

**IN THE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)**

Case no. 10695/2006

**THE CHAIRPERSON OF THE WALMER ESTATE
RESIDENTS' COMMUNITY FORUM**

1st Applicant

AZEEM HASSAN WALELE

2nd Applicant

v

THE CITY OF CAPE TOWN

1st Respondent

AKBER HOOSAIN ALLIE

2nd Respondent

MAYMONA ALLIE

3rd Respondent

RAZIA ISMAIL

4th Respondent

MOGAMAT SHAFICK ISMAIL

5th Respondent

JUDGMENT DELIVERED THIS TUESDAY, 20 MARCH 2007

CLEAVER J

[1] An application by the second to the fifth respondents ("the respondents") for permission to erect a building on a vacant erf owned by them, Erf 168217, Cape Town, was approved by the first respondent in terms of s 7(1)(a) of the National Building Regulations and Building Standards Act, No 103 of 1977 ("the Act") on 28 July 2006.

[2] The first applicant acts in his capacity as the Chairperson of the Walmer Estate

Agents Community Forum, an association not for gain, some of whose members own property in Walmer Estate, the region or area in which Erf 168217 is situated.

The second applicant is the owner of a developed property adjacent to Erf 168217.

[3] The first and second applicants have applied to review the decision of the first respondent to approve the respondents' application. The application is opposed by the first respondent which was represented by counsel. The respondents also opposed the application by filing answering papers, but were not represented by counsel at the hearing. Instead, heads of argument were filed on behalf of the respondents in which their grounds of opposition were set out. They adopted the attitude that they had been dragged into the application as unwilling participants and did not wish to incur further costs by engaging counsel to argue their case.

[4] The grounds of review advanced on behalf of the applicants are that the first respondent

4.1 Failed to comply with a mandatory and material procedure prescribed by an empowering provision in the Act;

4.2 Failed to comply with s 3 of the Promotion of Administrative Justice Act No 3 of 2000 ("PAJA");

4.3 Acted arbitrarily or capriciously.

FAILURE TO COMPLY WITH THE EMPOWERING PROVISIONS

[5] Under this head, the applicants contended the first respondent failed to comply with s 6(1)(a), 6(2) and 7(1) of the Act.

Section 6(1)(a) of the Act reads:

*"(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);"*

[6] The applicants rely in the main on certain pronouncements in the judgment of *Ex*

*Parte Porritt*¹. In *Porritt's* case the court had to deal with an application for rehabilitation in terms of s 124(2) of the Insolvency Act 24 of 1936. In terms of this section, an insolvent applying for rehabilitation before the expiry of a period of four years after his sequestration may not do so without the recommendation of the Master that his rehabilitation be granted. In such cases the Master files a report in which his recommendation is set out. The application was not supported by the insolvent's trustees and was also opposed by one of his creditors. Although the Master appears to have had doubts as to whether or not the application should be supported, he ultimately lent it his support in his report.

[7] Relying on the basis on which the learned judge declined to accept the recommendation of the Master in *Porritt's* case, counsel for the applicants argued that for the recommendation for the building control officer referred to in s 6(1)(a) to be valid, it should of necessity appear from it what factors for and against the application were taken into account by the building control officer in reaching his recommendation. It was submitted that the absence of a discernible basis to justify the recommendation would amount to an abdication of his function by the building control officer.

[8] In my view, the reliance on *Porritt's* case is misplaced and not helpful. The recommendation from the Master which is required in terms of s 124(2) of the

¹ 1991 (3) SA 866 (NPD)

Insolvency Act, is one which is required in order to permit an insolvent to apply for his rehabilitation earlier than would normally be the case. For that reason, it is obvious that the court will require a reasoned recommendation from the Master in order to decide whether to permit the rehabilitation in the unusual circumstances. Factors which influence a court's decision in granting a rehabilitation order relate to the manner in which the insolvent conducted his affairs not only prior to his insolvency but also in the period thereafter. Also in issue will be the nature and number of claims lodged against his estate, the amount of such claims, whether creditors proving claims have been called upon to make a contribution to the costs of the insolvency and whether the insolvent may be required to make payment in respect of claims that have not been satisfied out of his current earnings.

[9] The Oxford Dictionary of English² defines the word 'recommendation' as follows

"to put forward (someone or something) with approval as suitable for a particular purpose or role ... advise or suggest (something) as a course of action ... advise (someone) to do something ..."

'recommendation' is also defined as

"a suggestion or proposal as to the best course of action, especially one put forward by an authoritative body ... the action of recommending someone or something"

[10] When dealing with the building control officer it must be borne in mind that in terms of s 5(2) of the Act he is required to have the qualifications prescribed by National

² 2003, Oxford University Press, Second Edition

Building Regulation to be appointed as such.

- [11] An examination of the application filed by the respondents, reveals that 12 blocks are provided on the application form, each reflecting the name of a different department within the first respondent. The blocks are provided for the comments from *Director of Survey and Land Info*, *Medical Officer of Health (Medical)*, *Chief of Fire and Emergency Services*, *MOH (Mechanical Engineer)*, *Sewage Reticulation*, *Water Reticulation*, *Transport & Roads*, *LUM*, *Struc Eng. B.D.*, and *Building Regs.* In each block the words 'no objection' appear either by means of a stamp or in handwriting, together with the date on which the endorsement was made.

In a block at the foot of the document, the following appears

“BCO RECOMMENDED IN TERMS OF SECTION 6(1)(a) OF ACT 103 OF 1977”

Under this a signature appears with the date 26 July 2006, it being common cause that the signature was that of the building control officer.

- [12] The applicants' counsel submitted that the signature of the building control officer under the heading which I have quoted did not constitute his recommendation. In the answering affidavit file on behalf of the first respondent, the building control officer explained how the various departments within the first respondent had examined the application and once they had been satisfied that their requirements had been met, had cleared the application by endorsing “*no objection*” on it. He

says that when the plan was submitted to him on 14 July 2006, he made a positive recommendation to the first respondent as evidenced by his signature under the heading to which I have already referred.

[13] Applicants' counsel persisted with his argument that the recommendation of the building control officer should contain a reference to both the merits and demerits of the application, but understandably he was unable to indicate to me what was to be shown if the building control officer was of the view that there were no demerits to an application. It was also difficult to understand what would be required of a building officer in order to motivate a positive recommendation. As counsel for the first respondent pointed out, if he or she was satisfied that an application satisfies the requirements of the Act, it is implicit in any positive recommendation that he or she is so satisfied. The logical extension of the argument advanced on behalf of the applicants is that the signature and stamp with the words 'no objection' inserted by the various departments is also meaningless because it communicates nothing to the decision maker about the merits and demerits of the application.

[14] However, as explained by the building control officer, the procedure adopted by the respondent upon receipt of an application is first for the plans examiner to check whether the plans comply with the conditions of the Zoning Scheme in question. In respect of the application concerned, she outlined her requirements

on the application form which had to be complied with before the building plan could be considered for approval and ultimately gave her final clearance only on 2 May 2006. The application reveals that the examiner identified the relevant property as being situated in an R 3 sub-zone which permits the erection of blocks of flats as a right. Fire requirements were affixed to the approved building plan and made a condition of approval. Thereafter the plans were scrutinised and examined by each relevant department which was then required to indicate whether it objected and if so, why. I have already indicated that no objections were recorded. In respect of the Fire and Emergency Department, the documents reflect that the Chief of Fire and Emergency had considered the plan and stipulated his requirements before approving it. Once the plan complied with these requirements the Chief of Fire and Emergency eventually cleared the plans on 23 June 2006. The Traffic Engineering Department also considered the plans and made comments and only on 1 June 2006 did they place a “*no objection*” stamp on the application, the papers reflecting an endorsement dated 2 May 2006 reading “*Plan as amended is satisfactory.*”. The papers also reveal that on 11 April 2006 a meeting of the building plans liaison team, comprising land use management, traffic engineering, roads and survey was held at which the application was considered.

[15] In my view it is clear that when the Building Control Officer appended his signature

to the application after consideration of the plans, specifications, documents and information submitted to the local authority, he made a positive recommendation that the application be approved.

[16] Section 6(2) of the Act reads

“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.”

The first point made by applicants’ counsel was that for the reasons advanced in his argument relating to s 6(1)(a), the building control officer did not submit a recommendation and consequently the section could not be complied with. I have already found that the building control officer did submit a recommendation.

[17] Argument was also addressed to me on the meaning of the word ‘incorporate’, it being submitted that the building control officer had failed to incorporate the fire protection plan as required by s 6(2). This submission is highly artificial. It is clear that the report of the chief fire officer was attached to the plan on which the building control officer’s recommendation was based; also that such report was attached to the ‘form A’ signed by the building control officer when making his recommendation. Both the plan and the ‘form A’ together with the chief fire

officer's report were submitted to the decision maker for consideration. In my view this clearly constitutes sufficient or substantial compliance with subsection 6(2).

[18] It was also submitted that because the building control officer had not made a recommendation as contemplated in s 6(1)(a), the decision maker could not consider such recommendation in terms of s 7(1). This section provides that

“ (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 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) *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”

For the reasons already given in regard to the submissions made on behalf of the applicant in respect of the building control officer's recommendation, this point has already been dealt with.

NON-COMPLIANCE WITH PAJA

[19] It was submitted on behalf of the applicants that they had the right or legitimate expectation to be given notice of the application to erect the building on Erf 168217 before the first respondent approved the application and that the failure to do so meant that they had not enjoyed procedural fairness in relation to the decision of the first respondent.

It is common cause that the first respondent's decision to approve the application constituted administrative action and that consequently the provisions of s 3 of PAJA are in issue. This section reads:

“3. Procedurally fair administrative action affecting any person

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

(2) (a) A fair administrative procedure depends on the circumstances of each case.

(b) In order to give effect to the right to procedurally fair administrative action, an administrator, subject to subsection (4), must give a person referred to in subsection (1)

(i) adequate notice of the nature and purpose of the proposed administrative action;

(ii) a reasonable opportunity to make representations;

(iii) a clear statement of the administrative action;

(iv) adequate notice of any right of review of internal appeal, where applicable; and

(v) adequate notice of the right to request reasons in terms of section 5.”

[20] On behalf of the respondents it was pointed out that the first respondent had never given an express promise that neighbouring residents would be given notice of the applications of the nature in questions or that that had been done as a regular

practice which the applicants could reasonably expect to continue³.

In *President of the Republic and Others v South African Rugby Football Union and Others*⁴ (“SARFU”) the court said

“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.”

To return to PAJA, s 3(2)(a) provides that “a fair administrative procedure depends on the circumstances of each case”.

[21] The applicants have not made out a case that the first respondent made any promise from which they could expect to be given a hearing or that it by a regular practice created a legitimate expectation on their part that they would be given a hearing. In the papers they do not go much further than to make the bare and generalised allegation that they had a legitimate expectation of a hearing. One ground advanced by counsel for the applicants was that as far as the second applicant was concerned, his legitimate expectation stemmed from the fact that he was the owner of the adjoining property. As to rights flowing from the ownership of

³ cf *Administrator Transvaal and Others v Traub and Others* 1989 (4) SA 731 (A)

⁴ 1999 (10) BCLR 1059 (CC); 2000 (1) SA 1 (CC) at para 216

land in the context of building in the area, it has been held that

* Owners of an adjoining land have the right to insist that land adjoining their property must comply with the town Planning and Zoning Scheme unless a departure is authorised by the local authority⁵.

* Owners are entitled to insist that building applications be not approved if they trigger one of the qualifying factors in s 7(1)(b)(ii) of the Act⁶.
Neither of the situations mentioned has application.

[22] When dealing with the rights of the second applicant as a property owner, his counsel made reference to the fact that the second applicant contended that the erection of the proposed building would derogate from the value of his land. This is an aspect more properly dealt with in relation to the provisions of s 7(1)(b) of the Act and as such I will deal with it in due course.

[23] The decision which the first respondent arrived at in terms of s 7(1) of the Act was made after having regard to the requirements of the Act and any other applicable law, which would include the provisions of the applicable Zoning Scheme Regulations. The applicants do not contend that the Zoning Scheme or any other applicable law was contravened.

[24] Much reliance was placed on the judgment in *Erf 167 Orchards CC v Greater*

⁵ *Muller and others v City of Cape Town* 2006 (5) SA 415 (C)

⁶ *Paola v Jeeva NO and others* 2004 (1) SA 396 (SCA)

*Johannesburg Metropolitan Council*⁷. In that matter, **Wunsh J**, relying on a judgment of the Supreme Court of New South Wales held that neighbours had the right to be heard on the subject of the approval of their neighbours' neighbour's building plans and in particular, the siting of a building on the stand. In *Odendaal v Eastern Metropolitan Local Council*⁸ **Lewis AJ**, as she then was, expressly disagreed with the judgment in *Erf 167* and declined to be bound by it. In her judgment **Lewis J** explains the following:

“Another, and to my mind, more logical approach is the following: both the Act and the 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 dominion even further than the common law ever did.

.....

This did not mean that owners should have no rights to object to developments around them. On the contrary, it is essential that they not be disempowered by legislative regulation. That is why property owners who wish to make significant changes to their properties – through rezoning, for example – must afford notice to those in their area who may be affected by the change, and why the latter have the right to express their views to the tribunal that makes a decision that could affect their property values or the environment in which they live. But a balance does have to be struck, and

⁷ 1999 CLR (W) 91

⁸ 1999 CLR 77

the right of an owner to do as he or she pleases on his or her property, subject to reasonable limitations, must be respected. For this reason, amongst others, a local authority is given the power and the responsibility to approve building plans. No doubt it is also the reason why no express provision is made for neighbours to view, and a fortiori to object, to plans for the construction of a dwelling or an additional room or structure on adjacent property.”

Lewis AJ then concludes her analysis in the following manner:

“For the reasons set out above in relation to the role and powers of local authorities under the Act and the Scheme, I consider that neighbours do not have even an expectation that they may be heard in relation to the erection of a building, save where a provision of the Scheme expressly affords a right to make objections or where the erection of the building will be in breach of the Act or the Scheme and thus unlawful. They would not, then, in the ordinary course, have standing to sue for the setting aside of a decision. This view is fortified by a consideration of the implications of affording to all neighbours a hearing before building plans are approved.”

- [25] The logical extension of the argument put forward on behalf of the applicants would be that notice of any plan to erect or add to a building would have to be given to other owners in the township. The question which arises is whether the notice should be given to all other owners as in the case of the amendment of a title deed or simply to neighbouring owners, and if the latter, where is the line to be drawn? It is of course also implicit in the submission on behalf of the applicants that a local authority would be obliged to give notice of all applications for the approval of building plans and specifications to persons who might have an interest in such an application. In *Odendaal*'s case **Lewis** AJ alluded to the implications of such a procedure, which hardly need an explanation. Furthermore, the argument could hardly be advanced in respect of a small one-storey residence of medium

height which is unlikely to attract any interest. It is for that reason that I believe that the reasoning of **Lewis** referred to above should be supported. The decision whether to give notice to any person must clearly depend on the circumstances of the particular case. Such notice is of course required in the event of an application for a departure from the provisions of a Zoning Scheme.

- [26] A final aspect to consider is that the legal regime for the approval of building plans is an enabling one and is not restrictive. It must give effect to the constitutional right to property which in turn means that it would be unfair for the local authority to grant certain development rights to a land owner which cannot be exercised or given effect to. Property owners have the right to erect buildings on their land which comply with the zoning requirements and conversely, property owners must know that neighbours may develop their land in accordance with the zoning conditions. 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.

THE FIRST RESPONDENT ACTED ARBITRARILY AND CAPRICIOUSLY

- [27] Under this heading, the applicants sought to rely on an application for the approval of building plans in respect of an erf in the area in question by one N C Sooful ("the

Sooful application”). The facts of this application became known to the applicants only on 7 February 2007 after their replying affidavit had already been delivered. The applicants have ascertained that in the Sooful application a letter advising neighbours of the application had been despatched. It was accordingly submitted that because the first respondent appeared to have followed a different procedure in the Sooful application, the procedure in the respondent’s application was unlawful and should be set aside. In my view it is not helpful or relevant to refer to the Sooful application for the following reason:

- * The factual situation is not known. In particular, it is not known how high the proposed building will be above the street level.

- * The first respondent may have had some doubt as to whether the application would trigger any of the disqualifying factors in s 7(1)(b)(ii) of the Act and wished to hear submissions in that regard.

- * The fact that notice was given to Sooful when there was no departure from the town planning or zoning scheme does not make it unlawful not to give notice in another case. Each case must be dealt with on its own merits and concomitantly, the exercise of discretion may well result in decisions which differ from case to case.

[28] It was also submitted that the first respondent took into account irrelevant considerations and ignored relevant considerations when coming to its decision. The irrelevant consideration which the first respondent is said to have taken into account was that the applicants were not entitled to make any representations regarding the application and that there was no obligation on it to seek the input of neighbours. I have already dealt with these submissions. It was also submitted that it was irrelevant that the Holiday Inn Hotel, a multi-storey building, was to be found in the same area. Although reference was made in

the first respondent's papers to the Holiday Inn Hotel, I do not interpret the reference to indicate that that fact played any determining role in its decision. The relevant considerations which the respondent is said to have ignored are that the first respondent ignored the requirements of ss 6(1), 6(2) and 7(1) of the Act and that the owners of neighbouring properties were not treated fairly. In regard to these aspects, I have already found against the applicants.

[29] The submission to the effect that the decision taken by the first respondent was irrational since it was not connected to the purpose of the empowering provision is also without substance and has, in effect, been dealt with in connection with other submissions made on behalf of the applicants.

[30] The decision was also said to be unreasonable on the basis that no sensible authority acting with due appreciation of its responsibilities would have made it. In my view there is no substance in these submissions.

[31] 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 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.

[32] I referred in para 21 to the submission on behalf of the applicants that the erection of the proposed building would derogate from the value of the second applicant's land. As I explained, that submission was brought in under the argument relating to the meaning of a right to property.

The applicants contended that the fact that the building would not be in keeping with other buildings in the vicinity, more particularly since it would be the first four-storey building in the vicinity. (It may be mentioned that a seven-storey building would be permitted in terms of the Zoning Scheme.)

The respondents pointed out that the proposed building would consist of four "*upmarket*" face brick dwelling units which are "*only*" 11,244 metres above ground level. The proposed building will comprise:-

- * Basement level parking for eight vehicles (two bays per dwelling unit), generally below the natural ground level of the property,
- * A first level made up of two apartments 193m² in extent,
- * A second level made of two apartments 191m² in extent, and
- * A small third level made up of two bedrooms, each attached by a staircase to the respective units below and 45m² in extent.

The applicants' view as to the effect which the building would have on the area,

although supported by the *prima facie* view of an appraiser and valuer, was met by the views of two persons having particular knowledge of town planning and property valuation. The first affidavit is by Mr David Dewar, Professor of Architecture and Planning and Deputy Dean of the Faculty of Engineering and the Built Environment at the University of Cape Town. He explains the relationship in urban areas between land values and urban change. He records

“The internal land value of urban settlements, therefore, is continually fluctuating and adjusting, not always in predictable ways. One relatively common feature, however, is that when the dominant population dynamic is growth, the general tendency is for land values to increase because of increased demand and for net densities to increase – as the unit land value increases, the market response is to use land more efficiently and intensively. In these circumstances, well located areas and areas of high amenity in particular will commonly experience processes of intensification, frequently to the maximum levels allowed through public regulation.”

.....

“Almost always, the direction of these changes is towards allowing greater intensification: it is almost never in the opposite direction. Again, this is entirely consistent with the land market. As demand increases, the unit price of land increases and this requires more efficient use of land.”

“Most of these dynamics have occurred in Walmer Estate. As the popularity of the area has increased, demand for land has grown and prices have escalated dramatically, particularly over the last few years. Since the area is an established area, many of the housing units over sixty years old, change has been incremental. In almost all cases of new development, the dominant tendency has been towards residential infill and vertical expansion.”

To illustrate this point, he attaches photographs showing the proposed new development in Upper Adelaide Road, Upper Adelaide Road opposite the site and conditions looking up Upper Adelaide Road onto Coronation Street. These photographs reveal three double-story buildings, one three-storey building and a

number of single-storey buildings, all built very close to one another.

The affidavit filed by Erwin Gustav Rode is particularly important. He is a property economist, registered Professional Valuer and founder of the national property-valuation and property-research firm Rode & Associates. He has for many years been a part time lecturer at the University of Stellenbosch for the post-graduate course in Property Investment, which includes property valuation and since 1999 lectures on a part time basis at the University of Cape Town, contributing to the MSc in Property Studies. He explains that the value of a property is the market value and furnishes two definitions of market value. The International Valuations Standards Committee, based in London, has the following definition:

“(It is) the estimated amount for which an asset should exchange on the date of valuation between a willing buyer and a willing seller in an arm’s length transaction after proper marketing, wherein the parties had each acted knowledgeably, prudently, and without compulsion.”

The definition of market value published every quarter in the Glossary of *Rode’s*

Report on the South African Property Market is:

“(It is) the most probable price that a voluntary, informed purchaser will pay a voluntary, informed seller in a normal open-market (arms-length) transaction at the date of valuation – after allowing for proper marketing prior to the valuation date – when neither party is under any compulsion to sell or to purchase, other than their normal desire to transact.”

After explaining that Walmer Estate has a number of multi-storey houses and recording that Walmer Estate has many single residences with an R 3 zoning, he explains that the market values of many erven would have reflected the possibility of higher density developments being more viable and therefore more likely. He ultimately concludes that in regard to the property owned by the respondents, there will be no reduction in the true market value of the second applicant’s property as a result of the erection of the proposed building on the respondent’s property. At best for the applicants there is a dispute of fact in regard to whether or not the

proposed building will derogate from the value of the second applicant's property and on the basis of the rule in *Plascon Evans*, I conclude that the disqualifying factors in s 7(1)(b)(ii) were not present or at the very least that the version of the first respondent in regard to this issue has not been effectively challenged. The first respondent was not called upon to deal with the application on the basis that any of the disqualifying factors in s 7(1)(b)(ii) of the Act were present. It was therefor a little surprising that after I had heard full argument from counsel at the conclusion of the matter, including argument by the applicants' counsel in reply, that the latter submitted, almost as an afterthought, that if I was to rule against him on the other issues which he had advanced, the matter ought to be referred for the hearing of oral evidence in respect of the alleged derogation of the value of the second applicant's property. The fact is that the applicants came to court seeking final relief and nothing in their papers or in the heads of argument submitted on their behalf suggested that they would ask for a dispute to be referred for the hearing of oral evidence. In my view, having elected to proceed in the manner which they did, there is no basis for acceding to counsels' request, in fairness to the respondents, who have been prevented from carrying on with building operations since 6 October 2006 when the respondents agreed to an interim interdict restraining building operations pending the hearing of the review application.

[33] In the result, the application is dismissed with costs, the costs incurred by the first respondent to include the costs attendant upon the employment of two counsel.

R B CLEAVER