clauses related to the basement

and had nothing whatsoever to do with the level which should be used in that determination. The question of whether the lower levels of block "A" in the 2005 plans constituted a basement arose in the context of the review relief in that application which had become academic when the applicant's appeal against the 2005 plans succeeded.

[83] In the circumstances, it would not be appropriate to set aside the approval of the 2007 plans on the basis of this ground.

Third Ground : Pre-recommendation hearing

[84] It was argued on behalf of the applicant that the Constitutional Court held that a neighbour does not, simply by virtue of being a neighbour, have a right to a pre-decision hearing when building plans (other than those requiring special consent) are considered unless there is a circumstance which gives rise to a legitimate expectation of a hearing.

(*See: Walele v City of Cape Town & Others paragraphs [42] supra).*

[85] A legitimate expectation generally arises from a practise or a promise, but it has to arise where there is dramatic impairment of interest. *(See: Walele supra and Nortje v Minister of Correctional Services 2001 (3) SA 472 (SCA) [14] and Bullock v Provincial Government of North Western Province 2004 (5) SA 262 SCA para [22]* .

The facts and circumstances of a particular case determine the content of the procedural fairness required.

[86] It was further submitted that the submission of the building plans by the second respondent to the first respondent was 'a dramatic impairment of the interest' in the context of the second respondent's undertaking of which the

Municipality was aware that no new plans would be submitted until the basement issue had been determined, coupled with the pending litigation on the basement issue. Both these according to the applicant created a legitimate expectation that no decision would be taken without the applicant being heard, if indeed the first respondent decided to entertain the plans, at all.

[87] It was argued that in view of the failure to afford the applicant a pre-decision hearing on the objections to the fresh plans, the passing of the plans should be set aside. It was argued on behalf of the first respondent, correctly in my view, that the facts relied upon by the applicant, leaving aside the factual issues, are not such as can give rise to legitimate expectation as there was no promise made by the Municipality as the decision maker and any claimed expectation was not induced by the Municipality but by a third party.

[88] In *Walele's case, supra, at paragraph 35,* the following is stated:

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

1. Substantive benefit or advantage or priviledge which the person concerned could reasonably expect to acquire or retain and which it would be unfair to deny such a person without prior consultation or a prior hearing.

2. The doctrine applies where a person enjoys priviledge or a benefit which it would be unfair to deny that person without giving him or her a hearing. A legitimate expectation arise either from a promise

made by the decision maker or from a regular practise which is reasonably expected to continue.

See: also *South African Veteranary Council & Another v Syzmaski 2003 (4) SCA 42 at para 19 page 49 E-H.*

[89] Furthermore, it would not have been lawful or competent for the Municipality to refuse to entertain the 2007 plans as it would have been in contravention of Section 7 of the Buildings Standards Act, which imposes a legal duty on the Municipality to consider plans submitted to it.

See: Walele, supra, at para 41 page 150 F and the University of Western Cape v MEC for Health and Social Services 1998 (3) SA 124(C) at 134 C-G.

[90] It has also been established that persons in the position of the applicant have no right to be involved in the planning approval process.

(See: Walele supra and para 19 and City of Cape Town vs Readar and others 2009 (1) SA 555 (SCA) at para 30 & 31)

In the *City of Cape Town vs Reader & Others at para 31*, the Court held as follows: 'This interpretation, namely, objecting neighbours and others have no right of appeal at all under section 62, its borne out by section 62(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 right that may have accrued as a result of the decision. It seems plain that the purpose of Section 62 as a whole is to give to the dissatisfied applicant permission - and no-one else – an opportunity for the matter to be reheard by a higher authority within the Municipality …'.

[91] It follows therefore that the failure to afford the applicant a pre-decision hearing on the objections to the fresh plans cannot be a ground for setting

aside the passing of the plans. This ground should therefore fail.

Fourth Ground : Absence of the recommendation by the Building Control Officer as required in Section 6(1)(a) of the National Building Regulations and Building Standards Act 103 of 1977.

[92] The applicant contends that there is no recommendation as required in terms of Section 6 of the Act, by virtue of the fact that the form upon which that recommendation is endorsed is inconsistent and nonsensical.

[93] The approval of the building plans by local authority is governed by Sections 6 and 7 of the National Building Regulations and Building Standards Act 103 of 1977 (the Act) these sections provide:

Section 6(1)(a)

"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) Section (2) of the Act 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 sub-section 1(a) a report of the person designated as chief fire officer by such local authority, or any other person to whom such duty has been assigned has been by such chief fire officer, and if such building control officer has also been designated as the chief fire officer concerned, he himself shall also report in such recommendations".

[94] The applicant contends that *Walele decision, supra,* is the authority for the proposition that a simple endorsement does not count as a recommendation. Counsel for the first respondent submitted, correctly in my view, that the paragraph of *Walele* referred to by the applicant refers to a finding by the Court that in the particular case with which it was concerned with, the endorsement and signature of the building control officer did not constitute the recommendation. The basis of this decision was in *Walele* case, however, the fact that the building control officer had only made in a block on a form which read: *"BCO recommended in terms of Section 6(1)(a) of Act 103/1977". (See: Walele, supra,at para 5)* it was therefore not possible to determine what the building control officer had considered. It is also clear from the judgment that the building control officer in *Walele* had information concerning the issues the decision maker was required to consider which he did not place before the decision maker. (See: *Walele, supra, at para 70*)

[95] In the heads of argument the applicant has contended that the BCO, as a specialist must make a recommendation that makes sense and upon which the decision maker can rely for guidance. It is required to be in the form of a report, as was made by the BCO in the Camps Bay case – not just a signature above a stamp. Having read the Camps Bay judgment I did not find anything which states that such report is required.

(See: *Camps Bay Ratepayers and Residents Association and Another vs Harrison and Another 2011(2) BCLR 121 (CC).*

However, the decision in *Walele* is to the contrary effect. The Court in *Walele* case specifically disagreed with the submission that the grounds

supporting the advice given by the building control officer are required to appear in the body of the recommendation and that endorsement and signature on their own could not constitute a recommendation. *(See: Walele, supra, at para 64).*

[96] The applicant's case in regard to the building control officer's recommendation was initially based on a contention that he was not properly qualified and therefore not validly appointed. This seems to have been abandoned by the applicant who, once, proof of his valid appointment had been adduced, now contends that there is no recommendation as required in terms of section 6 of the Act, by virtue of the fact that the form upon which that recommendation is endorsed is internally inconsistent and nonsensical.

[97] The first respondent contends that the applicant seeks to find gross irregularity by misconstruing pro-forma documentation. It contends that the document in question is a pro-forma internal scrutineering sheet used by the Municipality's department of Building Control when evaluating plans. This department checks the plans against each of the categories referred to in the form and notes where there are difficulties. If categories are in order, then a tick is entered on the form if there are not then the item is crossed. It was contended on behalf of the first respondent that the ticks indicated that there was nothing wrong with the plans from a building control officer's perspective and this is consequently what led to the recommendation endorsed on this sheet. The first respondent has authorised that from the address details at the top of the form, it is apparent that the pro-forma document is envisaged to

be sent to the person who submitted the plans in the event that there is a problem. However, because a form contains a handy list of all the things that the building control department is required to apply its mind, it is used in all instances of scrutineering even where no problems are found and there is consequently no need to send the document to the person who submitted plans as was the case.

[98] Mr Van der Walt of the first respondent has explained how this form was used and what it actually means. It is not appropriate for the applicant to simply disregard this explanation and contend that there was no recommendation before Mr Van der Walt. There was a recommendation before him.

[99] Insofar as Section 6(2) of the Act is concerned, it was submitted, correctly in my view, on behalf of the first respondent that the relevant section of the Act pertains only to circumstances where a fire protection plan is required in terms of the Act. Furthermore this is a ground relied upon by the applicant belatedly it was not raised pertinently on the papers and the applicant has not stated upon what basis it contends that Section 6(2) finds application.

Fifth Ground : Non-compliance with Section 7(1)(a) of the Building Standards Act

[100] The applicant contended that the plans were not compliant with:

(i) The National Environmental Management Act of 107 of 1998 (NEMA)

ii) The Margate Town Planning Scheme;

i) The Deeds Registry Act;

(i) **Alleged non-compliance with NEMA**

[101] Section 24(2) (a) of the National Environmental Management Act 107 of 1998 (NEMA) provides that the Minister, or an MEC with the concurrence of the Minister may identify activities which "may not commence without environmental authorisation from the committed authority.

[102] A list of these activities together with competent authorities was published in GNR386 in Government Gazette Number 28753 of 21 April 2006 ("the list") the list took effect from 3 July 2006. Item 6 of list provides that "the excavation, moving, removal, depositing or compacting of soil, sand, rock or rubble covering an area exceeding 10 square meters in the sea or within the distance of a 100 metres inland of the water sea " are listed activities".

[103] The applicant contends that environmental assessment was required because both blocks "A" and "B" of the development are within one hundred metres of the high water mark. Authorisation from the competent authorities was consequently required and the Municipality cannot approve building plans for the development unless and until such authorisation has first been obtained.

[104] The Municipality has contended that this is not the position. The

Municipality has submitted, correctly in my view, that the language of NEMA makes it plain that the effect of the listing is that the activity could not, in the language of Section 24(2)(a) of NEMA "commence without environmental authorisation".

[105] Even in his heads of argument, the applicant has contended that construction cannot commencement on any property within 100 metres of the high water mark, until there is an environmental assessment as expressed under the regulations to the NEMA. The applicant is not saying that the approval of the plans is prohibited under the NEMA under these circumstances.

[106] There is evidence that the Municipality was advised prior to the approval of the plans by the third respondent's department that, in the department's view, NEMA did not apply and that environmental impact assessment on file was sufficient. The applicant seeks to impeach the Municipality's decision on the basis of a letter generated 6 months after the plans had been approved in which the department changed its stance. The department stated that NEMA does apply and that the environmental impact assessment was required. The Department, however, does not in that letter state that an environmental impact assessment is required before plans can be approved, but simply that an assessment and approval will be required before any further construction works continues on block "B". The applicant has contended that an environmental assessment report was required for both buildings "A" and "B" because both are within 100 metres within the high

water mark. The department's stance was, however, that no authorisation was required in respect of block "B" as work thereon was commenced before the coming into force of listed activities in terms of NEMA. The second respondent considered that building work on block "B" cannot commence until there is an environmental assessment. The fact that an environmental authorisation is outstanding does not preclude the approval of the plans. There was therefore no malafides or bias on the part of the first respondent when it approved the plans without the necessary environmental impact assessment.

(ii) <u>Non-compliance with Margate Town Planning Scheme</u>

[107] The applicant's contention in this regard relates largely to the question of whether the lowest level of blocks "A" and block "B" constitute a basement for the purposes of the scheme.

[108] It is common cause that the provisions of the town planning scheme in question are such that a floor of a building which constitute a basement does not count as a story for purposes of determining the height of the building allowed in terms of the scheme or any restrictions on the side space and building line which construction over three storey requires.

[109] The applicant contends that the lowest levels of block "A" and block "B" are not basements as defined, consequently, counts as storeys for the purposes of this scheme and thus require the building to be positioned from the normal side space and building line. If this were the case then the

approval of the 2007 plans would have been contrary to the provisions of the town planning scheme.

[110] The local authority is required to be satisfied that the plans complied with other law which would include the town planning scheme.

[111] Evidence on the papers has established that the determination of the natural ground level for the purposes of deciding whether the lowest levels of the development constitute basement is complicated by the fact that the second respondent's property was developed many years ago by the construction of a retaining wall and a dwelling. This in itself would have disturbed natural ground level. The natural levels were further disturbed when the second responded excavated and began constructing in terms of an earlier set of plans. There has also been development on adjacent sites.

[112] A determination of whether the last floor of the building constitutes a basement involves questions regarding the interpretation of the scheme clause in question and then its application to levels on the ground.

[113] Having perused the reports of the two land surveyors, it appears that there is a dispute between the professional land surveyors engaged by the applicant and the second respondent as to which levels are to be applied.

[114] Mr Van der Walt of the second respondent has explained in some length why it is was that he preferred the approach to determine the levels

according to which the basement calculation was done, which was adopted by the developer's surveyor over that employed the applicant's surveyor.

[115] The first respondent accepted the lowest levels of blocks "A" and "B", constituted basements for the purposes of the scheme based on the survey of the second respondent's surveyor.

[116] His data was preferred to that of the applicant's surveyor as : -

(a) The applicant's survey was based on a beacon which was not original and therefore could not represent natural ground level.

(b) The applicant's survey was inconsistent with physical features on the subject and surrounding sites;

(c) The second respondent's survey on the other hand;

(aa) was not based on the replaced beacon;

(bb) accorded with physical features on site, some of which had been present for many decades.

(cc) extrapolated contours by analysing not only the subject site but surrounding properties.

[117] It is clear that not only Mr Van der Walt's explanation of how he came to be satisfied is rational and compelling, the fact that he asked for further calculations to be done in order to satisfy himself accords with the dicta in Camps Bay referred to above.

[118] At the end of the day, the question is not which of the surveyor's is

correct but whether Mr Van der Walt was reasonable in preferring one of them to the other, and in my view, he in fact acted reasonably in preferring the second respondent's surveyor's views to those of the applicant's surveyor.

[119] As the Supreme Court of Appeal pointed out in *True Motives 84 Pty (Ltd) v Mahdi and another 2009 (4) SA 153 SCA at para 31*; in an analogous context, each case is manifestly dependent upon the local authority's evaluation of the known facts and it is not incumbent upon the local authority in order to discharge that onus to instruct its own expects. It cannot be expected that ratepayers within the municipality's area of jurisdiction be expected to foot the bill for the municipality engaging its own land surveyor's to adjudicate where there are differences of opinion between surveyor's engaged by the applicant and objector. The Supreme Court of Appeal held that would neither be practical nor cost effective. What is instead required is for the decision maker to come to a conclusion as to whether he or she positively satisfied on the basis of the known facts.

[120] That is precisely what Mr Van der Walt says indeed in para 126 of his supplementary answering affidavit:

"The Municipality is not in a position to instruct its own independent land surveyor to evaluate the competing contentions of those employed by the applicant and the second respondent. I preferred the views of one surveyor above another based on the actual physical appearance of the subject property …".

[121] Having considered all the facts on whether Mr Van der Walt adopted an approach which is both rational and reasonable, I am satisfied that he did.

Deeds Registry Act

[122] The applicant contends that there are restrictive rights (which have been referred to as Barregar rights) endorsed against the second respondent's title deeds which preclude the approval of the building plans.

The first respondent submitted, correctly, that if such rights did exist at the time that the 2007 plans were approved, they meant only that the development could not occur until the consent of those in whose favour the rights had been registered had been obtained.

Evidence has, however, established that the Barregar rights had, however, been varied with the consent of the holders prior to the approval of the plans and thus posed no obstacle thereto.

[123] Accordingly, the basis of challenge on these grounds must fail.

Sixth Ground: Non-compliance with Section 7(1)(b) of the Act

[124] The applicant contends that the erection of the two blocks of flats would disfigure the area, be unsightly and affect views, be overbearing and damage his privacy and derogate from and diminish the value of his property. This according to the applicant precluded the valid approval of the 2007 plans.

[125] Section 7(1)(b) of the Act reads as follows:

"If a local authority, having considered a recommendation referred to

in section 6(1)(a) –

…

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

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

(aa) is to be erected in such a 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) a 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".

[126] In support of its contention, the applicant made the following submissions: In paragraph 33 of the *Camps Bay case*, the Constitutional Court clarified its stance in the *Walele* by comparing the *Walele* principles to

those enunciated in the majority decision of the SCA in the True Motives case. What emerges is a clear restatement that stare decisis *(Camps Bay para 28)* requires that all lower courts apply the interpretation of section 7(1)(b)(ii) as it emerges from the Camps Bay case – namely that:

"The local authority cannot approve plans unless it positively satisfies itself that the proposed building will not trigger any of the disqualifying features referred to in section 7(1)(b)(ii). If in doubt the local authority must consequently refuse to approve the plans."

To place the matter beyond doubt, it is stated in *Camps Bay [para 33]:*

"under Walele it is the applicant for approval who must satisfy the local authority that the disqualifying factors do not exist … Walele imposes an obligation on the local authority to ensure the absence of the disqualifying features."

[127] The applicant submitted that neither the BCO nor the decision maker followed this process. Had they done so, the expert opinion of the property valuator which stated that the construction of two blocks of flats on Lot 3371 Margate would diminish the value of Applicant's property between 15% and 30%, would have been part of the record, since it was part of the litigation to which the first respondent was a party – but it is not.

The applicant has pertinently and repeatedly made the claim that his property has been and will be significantly devalued by the building to which the plans relate. The applicant has provided proof of diminution of the value of his property. There is no competing valuation from the respondents;

Accordingly the bald and unsupported denial of loss of value falls to be rejected as of being "so far-fetched and untenable that the Court is justified in rejecting them merely on the papers"

Plascon Evans Paint Ltd v Van Riebeeck Paints (Pty) Ltd 1984(3) SA 623(a) at 634H-635C

[128] In view of the failure of the decision maker to have proper regard to the disqualifying features, the decision to pass the plans should be set aside.

[129] The first respondent submitted that there are two conflicting decisions regarding what is required and the onus applicable in relation to section 7(1)(b). In *Walele, supra, at [55],* it is stated that the local authority cannot approve plans unless it positively satisfies itself that the proposed building will not trigger any of the disqualifying factors referred to in section 7(1)(b)(ii). If the local authority is in any doubt therefore it must refuse to approve the plans. *Walele* thus imposes an obligation on the local authority to ensure the absence of the disqualifying factors.

[130] The Supreme Court of Appeal in *True Motives, supra, [at 21],* however, found that these remarks were obiter and held a local authority is bound to approve plans unless it is satisfied that the proposed building will probably or in fact trigger one of the disqualifying factors referred to in section 7(1)(b)(ii). According to True Motives therefore, if there is doubt, the building authority must consequently approve the plans. Consequently, in terms of the True Motives test, it is the objector to the plans who must satisfy the local authority about the positive existence of the disqualifying factors and there is no duty on the local authority to ensure the absence of disqualifying factors.

[131] The Constitutional Court declined to pronounce on this difference in the *Camps Bay Ratepayers case, supra*.

[132] Counsel for the first respondent submitted that the Constitutional Court's stance in the Camps Bay Ratepayer's case means that the decision in True Motives, which held that the dicta in *Walele* regarding these matters were obiter and not binding is therefore still good law and consequently the test as per the Supreme Court of Appeal in True Motives is that which applies.

[133] Consequently, it is for the applicant to satisfy the Court as to the positive existence of the disqualifying factors upon which he relies.

[134] As the Court pointed out in True Motives [at para 24, 163D – E]:-

> *"when one has regard to the nature of the circumstances which may compel a refusal of building plans under section 7(1)(b)(ii) one sees that they are very much matters of opinion, matters upon which reasonable persons may disagree. They are not as clear cut as, for instance, the distance a building is set back from a street. Recognising this, the legislature introduced the concept of 'probability' that the building would be of a certain type or have a certain effect".*

[135] The Court in *True Motives at [para 57]* also pointed out that the test in this regard is whether the decision maker's approach is "both rational and reasonable".

[136] *True Motives at [para 31]* also drew attention to the fact that each case is "manifestly dependent on the local authority's evaluation of the known facts". As such, the Court pointed out that the local authority was not obliged

to employ professional valuers to advise it in relation to every application as this was neither practical not cost effective. The municipality must simply make a rational and reasonable decision on the basis of what is before it on the known facts.

[137] The applicant points to what he claims is a substantial derogation in value to his property which he claims will result from the construction of the development approved in terms of the 2007 plans. He bases this on a report from a valuer obtained in respect of the 2005 plans.

[138] There are two important legal principles which apply to the question of value in this context. Firstly, value means "market value" and that is calculated with reference to all of the property's potential, both realised and unrealised *[True Motives at para 30/164I – 165G].* In other words, the fact that the second respondent is entitled to develop its property in accordance with the law to the limits of its potential, is something which has an influence on the market value of the applicant's property as it stands. Put differently, a hypothetical purchaser now would val*ue th*e applicant's property taking into account that the town planning scheme allows the construction of six storeys in the view line of the applicant's property.

[140] Secondly, and this flows from the first principle:

"derogation from market value only commences:-

a) When the negative influence of the new building on the subject property contravenes the restrictions imposed by law; or

b) Because the new building, though in accordance with legally imposed restrictions, is, for example, so unattractive or intrusive that it exceeds the legitimate expectations of the parties to the hypothetical sale *[Camps Bay at para 40].*

[141] Consequently, the development of a building which materially interferes with a neighbour's previously existing amenities does not have as an automatic consequency the derogation in value as required to trigger a disqualifying factor in terms of the Act *[True Motives at para 30.164 I-J].*

[142] It is against this background and bearing the applicant's onus in mind that Van Der Walt's conduct must be measured.

[143] He was mindful of the fact that:-

1. Konyn's report was prepared in respect of the 2005 plans.

2. It was based on digital images that did not correctly reflect even the 2005 development as they were prepared on the basis that an additional story will be constructed on top of the already constructed portion of Block A, which is not what was approved in either the 2005 or the 2007 plans *[Volume 4(a), page 683, paragraph 206.3 and page 615, paragraph 129]*.

3. Block B in the 2007 plans has been moved 12 metres down the slope and out of the applicant's line of vision so:-

3.1 the depiction of Block B in the digital images did not show Block B as per the 2007 plans;

3.2 the impact of Block B in the 2007 plans on both view and amenity was greatly reduced.

4. The digital images were prepared from the lower levels of the applicant' where the impact was greater but the applicant's viewing room and main focal point is on the upper level *[Volume 4(a), page 684, paragraph 206.4].*

[144] It was submitted correctly, that Van Der Walt's approach and consideration of the matter was plainly rational and reasonable. In fact, his approach is given credence by the applicant's admission that the digital images add another floor *[Volume 5(a), page 846, paragraph 125].*

[145] The applicant has consequently failed to discharge the onus resting on him on this ground of review.

[146] Having considered all the submissions made and the relevant authorities referred to in this regard, I am satisfied that this ground has no substance and that the decision to pass the plans cannot be set aside on this ground.

Legal Position

[147] There is no doubt that the Municipality's decision to approve the 2007 plans is administrative action as defined in the Promotion of Administrative Justice at 3 of 2000 (PAJA). In terms of Section 33 of the Constitution, the Municipalities are required to act in a manner which is lawful, reasonable and procedurally fair. Section 33(1) of the Constitution of the Republic of South

Africa Act 108 of 1996 provides that everyone has a right to administrative action that is lawful, reasonable and procedurally fair.

Requirements for a Review

[148] In a review the question is not whether the decision is capable of being justified …, but whether the decision maker properly exercised the powers entrusted to him or her. The focus is on the process and on the way in which the decision maker came to the challenged conclusion."

See : Rustenburg Platinum Mines Ltd v CCMA 2007 (1) SA 576 (SCA) at 589 1-590 A.

[149] The grounds for review have been authoritatively stated as follows:

> *"Broadly, in order to establish review grounds it must be shown that the President* ***failed to apply his mind*** *to the relevant issues in accordance with the 'behest of the statute and the tenents of natural justice' … Such failure may be shown by proof, inter alia, that the decision was arrived at arbitrarily or capriciously or mala fide or as a result of unwarranted adherence to a fixed principle or in order to further an ulterior or improper purpose; or that the President misconceived the nature of the decision conferred upon him and took into account irrelevant considerations or ignored relevant ones; or that the decision of the President was so grossly unreasonable as to warrant the inference that he had failed to apply his mind to the matter in the manner aforestated."*
>
> *See: Johannesburg Stock Exchange v Witwatersrand Nigel Ltd 1988(3) SA 132 (AD) at 152 A-D*
>
> (See also: Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs 2004(4) SA 490 CC at paras 44 – 45)

[150] In *Pharmaceutical Manufacturer's Association of South Africa and Another: In Re Ex Parte President of the Republic of South Africa and Others*

2000 (2) SA 674 (CC) at paragraph 90, the Court stated:

"… The setting of this standard does not mean that the Courts can or should substitute as to what is appropriate for the opinion of those in whom the power has been vested. As long as the purpose sought to be achieved by the exercise of public power is within the authority of the functionary, and as long as the functionary's decision, viewed objectively is rational, a Court cannot interfere with the decision simply because it disagrees with it or considers that the power was exercised inappropriately".

[151] In my view, Mr Van der Walt's decision to approve the second respondent's plans was rational.

[152] I am satisfied that the six ground of review advance by the applicant in this matter have no substance and do not justify the setting aside of the approval of the second respondent's plans by the first respondent on 20 February 2007.

Alternative relief

[153] The applicant has submitted that in the event of this Court not being disposed to grant the review on the basis of any one of the legal grounds advanced above, on the papers as they stand, then the applicant will seek an order that the following factual issues be referred for oral evidence:

1. Whether the applicant had reasonable grounds for suspicion that the decision maker was biased;

2. Whether the basement issue was still subjudicare when the plans were passed.

3. Whether the Buildings Standards Act or any other law was contravened by the plans;

4. Whether there will be a derogation of value of the applicant's property if the building is constructed in accordance with the

plans.

[154] In my view, there are no real factual disputes that require the leading of oral evidence in this matter. All the issues raised in the alternative have been dealt with in this review. All parties concerned in this matter had an opportunity to place all the evidence before the first respondent and actually did so. In my view, oral evidence will not disturb any balance in this matter.

[155] Having considered all the material placed before me, I am satisfied that the applicant's review application should be dismissed.

[156] There is no reason why the costs should not follow the result in this matter.

[157] In the result, I make the following order:

1. The applicant's review application is dismissed with costs.

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SISHI J

APPEARANCES

Date of hearing	:	7 November2011 & 13 December 2012

Date of judgment	:	26 September 2012
Counsel for the Applicant	:	N. N. Lange
Applicant's Attorneys	:	PRESTON-WHYTE & ASSOCIATES C/O MASON INCORPORATED 3rd Floor Fedsure Building 251 Church Street PIETERMARITZBURG Ref: Craig Preston-Whyte/Keith Hobson
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Counsel for the Second Respondent:		Ernst Crots