

**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

CASE NO: 4859/2024

In the matter between:

THE GREEN POINT RESIDENTS AND

RATEPAYERS ASSOCIATION

First Applicant

THE TRUSTEES FOR THE TIME BEING

OF THE RUSNIC TRUST (IT 2867/09)

Second Applicant

THOMAS FRANCIS GALLAGHER

Third Applicant

JACQUELINE FRANCIS GALLAGHER

Fourth Applicant

ANDREW VINCENT MCPHERSON

Fifth Applicant

CYRIL IAN GLASER

Sixth Applicant

BARBARA RUTH MEYERS

Seventh Applicant

And

LEONHARD GARTNER

First Respondent

ANDREAS ROBERT HERMANN PLANK

Second Respondent

JANINE ADUDE STEPHANIE PLANK

Third Respondent

THE CITY OF CAPE TOWN

Fourth Respondent

Heard: 16 April 2024

Delivered: Electronically on 03 June 2024

JUDGMENT

LEKHULENI J

INTRODUCTION

[1] This is an application for a temporary interdict pending a review of the fourth respondent's (*the City*) decision to approve building plans. The applicants urgently filed this application in court seeking an interdict to stop further construction on a property owned by the first, second, and third respondents (*the respondents*) until their application for review is determined. The application is divided into two parts, Part A and Part B. In Part A, the applicants seek an interdict to halt further construction on erf 1901 Green Point, also known as 7 Joubert Road, Green Point, Western Cape, owned by the respondents.

[2] In Part B, the applicants are seeking a declaratory order stating that the decision made by the City, in terms of section 7 of the National Building Regulations and Building Standards Act 103 of 1977, to approve the building plans for erf 1901 Green Point, under application number 1700038722 was unlawful. In addition, the applicants seek a declaratory order that the first to the third respondents be ordered to demolish all building work that was unlawfully erected on erf 1901 Greenpoint, in terms of any unlawfully approved building plans or otherwise, to ensure that any remaining built form, if any, on erf 1901 Greenpoint Camps Bay is fully compliant with the provisions of the Building Standard Act, the planning By-Law, the

Development Management Scheme (*'DMS'*) and the applicable restrictive title Deed conditions. This court is only required to consider Part A of this application.

[3] This is the second application for an interdict pending review regarding plans for the same erf and building project. After the construction of the building on the site began following the approval of the initial set of plans in 2021 (*'the 2021 plans'*), the same applicants mentioned above filed an application to review and set aside the approval of those plans (*'the first review application'*). In that application, the applicants sought an interdict *pendente lite* preventing further construction on erf 1901. After the opposed matter was properly ventilated in court for two days, Gamble J issued an interdict as prayed, and the construction thereafter ceased. The Part B relief in that first review application is still pending in this court, although both the City and the respondents have accepted that the approval of the 2021 plans must be set aside.

[4] Subsequent thereto, in 2023, the respondents submitted new plans to the City for approval. After giving the applicants an opportunity to comment on the new plans, the City carefully considered their comments, and on 27 November 2023, the City approved the new plans. Relying on the approval of the new plans regarding the same site, the respondents recommenced building on erf 1901 on 09 February 2024, contending that the interdict granted by Gamble J did not find application to the new plans. The applicants in this application accordingly seek an interdict to prevent further construction pending the hearing of Part B of this application, a review of the City's approval of the new building plans.

THE FACTUAL BACKGROUND

[5] To fully comprehend the pertinent issues that must be determined in this application and my view on this matter, it is necessary to provide a brief background of the facts underpinning the reasons that fortify my conclusion. The first, second and third respondents purchased erf 1901 in March 2020. The applicants' properties are all within the immediate vicinity of the erf 1901. On 22 February 2021, the City approved building plans to redevelop the respondents' property. The City approved the first set of building plans (the 2021 plans) for erf 1901 following a positive recommendation from a Building Control Officer (*the BCO*), Mr Craig Rolfe. Before construction could commence, the respondents' architect, Mr Raazik Nordien, approached neighbours to discuss the intended construction.

[6] Building work thereafter commenced on the property in July 2021, which led to the applicants raising complaints concerning the lawfulness of what had been approved. Eight months after construction began, the applicants launched a review and an interdict application under case number 6707/2022 to halt construction on erf 1901 based on building plans approved by the City on 22 February 2021. The application related to a proposed building the respondents sought to erect on the said property. The applicants sought the review and setting aside of the plans relating to such construction.

[7] In that application (the first application), the applicants contended, inter alia, that the existing ground level of the respondents' property should have been based on the City's Lidar Map of February 2021 rather than a survey undertaken by the

respondents' land surveyor, Mr Gluckman. It was further suggested that the Lidar Map reveals that the existing ground levels are lower than supposed by the respondents. The applicants asserted that the new dwelling was unsightly and objectionable and negatively affected the amenities enjoyed at their erfs, particularly erven 238 and 237. Furthermore, the applicants submitted that the new second dwelling was said to exceed the 6 metres (as measured from ground level to wall plate) and 8 metres (as measured from ground level to the top of the roof) height restrictions applicable to the respondents' property. This ground of complaint rested on the contention that the second dwelling was separate from the main dwelling house. If the second dwelling was not a separate structure (i.e., contained within the same building as the main dwelling), the height restrictions would be less onerous: 8 and 10 metres, respectively.

[8] After a two-day hearing, on 8 April 2022, Gamble J granted an interim interdict (*the Gamble order*) pending the determination of a review, thus stopping construction on the respondents' property pending the review. This present application is a sequel to that initial application brought by the same applicants against the same respondents regarding the same erf. The relevant part of the interim order Gamble J granted and attached to the applicants' founding affidavit stated:

"No further building work may take place pending the final determination of the relief sought in part B of the notice of motion under case number 6707/2022 (*the 2022 Review*"); The prohibition against further building work applies to any building work in terms of the original building plan dated 22 February 2021... or otherwise."

[9] After the interim interdict was granted on 8 April 2022, the respondents asserted that they sought advice from a professional town and regional planner, Mr Tommy Brümmer, who advised them that the applicants had good prospects in the review application, particularly on the separate structure and title deed issues. The City and the respondents conceded to the review application in respect of the first application.

[10] Pursuant to this advice and notwithstanding the interdict, the respondents decided to submit new building plans to the City for approval. According to the respondents, Mr Brümmer and the respondents' architect, Mr Nordien, were asked to ensure that new plans were wholly compliant with the DMS and the title deeds. To this end, the previous complaint raised by the applicant, particularly the separate structure issue, was addressed by linking the second dwelling to the main dwelling through a new bedroom and entrance lobby so that (a) the second dwelling was contained in the same building as the main dwelling and (b) the more generous height restrictions of 8 metres to the wall plate and 10 metres to the top of the roof applied. The respondents stated that they attended to all the other complaints the applicants raised in the previous application.

[11] The respondent submitted new building plans to the City for approval on 30 April 2022. On 26 April 2023, the City invited the applicants to comment on the latest plans. In response, the applicants' attorneys submitted an objection to the new plans. In their objection, the applicants repeated the complaints raised in their initial review application. The City engaged with the latest building plan application and the applicants' opposition. On 13 November 2023, the BCO of the City, Mr Nishaam

Boltman, wrote a detailed 15-page recommendation in which he recommended to the decision-maker, Mr Iraneous Philander, that the respondents' new plans be approved.

[12] The BCO's report, amongst others, notes that the new plans were circulated to all relevant internal departments, who confirmed that the plans complied with their requirements and that the BCO considered and evaluated the applicants' objections. Further, the BCO's report notes that the new plans complied with the DMS, the National Building Regulations and Building Standards Act 103 of 1997, and all other applicable laws. According to the report, the BCO considered and evaluated the applicants' objections and was satisfied that the new dwelling would not devalue adjoining and neighbouring properties. On 27 November 2023, the decision-maker considered the BCO's recommendations and the applicants' objections and approved the respondents' new building plans.

[13] Pursuant to the approval of the second building plans, the respondents recommenced construction on 8 February 2024. The applicants believed that such building construction was contrary to Gamble J's order of 8 April 2022, and consequently, on 1 March 2024, they launched an urgent application to 'Compel Compliance' with that order. The applicants believed that pending the determination of the first review, the respondents are forbidden from any building work on erf 1901 in accordance with any building plans approved by the City, submitted and approved after the grant of the order, even if such plans are lawful and unobjectionable.

[14] The applicants' application to compel compliance with the Gamble J order came before Adams AJ on 11 March 2024. Adams AJ heard arguments on the application and reserved her judgment. Judgment was delivered on 12 March 2024, and the application was struck from the roll for want of urgency. Subsequent thereto, the applicants approached this court to challenge the approval of the 2023 building plans. The applicants asserted that the important point to make is that if all the relief in part B of the notice of motion under case number 6707/2022 were conceded by the respondents, as alleged by the respondents, then the unlawful elements of the structure which exist on Erf 1901 should be demolished. If it is not conceded, then the court order of 8 April 2022 continues to prevent further building work on erf 1901, despite the approval of the revised building plan.

[15] Simply put, in the applicants' view, the order sought by them and granted by the court in April 2022 (the Gamble J order) not only interdicts the building pursuant to the 2021 building plans but also prohibits any construction on the property in terms of any other plans that may be approved until the review in Part B of that application is finalised. To this end, the applicants implored the court to grant the interdict halting the building construction at erf 1901 pending the review application in Part B of this application.

PRELIMINARY ISSUES

[16] At the hearing of this matter, the parties raised three preliminary issues, which I intend to deal with before I can consider this application on its merits. The preliminary points involve the City's application in terms of Rule 6(5)(e) of the

Uniform Rules, the respondents and the City's application to strike out, and the question of urgency. For the sake of convenience, I will deal with these preliminary points sequentially.

The Rule 6(5)(e) Application

[17] The City applied for leave in terms of Rule 6(5)(e) of the Uniform Rules to file an additional affidavit incorporating annexure CT12, a letter dated 12 April 2022. The City's application is premised on the grounds that paragraph 50 of the applicants' heads of argument asserts that the City relied on the plans to assess the single appearance issue. According to the City, this claim was made for the first time in the heads of argument.

[18] Furthermore, the City avers that the applicants' claim is an unfounded speculation, as nothing on the paper supports it. The City asserted that this claim is factually incorrect as it did not rely on the plans to judge the single appearance requirement and that this factual error in the applicants' heads of argument must be corrected. The only way the City can correct this factual error, so the contention proceeded, is to ask the court's permission to file Annexure CT12, as the rules do not contemplate an application to strike out new material raised in the heads of argument.

[19] Meanwhile, the applicants objected to this application and contended that no case was made for the reception of further evidence as requested by the City. The applicants particularly impugned paragraph 3 of the affidavit supporting the Rule

(6)(5)(e) application in which it is stated that the applicants' claim that the City relied on the plans to assess the single appearance issue was made for the first time in the heads and amounted to unfounded speculation. Mr Irish, the lead Counsel for the applicants, submitted that this allegation was not made for the first time in the heads of argument. According to Mr Irish, these allegations came directly from the City's answering affidavit.

[20] To this end, Counsel referred the court to paragraph 77.4 of the City's answering affidavit in which it was asserted that the BCO recorded that *'in relation to the new plans for which approval was sought, that whereas the 2021 plan showed the second dwelling as separate from the existing dwelling, the new plan shows them within the same structure – this is because the main dwelling and the second dwelling are shown as connected at basement level.'* According to Mr Irish, this refers to the two sets of plans, then 2021 and 2023 plans.

[21] In addition, Mr Irish referred the court to the BCOs' report, in particular, paragraph 28, where it is recorded that *'the Land Use Management Section considered whether the building plan complies with the DMS and other land use planning laws (one of which is the structural appearance). The issues raised by the objectors and the owners' responses are included in the assessment.'* It was the Counsel's submission that one of the issues raised by the objectors was the appearance of the building. Counsel submitted that the document that the City intended to introduce was not considered by the BCO, as appears in paragraph 28.5 of his report.

[22] It is trite that this court has a discretion in permitting the filing of further affidavits or relevant documents in the context of the fundamental consideration that a matter should be adjudicated upon all the facts pertinent to the issues in dispute. I have considered the submissions made by the parties and the objection of Mr Irish; and I believe that for the court to make an informed decision, all the issues must be placed before the court. I have also carefully considered the BCO's report and the City's answering affidavit, and I am of the view that there is no prejudice that the applicants will suffer if the City's application is granted. In my view, all the disputed issues must be properly ventilated to enable the court to make an informed decision. Therefore, the City's application must succeed.

The Striking out application

[23] The first, second, and third respondents launched an interlocutory application to strike out an affidavit deposed to by Mr Petrus Johannes Lerm dated 08 April 2024, which is attached to the applicants' replying affidavit. The grounds of attack raised by the respondents are two-fold: Namely, that Mr Lerm's affidavit contains a new matter in reply and amounts to inadmissible evidence regarding the interpretation of the City's Compliance Advisory 14 of 2021 and the Development Management Scheme (*'DMS'*).

[24] In his affidavit, Mr Lerm, among others, dealt with the similarities and differences between the respondents' 2021 approved plans and the 2023 plans. Mr Lerm also dealt with the existing ground level, the separate structure, and the singular appearance issue concerning the two buildings in erf 1901. The

respondents averred that Mr Lerm's evidence regarding the separate structure and the separate appearance of the building in erf 1901 involves both factual evidence constituting new matter in reply and evidence as to the meaning of the DMS.

[25] According to the respondents, the papers in the main application clearly show that Urban Dynamics has assisted the applicants since at least 23 May 2023. To this end, the respondents asserted that the applicants do not explain why, in the month they took to prepare their application, they did not procure Mr Lerm's assistance, especially considering that Mr Lerm is a town planner at Urban Dynamics. In the respondents' view, the delivery of Mr Lerm's affidavit long after both the founding papers and the answering papers have been filed and a mere week before the hearing of the main application should not be countenanced. The respondents further stated that they were prejudiced by this, and they urged the court to strike out Mr Lerm's affidavit with costs.

[26] The City also launched a similar application to strike out Mr Lerm's affidavit. The grounds for the City's striking out application are in substance aligned to the grounds raised by the first, second and third respondents. However, in addition to the grounds raised by the respondents, the City asserted that Mr Lerm's report contains his views about whether the 2023 plans are lawful with reference to his opinions about the interpretation of the planning By-Law and DMS.

[27] The City further impugned Mr Lerm's affidavit because it alleges that Mr Lerm impermissibly expressed his opinion on the correct interpretation afforded to relevant sections of the DMS, the By-Law and the City's Compliance Advisory 14 of 2021.

According to the City, questions of law are for the court to determine and not for witnesses, including experts expressing opinions. For this reason, the City asserted that Mr Lerm's report and references to it in the replying affidavit are inadmissible and should be struck out.

[28] In addition, the City stated that the applicants had tried to shift their case in reply. In their founding affidavit, the City contended that the applicants relied on a clear right to the preservation of the character and ambience of the neighbourhood, whether such emanates from the provisions of the Building Standard Act or the regulatory environment established by the Planning By-Law and the associated DMS. However, the applicants sought to invoke other rights in the replying affidavit. The City asserted that in the replying affidavit, the applicants contended that they do not seek to protect their right to pursue an administrative review of a planning decision but seek to protect the rights as immediate neighbours who will be grossly and adversely affected by the completion of the intended building on a neighbouring site. Those rights are the rights to privacy and the enjoyment of the amenities of their properties, including sunlight, tranquillity, and a sense of space. To this end, the City averred that the applicants had denied the respondents a proper opportunity to address the new matter in reply.

[29] The applicants opposed the striking applications. They asserted that in reply to the respondents' answering affidavit, they were entitled to refute the allegations and evidence contained therein with evidence in reply. The applicants stated that Mr Lerm's affidavit confirms the correctness of the allegations made in the founding

affidavit and places in issue (“disputes”) the denial of those allegations by the first to third respondents and the City in their answering affidavits.

[30] Furthermore, the applicants contended that the relevant allegations in the founding affidavit juxtaposed with the responses in both sets of answering affidavits and in the replying affidavit demonstrate that the applicants’ case both in the sense of the cause of action and the nature of the evidence proffered in support thereof has remained the same throughout. According to the applicants, no new case is made in the replying affidavit. To the extent that Mr Lerm’s affidavit constituted further evidence supporting the same case, the applicants asserted that same is wholly permissible.

[31] A decision on whether to strike out an affidavit or averments in an affidavit is discretionary in nature. (See *Rail Commuters’ Action Group v Transnet Ltd* 2006 (6) SA 68 (C) at 83E). The critical consideration is that of prejudice. It is well established that an applicant must make out his case in the founding affidavit. Generally, all the essential averments the applicant must allege must be in the founding affidavit filed in support of his application. The respondent is entitled to know what case he or she must meet and respond to it. *National Council of SPCA v Openshaw* 2008 (5) SA 339 (SCA) at para 29. An applicant will not generally be allowed to make or supplement his or her case in the replying affidavit.

[32] In other words, an applicant cannot supplement his case by adducing facts in his replying affidavit, which should have been in the original affidavit, and if he does so, such facts, as a rule, must be struck out. The applicant may, however, bring in a fresh matter in a replying affidavit if this is by way of reply to a defence raised by the

respondent and is not a matter which should have been in the original founding affidavit to show the applicants' course of action.

[33] In this case, I had the opportunity to thoroughly examine the founding affidavit of the applicants, the answering affidavits of the respondents, and the applicants' replying affidavit and I am of the view that Mr Lerm's affidavit attached to the replying affidavit is in response to the issues raised by the respondents in their answering affidavit. It has been the applicants' case throughout that the 2021 and 2023 set of plans contained unlawful identical elements. To this end, the applicants asserted that the Gamble J order was still in force as the 2023 plans were similar to the 2021 plans, which are the subject of the first review application. In their answering affidavits, the respondents denied these allegations. In response to this denial, Mr Lerm restates the applicants' objections with specific reference to the differences and the alleged similarities between the first and second plans.

[34] As correctly pointed out by Mr Irish, Mr Lerm emphasises the applicants' objections with specific reference to the alleged differences and similarities between the first and second plans. In my view, the reply by Mr Lerm does not constitute a new matter in reply. Instead, it restates and reinforces the observations of Mr Burnett, the deponent of the applicants' founding affidavit and places in issue specific allegations in the answering affidavit.

[35] I am also mindful of Mr Paschke's (the lead Counsel for the City) argument that the applicants have shifted their case in reply and pleaded new rights in the replying affidavit that they intended to protect. I do not agree with this proposition.

The rights that the applicants sought to protect were explicitly expressed in reply. However, in substance, the same rights are averred in the founding affidavit. In any event, as previously stated, I am of the view that all the issues must be properly ventilated to enable the court to make an informed decision in the matter.

[36] More so, in *Drift Supersand (Pty) Ltd v Mogale City Local Municipality and Another* [2017] 4 All SA 624 (SCA) at para 10, the Supreme Court of Appeal observed that there is today a tendency to permit greater flexibility than may previously have been the case to admit further evidence in reply. The court noted that if the new matter in the replying affidavit is in answer to a defence raised by the respondent and is not such that it should have been included in the founding affidavit to set out a case of action, the court will refuse an application to strike out. (see *Airports Company South Africa Ltd v ISO Leisure OR Tambo (Pty) Ltd and another* 2011 (4) SA 642 (GSJ)).

[37] The respondent also impugned Mr Lerm's affidavit on the grounds that it contains inadmissible evidence regarding the interpretation of the City's Compliance Advisory 14 of 2021 and the Development Management Scheme. It is trite that courts are the sole arbiters of legislative interpretation and that they are called to do so when a dispute arises regarding such interpretation, more particularly when it occurs between persons operating within a regulated environment who do not agree on the proper interpretation or manner of application of a provision. As astutely noted by Mr Baguley, the first, second and third respondents' junior Counsel, it is well established that the interpretation of documents, whether it is a statute, contract, or any other kind of document, is a matter of law and not of fact and, accordingly

interpretation is matter for the court and not for witnesses. *KPMG v Securefin Ltd* 2009 (4) SA 399 (SCA) at para 39.

[38] In this case, I do not understand Mr Lerm's affidavit to be impermissibly expressing his opinion on the correct interpretation afforded to the relevant sections of the DMS and the By-Law. In my view, he is expressing his understanding of the meaning or effect of the applicable legislation or regulation. As contended by the applicants' Counsel, deponents who operate in a regulated environment routinely express their understanding of the meaning or effect of the applicable legislation or regulation they are required to observe or implement. That understanding does not, in my view, constitute the deponent's interpretation of a legislative provision. It only reflects his understanding and knowledge of the provision or of the way it has been applied in his experience. As noted by Mr Irish, it is no different from how the City's planning officials or the respondents' own town planners understand and apply a provision.

[39] From the totality of the evidence, I am of the view that the affidavit of Mr Lerm does not raise new evidence and does not amount to the interpretation of the City's Compliance Advisory 14 of 2021 and the DMS. To the extent that Mr Lerm's affidavit constitutes further evidence supporting the applicants' case as pleaded in the founding affidavit, it is wholly permissible. In my view, no case has been made for the striking out of Mr Lerm's report, any part thereof, or any part of the replying affidavit. Thus, the respondents' application for striking out Mr Lerm's affidavit must fail.

Urgency

[40] The respondents took issue with the urgency with which this application was brought. Mr Muller, the lead Counsel for the first, second and third respondent, submitted that this application was not urgent and should be struck off the roll. Mr Muller submitted that the City approved the first plans on 22 February 2021, and the applicants launched the first review and interdict application on 8 April 2022. Subsequently, the respondents submitted the second set of plans to the City on 30 April 2022. Notwithstanding the applicants' objections, the City approved the second plans on 27 November 2023, and the building work recommenced on 7 February 2024. Counsel submitted that the applicants admitted that they were advised of the approval of the plans on 27 November 2023.

[41] Mr Muller submitted that on that day, the applicants knew or ought to have known that the respondents would commence building in accordance with the new plans. Mr Muller further submitted that instead of launching their application at the end of November 2023, as they should have, the applicants waited almost three and a half months to bring their application. In Counsel's view, this amounted to a self-created urgency that would not usually be countenanced. (*see Black Sash Trust v Minister of Social Development* 2017 (3) SA 335 (CC) at para 36).

[42] Mr Paschke's argument for urgency on behalf of the City aligns with Mr Muller's argument. To avoid prolixity, I will not repeat his argument herein, save to add that he submitted the Gamble J order, granted no relief or any interdict against the City. According to Mr Paschke, it can never be interpreted to prevent the City

from deciding on new building plan applications with respect to the property. Mr Paschke submitted that the City cannot be in contempt of an order which did not grant any relief against it. Counsel argued that there is nothing 'extraordinary' about the City's conduct and that there is no 'constructive contempt' of the Gamble J order as suggested in reply.

[43] On the other hand, the applicants contended that the matter was urgent. According to the applicants, the matter is urgent because, with every day that passes, the respondents continue their unlawful activities in what appears to be a transparent attempt to build themselves into what has been referred to in case law as "*an impregnable position*". The applicants asserted that the mere circumstances that the respondents have not, of their own volition, ceased building seems to demonstrate a belief that what they are currently building, even if unlawful, will not be required to be demolished in the fullness of time.

[44] Mr Irish submitted on behalf of the applicants that the City approved the 2023 plans on 27 November 2023. Counsel pointed out that as of the date of approval of the 2023 plans, an extant interdict was in place, which prohibited further building on the site pending the determination of the review. Further, Counsel submitted that as at the date of approval of the new plans, the new plans contained several features, the legality of which would be determined in the pending review.

[45] It was submitted on behalf of the applicants that on 7 February 2024, in response to seeing some activity on erf 1901, the respondents advised a trustee of the second applicant that they were doing some "*painting work*". On 12 February 2024, the applicants' attorney formally demanded a cessation of building works on

erf 1901, which was refused on Friday 14 February 2024. On 25 February 2024, the respondents formally notified their neighbours that they intended to recommence building work. On 7 March 2024, the applicants launched this application to seek interim interdictory relief as a matter of urgency to prevent further building work from taking place at erf 1901 in accordance with the currently approved building plans or otherwise, pending the determination of the relief sought in Part B.

[46] In terms of Rule 6(12) of the Uniform Rules of Court, an applicant is, in law, required to set out the circumstances which justify the hearing of an application on an urgent basis and the basis on which it contends that it would not obtain substantial redress at a hearing in due course. Rule 6(12)(b) requires two things of an applicant in an urgent application. *First*, the applicant must explicitly state the circumstances that he avers render the matter urgent and, *secondly*, why he claims that he would not be afforded substantial redress at a hearing in due course.

[47] It is trite that where an application is brought based on urgency, the rules of court permit a court to dispense with the forms and service usually required and dispose of it as it deems fit. (Rule 6(12)(a)). Where the application lacks the requisite element or degree of urgency, the Court can, for that reason, decline to exercise its powers under Rule 6(12)(a). (See *Commissioner, South African Revenue Services v Hawker Air Services (Pty) LTD* 2006 (4) SA 292 (SCA) para 9). In other words, where the facts indicate that the urgency is self-created, an applicant will not be entertained, and the application will be struck from the roll. (see *W.M.W v S.W* (26912/17) [2023] ZAGPJHC 710 (15 June 2023)).

[48] In the present matter, it is not in dispute that the plans were approved on 27 November 2023. The applicants received notification of the approval of the 2023 plans on 27 November 2023. However, the applicants asserted that they did not expect the respondents to infringe the terms of the existing interdict nor to commence construction without first addressing the pending relief in part B. Simply put, the applicants contend that they did not immediately approach the court after being informed about the 2023 approval because they believed that the Gamble J order precluded the respondents from building in accordance with the 2023 plans until the review in Part B of that application is finalised.

[49] I have some difficulty with this proposition. This proposition suggests that the respondents are precluded from building on the property even if the City were to approve a separate building plans that complies with the applicable statutory framework and satisfies all the applicants' objections. This, in my view, cannot be correct. The interdict granted was in respect of the 2021 plans, which were found to be wanting and infringing the DMS and the Building Standard Act. I do not understand the Gamble J order to interdict the building on erf 1901 based on new plans which comply with the relevant legislation and the applicable regulations. I also do not understand the 2022 interdict to mean that the respondents are forbidden from building in accordance with plans not yet considered by the Court, which are different to the first plans, which have been approved in terms of the Building Standard Act after an exhaustive process, and which are entirely compliant with the law.

[50] As correctly pointed out by Mr Paschke, the inclusion of the words '*or otherwise*' at the end of the Gamble J order prohibiting building in terms of certain approved plans cannot be interpreted to preclude building in terms of plans that have not yet been drawn up let alone submitted or considered by the City or to prohibit the City from taking further decisions to regularise any irregularities. That interpretation would mean that the court's order would effectively interfere with future exercises of statutory power by the City. In my view, that is not what is intended by the order, as that would undermine the constitutional separation of powers.

[51] I am further of the firm view that the court that considered the 2021 order did not intend to grant an interdict to stop building construction based on lawful plans that comply with the statutory framework. As correctly pointed out by Mr Muller, it makes no sense that a Court would interdict building plans that it has not considered, do not yet exist, and which may be very different from the plans which gave rise to the review and are wholly compliant with the law. As previously stated, I am of the view that the interdict granted on 08 April 2022 cannot halt the building in terms of different plans submitted and approved after the order was issued.

[52] As stated above, the prohibitory interdict of the nature contended for by the applicants is impermissible in our law as it would violate the constitutional separation of powers. When the interdict was granted, the 2023 plans had not yet been considered and approved by the City. The applicants cannot obtain a prohibitory interdict against the exercise of public powers by the City in the fulfilment of its developmental mandate for building plans and land-use applications that have not even yet been made, let alone considered or decided.

[53] The applicants knew on 27 November 2023 that the 2023 building plans had been approved by the City. In my view, the applicants should have known that the respondents would commence building in accordance with those plans. They contend that they had no reason to think that the respondents would commence construction in accordance with the second building plans because there was an interdict in place. As noted by the respondents, this is unsustainable. The sole purpose of submitting the second building plans was to avoid the problems of the impugned building plans of 2021. It is also incontestable that the respondents submitted the second plans for approval to ensure that the building on the plot complies with the relevant statutory framework. As explained above, the applicants' interpretation of the Gamble J order is unsustainable.

[54] In my view, as soon as the approval of the plans came to their attention, the applicants should have written to the respondents and asked for assurance that no work would be carried out based on the second plans if they genuinely believed that the order prevented construction according to those plans. They did not do so. Instead, they sat back. Crucially, the applicants had the new plans at their disposal. They should have applied for their interdict before the end of last year (2023) to stop any building in terms of the new plans. They have waited too long, and whatever urgency exists, in my view, is self-created.

[55] Notably, the communication exchange between the parties between 7 February 2024 and 14 February 2024 makes it abundantly clear that the urgency pleaded by the applicants is self-created. On 12 February 2024, the applicants' legal

representative addressed a letter to the respondents' legal representative. The relevant parts of that correspondent states:

“ ...

3. The applicants foresaw, at the time that the interdict application was sought, that your clients may attempt to have further building plans approved, in an attempt to continue the building work and on that basis, the order was granted in the terms that it was. We know this, because your client told the undersigned they would want to do so, when a meeting was held at our offices prior to the interdict order.

4. We understand that your clients have in fact now:

4.1 Proceeded to have such further building plans approved; and

4.2 *Recommended building work pursuant to those approved building plans.*

5. Such conduct is blatantly unlawful and in clear breach of the existing court order.

6. Please communicate with your clients immediately, in order to cease the building work without any further delay.” (emphasis added)

[56] In response to this correspondence, on 14 February 2024, the respondents' legal representative asserted in paragraph 24 of that correspondence that their clients intended to proceed with the building work without any delays. In addition, the respondents' legal representative indicated that should the applicants proceed to institute any legal action against them, such legal action would be vigorously opposed. Notwithstanding this clear and unequivocal pronouncement, the applicants still took over three weeks to launch their application.

[57] I appreciate that the applicant sought information before launching this application and that there was an enforcement application which was struck off the

roll. However, I believe that the urgency with which this application was brought about was self-created by the applicants. The applicants knew of the approved plans as of 27 November 2023 and did nothing to stop the respondents from recommencing the building construction. For these reasons, the applicants' application must ordinarily fail due to their decision to wait three months to approach the urgent court and their incomplete and paltry explanations for the delay.

THE APPLICANTS' APPLICATION ON THE MERITS

[58] Ordinarily, the above finding on urgency would result in the dismissal of this interdictory application. However, for the sake of completeness and greater certainty on the issues raised, I will consider the applicants' application on the merits. The Applicant seeks an interdict against the respondents, including the City, pending the review application in Part B. The traditional formulation of the requirements for an interim interdict is that the applicant must establish (a) a prima facie right (b) a reasonable apprehension of irreparable harm and imminent harm to the right if the interdict is not granted, (c) the balance of convenience must favour the grant of the interdict; and (d) the applicant must have no other remedy. (See *Olympic Passenger Service (Pty) Ltd v Ramlagan* 1957 (2) SA 382 (D) at 383A-C; *Pietermaritzburg City Council v Local Road Transportation Board* 1959 (2) SA 758 (N) at 772C-E).

Prima facie right

[59] In determining whether a prima facie right has been established, the right need not be shown by a balance of probabilities. If it is prima facie established,

though open to some doubt, that is sufficient. *Webster v Mitchell* 1948 (1) SA 1186 (W) at 1189; *Knox-D'Arcy Ltd v Jamieson* 1995 (2) SA 579 (W) at 592H – 593B. In cases where there is a dispute of fact, the proper approach is to take the facts set out by the applicant, together with any facts as set out by the respondent that the applicant cannot dispute, and to consider whether, having regard to the inherent probabilities, the applicant should on those facts obtain final relief. The facts set up in contradiction by the respondent then fall to be considered. If serious doubt is thrown upon the applicants' case, he cannot obtain temporary relief. (see *LF Boshoff Investments (Pty) Ltd v Cape Town Municipality* 1969 (2) SA 256 (C) at 267E-F.

[60] The Court has a general and overriding discretion whether to grant or refuse an application for interim relief. In this case, the respondents rely on the likelihood of success in establishing their prima facie right to grant the order. In their founding affidavit, the applicants asserted a clear right to protect and enforce their rights and interests pertaining to their respective properties. The applicants also relied on a clear right to preserve the neighbourhood's character and ambience, whether such emanate from the provisions of the Building Standards Act or the regulatory environment established by the Planning By-Law and the associated DMS.

[61] In their replying affidavit, the applicants asserted that they wish to protect their rights as immediate neighbours who will be grossly and adversely affected by the completion of the intended building on a neighbouring site. The applicants asserted that the rights they seek to protect are the rights to privacy and the enjoyment of the amenities of their properties, including sunlight, tranquillity, and a sense of space and property value.

[62] As previously stated, the applicants asserted their right to a review as their anchor *prima facie* right in their founding papers. They focused on demonstrating their prospects of success on review. At the hearing of this application, the court was referred to various grounds supporting the applicants' argument that they have very good prospects of success in Part B and that the interdict should be granted. Furthermore, the applicants relied on a line of cases where the courts held that the prospects of success in contemplated review or demolition proceedings represent the measure of the strength or otherwise of the alleged right that the applicants must establish *prima facie* to obtain interim relief. (See *Searle v Mossel Bay Municipality and Other* [2009] ZAWCHC 9 at para 6).

[63] This court heard full arguments regarding the grounds of review during the hearing of this matter. I have peeked into the grounds of review raised in the main review application, and I believe that that issue will be determined by the review court dealing with Part B. At this stage of the proceedings, it is not appropriate for this court to determine the cogency of the review grounds and usurp the pending function of the review court and thereby anticipate its decision.

[64] However, I must stress the fact that ever since the decision of the Constitutional Court in *National Treasury and Others v Opposition to Urban Tolling Alliance and Others* 2012 (6) SA 223 (CC) ('OUTA'), there has been a considerable shift on the applicable test in applications for an interdict pending review proceedings. To obtain a temporary interdict, it is no longer enough for an applicant to contend that it has a good review case. In terms of *OUTA*, the *prima facie* right that an applicant must establish is not merely the right to approach a court to review

an administrative decision. It is a right to which irreparable harm will ensue if not protected by an interdict. For completeness, in paragraph 50, the court stated:

‘An interdict is meant to prevent future conduct and not decisions already made. Quite apart from the right to review and to set aside impugned decisions, the applicants should have demonstrated a prima facie right that is threatened by an impending or imminent irreparable harm. The right to review the impugned decisions did not require any preservation pendente lite.’ (my emphasis).

[65] Simply put, to interdict building work pending a review, a prima facie right is not established merely if grounds of review show prospects of success. Expressed differently, there could be no consideration of irreparable harm without a prima facie right to be protected from future irreparable harm. The right to review an allegedly unlawful decision cannot form the basis for interim interdictory relief pending a review. (see *Joostenbergvlakte Community Forum v Montana Development Company (Pty) Ltd*, Case Number: 12205/2023 ZAWCHC (28 December 2023)). Crucially, the full court of this division in *Khoin and Others v Jenkins and Others* [2023] 1 All SA 110 (WCC) relied on *OUTA* in determining an application for a construction interdict pending review. The court found that protecting the right to review the unlawful decision cannot form the basis for interim relief.

[66] Considering the principles espoused in these cases, I share the views expressed by Mr Paschke that the following is the approach to deciding whether to grant an interim interdict preventing construction pending the determination of a judicial review of the administrative decisions that authorise the development:

[67] First, an applicant must demonstrate that construction threatens a prima facie right with impending or imminent irreparable harm. Secondly, there is a jurisdictional

requirement to demonstrate that construction will irreparably harm a substantive right other than the right to review. Thirdly, demonstrating prospects of success in the review is necessary but insufficient to establish a prima facie right to a construction interdict. Fourth, if a substantive right other than the right to review is not threatened by impending or imminent irreparable harm, then the court does not reach the review grounds, and the interim interdict will be refused even if the review has good prospects. Fifth, if an administrative decision authorises construction which threatens impending or imminent irreparable harm to a prima facie right other than the right to review, then the court considers whether the proposed grounds for reviewing the decision have good prospects.

[68] It must be stressed that the rights relied on by the applicants in the present case mirror, almost exactly, the rights relied on by the applicants in *Joostenbergvlakte Community Forum v Montana Development Company (Pty) Ltd* ZAWCHC case 12205/2023 (28 December 2023). In *Joostenbergvlakte*, like in the present case, the applicants sought an interim interdict stopping building work pending a review and setting aside of building plans approved by the City. Like in the present case, the applicants in *Joostenbergvlakte* contended that the City's approval of the building plans conflicted with the Building Standard Act and the provisions of the Municipal Planning By-law, the DMS and certain restrictive title deed conditions.

[69] The court summarised the rights relied on by the applicants; that they included: the right of the applicants in their properties, the right to ensure compliance with the zoning scheme, the right to take appropriate legal steps to ensure that no one unlawfully diminishes the amenities which flow from the zoning of property, the

rights of neighbours to enforce compliance with the zoning scheme, the right to see that buildings are erected lawfully, and the right that the law be complied with in respect of building plans. The Court held that the applicants were thus asserting their rights to just administrative action and to a right of review. Relying on the Constitutional Court's decision in *Outa*, the Court found that the applicants had not established a prima facie right for the purposes of the interim interdictory relief they sought because their right of review was unaffected by the building work carrying on and did not require protection.

[70] In my view, the court's decision in *Joostenbergvlakte* is underpinned by sound reasoning. Similarly, the rights relied on by the applicants in the present case mirror the rights relied on by the *Joostenbergvlakte* applicants. The applicants assert their right to just administrative action, the right to privacy and enjoyment of the amenities of their properties, including sunlight, tranquillity, and property value and their right of review. These constitutional rights, however, are rights which reside in everyone. They are not sufficient, without more, to find a prima facie right for the purposes of interim interdictory relief. The building work does not affect the rights the applicants seek to protect.

Irreparable harm

[71] The applicants have not established that irreparable harm would ensue if their rights mentioned above are not protected by an interdict. This is so because the applicants have asserted their right to just administrative action, to property, and their right of review. However, the building work undertaken on the respondents' property does not threaten those rights. As astutely noted by Mr Muller, the

respondents' lead Counsel, the applicants do no more than repeat the overused and hackneyed mantra that, if an interdict is not granted, the respondents will build themselves into an impregnable position. In paragraph 147 of the founding affidavit, the applicants stated:

'If the proposed development is constructed pursuant to the 2023 plans, these rights will be rendered nugatory as there is little prospect of the applicants securing a demolition order once the building is finally constructed. Regularisation will inevitably follow, and the City, given its pro-development stance will likely approve any departures applied for in the face of extant constructed buildings – the way the 2023 plans were approved is evident of what I record in this paragraph.'

[72] This is wholly insufficient. a right to demolition arises only if non-compliance with the law cannot be remedied. Our Courts have emphasised that if building plans are set aside and the building cannot be remedied, demolition relief is available at the instance of the local authority or interested parties. (See *Lester v Ndlambe Municipality* 2015 (6) SA 283 (SCA) at paras 18 to 20; *BSB International Link v Readam SA* 2016 (4) SA 83 (SCA)).

[73] More so, if the reviewing court upholds the review and decides that the building plan approval is invalid, the construction will not irreparably harm the rights to privacy, sunlight, tranquillity, and property value that the applicant seeks to protect. In other words, if the review succeeds, the ordinary remedy would be to remit the matter to the decision-maker for reconsideration. The City will decide on any remitted application in accordance with the law, regardless of whether the structure has already been built.

[74] Alternatively, as stated above, if the building is found irredeemably unlawful, any interested person may seek a demolition relief against the respondents. The City as well would have to consider issuing and enforcing a demolition directive to the extent necessary under section 128 of the Planning By-Law and or National Building Regulation A25. Thus, the unlawful building or part thereof will be demolished. Simply put, if the applicants are successful in their review, whatever has been built unlawfully can be removed to their benefit. Thus, the construction will not harm their rights.

[75] On the other hand, as correctly expressed by Mr Paschke, if the construction continues and the review court dismisses the review and decides that the building plan approval is valid, the construction will not have infringed any of the applicants' rights since the applicants do not have a right to prevent lawful development. As previously stated, quite apart from the right to review and set aside impugned decisions, the applicants should demonstrate a prima facie right threatened by impending or imminent irreparable harm. In my view, that has not been established in this case. Furthermore, any prejudice that the applicants may suffer is accordingly not irreparable. The City points out, correctly, in my view, that the availability of regularisation post-review or, if appropriate, a demolition order would repair any harm suffered in the interim.

The balance of convenience

[76] In determining the balance of convenience, the court must assess the harm that the respondents may suffer if the interim order is granted with the prejudice the applicants will face if it is refused. In addition, the balance of convenience inquiry must thoroughly probe whether and to what extent the restraining order will probably intrude into the exclusive terrain of another branch of government. The enquiry must properly regard what may be called separation of powers harm. (See *National Treasury and Others v Opposition to Urban Tolling Alliance and Others* 2012 (6) SA 223 (CC) para 47).

[77] It is common cause that the City has the constitutional and statutory mandate and authority to approve building plans and regulate land use within its jurisdiction. The City uses its mandate and applies the By-Law and Building Act to facilitate the lawful development and use of land within the City. In my view, the granting of an interdict has the potential to thwart development. This will affect the discharge of the City's constitutional developmental duty as envisaged in sections 152(1)(c) and 153 of the Constitution. I am of the view that the balance of convenience does not favour the applicants for the granting of an interim interdict. There is no imminent irreparable harm that the applicants would suffer if the interim interdict is not granted.

Alternative remedy

[78] The applicants, in my view, have an alternative remedy. The review application is the applicants' alternative remedy. Should they be able to establish

reviewable irregularities, the review court will be able to grant suitable remedies to protect their rights.

Conclusion

[79] Given all these considerations, I am of the view that the applicants have not demonstrated an entitlement to a temporary interdict. The applicants' application for an interim interdict to halt the construction at erf 1901 must fail.

Costs

[80] As far as the issue of costs is concerned, it is trite that a court considering an order of costs exercises a discretion and that the court's discretion must be exercised judicially. (see *Ferreira v Levin NO and Others; Vreyenhoek and Others v Powell NO and Others* 1996 (2) SA 621 (CC); *Motaung v Makubela and Another, NNO; Motaung v Mothiba NO* 1975 (1) SA 618 (O) at 631A. In this case, there are no reasons advanced for a departure from the normal rule that costs follow the event. I am of the view that the applicants must pay the costs of this application, including such costs occasioned by the employment of two counsels for the respondents and for the City. I am further of the view that each party must pay its own costs in respect of the striking out application and the Rule 6(5)(e) application.

Order

[81] The applicants' application for an interim interdict is hereby dismissed.

81.1 The striking-out application is hereby dismissed.

81.2 The fourth respondent's application in terms of Rule 6(5)(e) of the Uniform Rule is hereby granted.

81.3 The applicants are ordered to pay the costs of this application jointly and severally, including such costs occasioned by the employment of two counsels for the respondents and the City.

81.4 Each party will pay its own costs in respect of the striking out application and the rule 6(5)(e) application.

LEKHULENI JD

JUDGE OF THE HIGH COURT

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