



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

Case number: 15284/2023

In the matter between:

PETER JACK	First Applicant
ELSA FOURIE	Second Applicant
EBEN FOURIE	Third Applicant
DONALD DE BEEER	Fourth Applicant
RONEL STANDER	Fifth Applicant
JOHAN VAN DER MERWE	Sixth Applicant
MIKE RUSSON	Seventh Applicant

and

SALDANHA BAY MUNICIPALITY	First Respondent
JOHAN JACOBS	Second Respondent
LEENTJIESKLIP CHALET OWNERS ASSOCIATION	Third Respondent

Coram: Acting Justice P Farlam

Heard: 16 August 2024, further submissions 19 August 2024

Delivered: 9 October 2024

JUDGMENT

FARLAM AJ:

INTRODUCTION

- [1] The applicants and the second respondent lease sites in the Leentjiesklip caravan park on the edge of the Langebaan beach, in an area falling under the control of the first respondent ("the Municipality"). The applicants allege that the Municipality's approvals of building plans for the house occupied by the second respondent ("Jacobs") were unlawful and fall to be reviewed and set aside. They also seek an order directing Jacobs to demolish a cellar constructed below the house on his leased stand in the caravan park.
- [2] Jacobs is the only respondent to oppose the application.¹ The Municipality has abided the application, after being assured that no costs would be sought against it in that eventuality. The third respondent, the Leentjiesklip Chalet Owners Association ("LCOA"), which was merely cited by virtue of its interest in the matter, has understandably not participated at all.
- [3] I address the grounds of review below, after outlining the applicable regulatory framework, before turning to the further relief sought. But before doing so,

¹ Jacobs' answering affidavit was filed out of time and he accordingly had to seek condonation for the late delivery thereof. As no real prejudice was occasioned by the late filing and the condonation application was consequently not opposed, I accordingly indicated at the hearing that condonation would be granted (as it is, in paragraph 1 of the order below).

comments are apposite on Jacobs' challenge to the first applicant's standing, as well as the applicants' treatment of the record provided by the Municipality.

THE FIRST APPLICANT'S STANDING

- [4] As mentioned, the applicants all rent erven in the Leentjiesklip caravan park ("the Caravan Park"). On the face of it, each applicant has an interest in the rules and practice of the Caravan Park being adhered to and enforced. Jacobs has nevertheless placed the standing of the first applicant ("Jack") in dispute. This is because Jack is not an '*immediate neighbour*' of Jacobs but instead resides about 550 metres away in the Caravan Park, with many other stands in between. According to the second respondent, that means that Jack's consent was not required for the building works and that he consequently does not have a "direct and substantial interest" in the review application.
- [5] That submission is wrong for several reasons. Significantly, it fails to appreciate that the Municipality's impugned approvals involved administrative action, and that the applicants' challenges thereto accordingly implicated section 33 of the Constitution (the right to just administrative action) and were therefore governed by the standing provisions pertaining to breaches of constitutional rights, enumerated in section 38 of the Constitution.² The more restrictive common-law standing rules are therefore not of application, and it is unnecessary for Jack to have a direct and substantial interest in Jacobs'

² See e.g. *Giant Concerts CC v Rinaldo Investments (Pty) Ltd* 2013 (3) BCLR 251 (CC) para 29, and High Court decisions such as *Premier of KwaZulu-Natal and others v KwaZulu-Natal Gaming and Betting Board and others* [2019] 3 All SA 916 (KZP) para 44.

building approvals; it is enough that he has a sufficient personal interest in the lawfulness of them,³ or that he satisfy one of the other constitutional standing grounds.⁴ In any event, as will be apparent from the discussion of the review grounds, the applicants are relying on non-adherence with a municipal resolution which was intended to be binding on all residents of the Caravan Park, as well as alleged flouting of the terms of a standard lease agreement, informed by that resolution, which pertains to all occupiers. As lessees and residents in the Caravan Park, all the applicants have a direct interest in challenging non-compliance with the resolution, at least.⁵ That Jack's consent was not required for the building plans under the lease agreement, as a result of his not being an immediate neighbour, does not detract from his standing to advance other review grounds.

The applicants' non-compliance with rule 53

- [6] As mentioned, the Municipality's impugned approvals constitute administrative action. They are accordingly governed by the Promotion of Administrative Justice Act, 3 of 2000 ("PAJA"), which gives effect to the right to just administrative action in section 33 of the Constitution. A review of

³ Or, more precisely, that he can show that the impugned decisions have the capacity to affect his own legal rights or interests (*Giant Concerts* para 30).

⁴ It would appear from the founding affidavit that the applicants rely for standing not only on s 38(a) (own interest), but also on subsections 38(c) & (e) (i.e., that they seek to bring their review in the interests of a group or class of persons (the residents of the Caravan Park as a whole) and in the public interest, as well).

⁵ In the terminology employed by the Supreme Court of Appeal in *Tavakoli and Another v Bantry Hills (Pty) Ltd* 2019 (3) SA 163 (SCA), the applicants were all members of the "specific class" for which the Resolution was enacted and the Lease Agreement was drawn up, pursuant to the By-law, which also had specific application to them.

administrative action must thus accord with PAJA and the regulations promulgated thereunder, most notably for present purposes the Administrative Review Rules,⁶ which effectively make Uniform Rule 53 applicable to reviews other than legality reviews.

[7] In terms of Uniform Rule 53, a review applicant *inter alia* (a) is required to extract relevant documents from the record provided by the decision-maker(s) under rule 53(1)(b) and provide the registrar and the other parties with copies thereof (rule 53(3)), and (b) may thereafter file a supplementary affidavit which makes reference to those documents (and attaches especially pertinent ones) and identifies any further review grounds or prayers arising from the record of decision (rule 53(4)). It is only the selected portions of the record which should be regarded as evidence in the review application.⁷ While an applicant may in some instances consider it appropriate to place reliance on the entire record of decision ("RoD"), the applicant should at least explain why this is so. If the entire RoD is intended to be placed before the court, it would moreover be preferable if it were paginated separately.

[8] There was wholesale non-compliance with those requirements in this case. The applicants' attorneys merely made available the entire indexed RoD received from the Municipality's attorneys and at some stage added the whole RoD, with the Municipality's index, to the paginated application papers

⁶ Published together with the Promotion of Access to Information Rules, under GN R1284 in Government Gazette 42740 of 4 October 2019, which took effect from 4 November 2019.

⁷ *Venmop 275 (Pty) Ltd v Cleverlad Projects (Pty) Ltd* 2016 (1) SA 78 (GJ) at 90A-C (para 17).

immediately after the founding affidavit and returns of service. The applicants did not indicate which documents in the RoD, if any, were considered “necessary for the purposes of the review” (rule 53(3)). Nor did they file a supplementary founding affidavit, or thus seek to rely on anything contained in the RoD in augmentation of their founding affidavit (in terms of rule 53(4)) prior to the respondents being called upon to present their answer to the review. The applicants consequently created the impression that they would not be relying on any portions of the RoD. Yet, compounding the irregularity, the applicants proceeded to cross-refer to pages of the RoD on numerous occasions in reply and sought for the first time to place emphasis on those documents in that context.

- [9] Jacobs did not object to the applicants’ approach. Nor did the Municipality, whose attorney appeared at the start of the hearing merely to confirm the terms on which the Municipality was abiding. I shall nevertheless not have regard to the portions of the RoD relied upon for the first time in reply, or any other portions of the RoD not mentioned in the answering affidavit, when deciding this application.

The regulatory framework

- [10] Because the applicants lease sites in a caravan park which is situated on land owned by the Municipality, the parties’ respective rights and obligations are regulated in the first instance by the Saldanha Bay Municipality Public Amenities By-Law (“the By-law”), which defines ‘*public amenity*’ as meaning *inter alia* ‘any land, ... camping area, caravan park, ... which is the property

of, or is possessed, controlled or leased by the municipality and to which the general public has access ...

- [11] In terms of section 15 of the By-law, the Municipality *'may determine and allocate a portion in a caravan park to be permanently occupied by caravans or mobile homes'* (ss (1)), and *'may determine conditions additional to those contained in this by-law for the use of caravan parks that fall under the control of the municipality'* (ss (3)). Section 8 of the By-law provides that the Municipality *'may enter into an agreement with any person in terms of which a public amenity or any part thereof may be used for the purpose and subject to the conditions set out in the agreement'*.
- [12] As set out below, there is a standard lease agreement, as contemplated in section 8 of the By-law, which regulates all occupiers' use of the stands in the Caravan Park ("the Lease Agreement"). The Municipality has also determined conditions for the use of the Caravan Park, in terms of section 15(3), most recently in a resolution passed by the Council on 15 August 2015 ("the Resolution"). When considering any application for building plan approvals by an occupier of the Caravan Park, the Municipality would consequently be required to have regard to relevant provisions in both the Lease Agreement and the Resolution.
- [13] The Resolution – which was headed "PFC&P21/8-15: MUNICIPAL BUILDINGS AND TERRAINS: LEENTJIESKLIP HOLIDAY RESORT: CONTRACT CONDITIONS" – appears to have been designed to address and

regularise unauthorised constructions at the Caravan Park. To that end, it repealed an earlier resolution of October 2014 and introduced a number of additional conditions for building in the Caravan Park, which were required to be included in the standard lease agreement between the Municipality and all lessees of stands in the Caravan Park (defined above as the Lease Agreement).⁸

[14] Of particular relevance for present purposes is clause xvi) of the Resolution, which provided 'that due to a lack of an adequate sewer system, no additional permanent residence be allowed as the camp was mainly developed for short term holiday purposes' [underlined emphasis added].

[15] That no permanent structures would be allowed in the Caravan Park was also confirmed by clause iii), which listed the improvements recorded in August 2014 that would '*be regarded as minor improvements that may be allowed ... with the understanding that the improvements be of such a nature that it can easily be removed and not be regarded as permanent structures and that the Municipality will not compensate any tenant for any minor improvements in the event that the mobile home must be removed*' [bold emphasis in original].

[16] In similar vein, it is stipulated in clause x) of the Resolution:

⁸ It was resolved in clause xvii) of the Resolution (the final clause thereof) "that the lease agreement attached as annexure 'A' to the report (PFC&P15/10-14 of 8 October 2014) be amended per addendum to accommodate the changes above."

‘that the following improvements be allowed according to the lease agreement: enclosing the front porch/verandah (original roof structure) of which the extent is not exceeding the total floor area of the existing home with the same material as the original mobile home’.

- [17] As regards the process for approvals, it was recorded in clause v) of the Resolution *‘that as the Saldanha Bay Municipality is the Landlord in this matter, approval from the latter first be obtained before building plans are submitted for approval’.*
- [18] Potentially relevant, too, to the demolition relief sought by the applicants is clause ix), in which it was resolved that *‘where illegal structures/additions were constructed without the Municipality’s prior approval, a contravention levy of R30-00 per square meter (m²) per month be paid until the illegal structure / addition is approved by the municipality or demolished by the tenant and that the application of the levy be determined in collaboration with the LCOA’.*
- [19] The terms of the Resolutions were apparently communicated (verbatim) to the then lessees in a letter from the Municipality dated 16 May 2016, which also attached a copy of the Lease Agreement.⁹ It would seem from the applicants’ leases appended to the founding affidavit that only some of the directions contained in the Resolution were expressly included in the Lease Agreement when it was amended following the Resolution. The Lease Agreement is nevertheless required to be read with the Resolution in its entirety, as the

⁹ This is not disputed on the papers, though surprisingly, given the importance of this letter, it was not attached by the applicants to the founding affidavit. (Nor was it included in the RoD.)

Resolution prescribed additional terms of occupiers' use of the Caravan Park, in terms of section 15(3) of the By-Law. Insofar as may be necessary, the remaining contents of the Resolution could be regarded as impliedly or tacitly included in the Lease Agreement.

- [20] As is evident from the Resolution, as well as section 8 of the By-law, the Lease Agreement is the primary document governing the lessees' use of their stands in the Caravan Park. Each tenant was required to conclude such an agreement with the Municipality prior to taking occupation.
- [21] The applicants placed particular reliance on a clause of the Lease Agreement, headed "Maintenance", which they indicated to be clause 19 thereof (though it is clause 20 in some versions of the applicants' post-2015 leases). That clause states *inter alia* (underlined emphasis added):

*'No construction (including the erection of shade nets and/or lean-to's) of any nature whatsoever shall be allowed unless a building plan has been submitted to the relevant council for approval and subsequent approval thereof and all immediate neighbours have consented thereto. The consent of the immediate neighbours must be in writing.'*¹⁰

¹⁰ It is also stated earlier in that clause that: *'The tenant shall for the duration of this agreement, maintain the property and mobile home in a good condition. ... Maintenance shall include that the tenant must comply with all Municipal ordinances, regulations and park rules. ... It is expressly agreed that maintenance only includes repair work in accordance with the original style and material of the premises.'*

- [22] The applicants drew attention, too, to a further clause of the leases concluded from 2017 onwards (which they referred to as clause 20, though it was also numbered as clause 20(a)), which provides that:

'The Tenant must ... at all times during the lease period ensure that any maintenance and improvement work to the leased property be done strictly in accordance with the clauses titled "Use" and "Maintenance". Should the Tenant carry out any maintenance and improvement work contrary as prescribed [sic] in the said clauses, the Landlord shall be entitled, without prejudice to any of his rights contained in the clause titled "Failure by Tenant" also be entitled [sic] to request the Tenant in writing to at own cost remove such contradiction and restore the leased property to the satisfaction of the Landlord.'

- [23] Referred to in that clause, and also otherwise germane, is the clause of the Lease Agreement headed "Use" (contained in either clause 12 or clause 13 of the applicants' attached leases), which speaks to the kinds of improvements which can lawfully be made on stands in the Caravan Park. It provides that:

'The Tenant may use the property to park and occupy one mobile home thereon together with a sun porch and glass enclosure, as the Landlord in his sole discretion may approve, and which discretion must be exercised in a reasonable manner.'

THE APPLICANTS' GROUNDS OF REVIEW

- [24] The applicants have sought to impugn the Municipality's building plan approvals on three broad bases. The applicants have contended that:

24.1. the structure which was approved by the Municipality, and built by Jacobs, constitutes a “permanent structure”, and was accordingly in contravention of the Resolution;

24.2. the approvals also violated section 7 of the National Building Regulations and Building Standards Act, 103 of 1977 (“the Building Act”) in the following respects:

24.2.1. the Municipality *‘could never be satisfied that the applications and building comply with the requirements of the [Building] Act and any other applicable law as required by section 7(1)(a) because of the Resolution ...’*;

24.2.2. the Municipality *‘could also not have been satisfied under section 7(1)(b)(ii)(aa)(ccc) that the structure would not ‘probably or in fact derogate from the value of adjoining or neighbouring properties’*;

24.3. the immediate neighbours did not give their consent to the building, as required by the Lease Agreement, and the approval process was moreover procedurally unfair by virtue of not giving directly affected persons in the Caravan Park an opportunity to comment on the building plans.

[25] It is also not altogether clear exactly how the applicants’ challenges should be considered to relate to the section 6(2) PAJA review grounds in terms of which

all judicial review applications must be framed.¹¹ It would however seem that the remaining review grounds were intended to at least involve challenges in terms of sections 6(2)(b), 6(2)(c), 6(2)(e)(iii), and 6(2)(f)(i) of PAJA – and thus involve contentions that, respectively: there was non-compliance with a mandatory and material procedure or condition prescribed by an empowering provision; the process was procedurally unfair; the municipal officials failed to take account of relevant considerations; and the approvals contravened a law.

[26] I shall address the review grounds in that context, commencing, for convenience, with the contention referred to in paragraph 24.3 above (the complaint that the immediate neighbours' consent was not obtained). But before doing so, a comment is appropriate on the applicants' argument that it could be inferred from the Municipality's lack of opposition that the Municipality considered the application to be well-founded. I disagree with that contention. As submitted by Jacobs' counsel, the Municipality's decision to abide the review could have been informed by various considerations and therefore does not imply an acceptance of the merits of any of the review grounds. That having been said, the fact that the Municipality has not filed an answering affidavit and consequently not denied any allegations in the founding affidavit, nor furnished any reasons, as it was entitled under Rule 53(1)(b) to do, is nevertheless a complicating factor for Jacobs. For only the Municipality's

¹¹ *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 (4) SA 490 (CC) paras [25] to [26].

officials could provide firsthand evidence of what exactly the Municipality considered when granting the impugned approvals.

Non-compliance with the consent requirement in the Lease Agreement

[27] As mentioned, it is stipulated in the Lease Agreement, which all occupiers of sites in the Caravan Park must conclude, that construction of any nature on a site in the park requires both the approval of the Municipality and the written consent of all “immediate neighbours”.

[28] Jacobs’ site is stand 53. As is evident from an aerial photograph of the relevant portion of the Caravan Park adduced by the applicants [annexed at the end of this judgment], and would anyway follow from a sequential numbering of stands, Jacobs’ immediate neighbours include the occupiers of stands 52 and 54. In addition, as the aerial photograph shows, sites 51 and 56 are also immediately adjacent to Jacobs’ stand; while sites 59 and 58 are directly opposite, across a (narrow) road, and the lessees thereof would accordingly, in my view, qualify as immediate neighbours in terms of clause 19 of the Lease Agreement as well.

[29] Elsa and Eben Fourie, the second and third applicants, lease site 52; Mike Russon, the seventh applicant, leases site 54; and Donald Wayne de Beer, the fourth applicant, leases site 58 together with his wife. All of them are therefore immediate neighbours of Jacobs. So, too, in my view, is the occupier of site 59 (whom the court was advised in a note furnished after the hearing is leased by Dr Van Rooyen, who is not party to these proceedings), as well as

the lessee of site 51, who was indicated to be Ms IC Boswell, and the lessee of site 56, whose identity was not revealed in the application papers.¹²

[30] In terms of his lease agreement with the municipality, the prior written consent of all those persons was therefore required before Jacobs could commence construction of any kind on his site (stand 53). There was not such consent.

30.1. The case of both Jacobs and the Municipality in this regard¹³ is that:

30.1.1. written consent was provided by the LCOA and two immediate neighbours: (i) Elsa and Eben Fourie (the second and third applicants, and the occupiers of stand 52), who sent an email on 21 August 2019; and (ii) Lynne Jones, the daughter of IC Boswell (the lessee of stand 51), who sent an email on 29 August 2019; and

30.1.2. the other neighbours were aware of the proposed construction and did not object.

¹² None of the other applicants would appear to constitute "immediate neighbours" as contemplated in clause 19 of the Lease Agreement, though Ronel Stander (the fifth applicant) and Johan van der Merwe (the sixth applicant) lease stands (sites 60 and 61, respectively), which are on the other side of sites 58 and 59, and thus only separated from site 53 (Jacobs' stand) by sites 58 and 59 and a road. As noted, when dealing with standing, the site leased by Peter Jack (the first applicant) is some distance away from Jacobs' stand and Jack would therefore not even qualify as a neighbour of Jacobs.

¹³ The Municipality's position was recorded in a memorandum dated 29 November 2023 from the Senior Manager: Legal Services to the Senior Manager: Administration, which was annexed to the answering affidavit, after earlier being included in the RoD.

30.2. That version is even on its own terms inadequate.

30.2.1. Elsa and Eben Fourie did not expressly agree to the construction of a cellar;¹⁴ nor, it seems, was their consent sought in 2022, before the Municipality granted a fresh approval (pursuant to the resubmission of the application for stand 53 in May 2022) on 5 September 2022.¹⁵ Even if Lynette Jones could give consent for her mother, the lessee of stand 51, without any indication of authorisation,¹⁶ her approval was also only given in response to the August 2019 application, and not the further submission in May 2022. There is furthermore no suggestion of consent from Russon or De Beer (the lessees of stands 54 and 58), or the consent of whoever leases (or leased) site 56.

30.2.2. The absence of an objection from an immediate neighbour was also hardly sufficient. For what is required by the

¹⁴ Their 21 August 2019 email states that they consented to the *'restourasie van huis 53 (dak, sonkamer, waskamer agter die huis en stoep) soos voorgestel deur Mnr and Mev Jacobs'* – or, in other words, the restoration of house 53 (roof, sunroom, washroom behind the house and stoep), as proposed by Mr and Mrs Jacobs.

¹⁵ Although the application submitted in May 2022 was apparently the same as the one lodged in August 2019, fresh consents even from the persons who had earlier indicated their approval would, in my view, have been required, not least because of the developments that had occurred in the meantime, including alleged deviations from the earlier approved plan and the visible evidence of what was being contemplated for stand 53.

¹⁶ Jones' email of 29 August 2019, sent to the caretaker of the Caravan Park, Lise Geldenhuys, on 29 August 2019, stated that she has *'had a look at these plans [for stand 53] and give my approval to proceed with them'*.

“Maintenance” clause in the Lease Agreement is written consent, not tacit acquiescence.

[31] Although the relevant clause of the Lease Agreement does not stipulate that the written consent of immediate neighbours is a prerequisite for municipal approval (merely for construction), it must, in my view, follow from that clause that the Municipality would have to consider whether the neighbours have consented before deciding whether to grant approval. It would neither be sensible nor appropriate for the Municipality to disregard that requirement when considering whether to approve submitted building plans. To do that would be to invite wholesale disregard of the Municipality’s own condition (immediate neighbours’ consent), as well as to oblige municipal officials to spend time on an endeavour which could be futile (if the immediate neighbours’ consent were not forthcoming). As a matter of logic and practicality, the immediate neighbours’ consent is therefore, under the current regulatory scheme, a jurisdictional prerequisite, which the Municipal Council should satisfy itself has been complied with, before considering whether to approve a municipal plan.

[32] There is no indication that the Municipality considered that factor in this instance; nor it appears, could it have been so satisfied, either in 2019 or in 2022. The impugned approvals were thus arrived at as a result of a failure by municipal officials to apply their minds properly to all relevant considerations. They accordingly fall to be set aside in terms of section 6(2)(e)(iii) of PAJA.

[33] As I understood the applicants' submissions, they also contended that:

33.1. the absence of the immediate neighbours' consent meant that there had been disregard of a mandatory and material procedure or condition prescribed by an empowering provision (rendering the approvals reviewable in terms of section 6(2)(b) of PAJA); and

33.2. the failure of the Municipality to engage with the neighbours resulted in the process being procedurally unfair (triggering section 6(2)(c) of PAJA).

[34] While it is unnecessary for me to reach a final conclusion on those submissions, I should mention that the first submission seems to have merit; but the second does not.

34.1. The term "empowering provision" is defined in section 1 of PAJA as "a law, a rule of common law, customary law, or an agreement, instrument or other document in terms of which administrative action was purportedly taken". While it may well be that not all contracts would qualify as empowering provisions,¹⁷ and the impugned approvals were moreover not taken in terms of the Lease Agreement in this case, it could in my view be concluded that a condition in the Lease Agreement – an agreement contemplated by section 8 of the By-law, which, in

¹⁷ Cf. the dissenting judgment of Rogers AJA (as he then was) in *South African National Parks v MTO Forestry (Pty) Ltd* 2018 (5) SA 177 (SCA) paras [53] to [54].

terms thereof, may prescribe the purposes and conditions of use of the Caravan Park (a public amenity) – was a mandatory and material condition prescribed by an empowering provision.

34.2. The procedural unfairness contention has less to commend it. The applicants' arguments confusingly blurred the absence of the immediate neighbours' consent with the Municipality's failure to engage with the neighbours prior to approving the plans (two potentially distinct issues). It was, as indicated, necessary in the light of the Lease Agreement for the immediate neighbours both to be consulted and to consent. Insofar as any immediate neighbour was not approached for comment (and requested to consent), the absence of consent would on its own be fatal. There would not seem to be any duty to engage with interested persons outside of the strictures of the Lease Agreement,¹⁸ unless it was proposed to adversely affect the rights or legitimate expectations of other occupiers of the Caravan Park, which I do not understand the Municipality to have intended to do (though whether they in fact encroached on occupiers' rights is a different matter and addressed in the context of other review grounds). I therefore do not think that there is an independent procedural unfairness review ground in this context.

¹⁸ *Walele v City of Cape Town and Others* 2008 (6) SA 129 (CC) paras [31] to [45].

The disregard of the Resolution

[35] As is evident from the summary of the review grounds in paragraph [24] above, the Resolution (passed by the Municipality on 15 August 2015 in respect of the Caravan Park) is central to the first and second review grounds, which can conveniently be discussed together.

[36] The applicants' arguments in this regard are straightforward. Their case is that the Resolution only permitted temporary structures, yet the approved building included a concrete cellar which is by its nature permanent.

[37] Jacobs strongly disputed that his improvements were permanent. There was thus a dispute of fact on this score. In the light of my conclusions above, it is unnecessary for me finally to resolve this dispute, and in the light of what is stated in the next two paragraphs, I also deem it inappropriate to do so. I therefore merely mention that *prima facie* it is difficult to conceive of a concrete structure as a temporary edifice, and the construction of a concrete cellar would also appear to be at odds with the "Use" clause in the Lease Agreement (quoted in paragraph [23] above). This may therefore be an instance – though I put it no higher than that – where a factual dispute could be resolved on the papers in favour of the applicants,¹⁹ and where a court could '*take a robust, common-sense approach to a dispute on motion*'.²⁰

¹⁹ *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634I-635C.

²⁰ *Soffiantini v Mould* 1951 (3) SA 307 (O) at 308.

- [38] As indicated, I consider it undesirable to express a firm opinion on this issue in this application. This is not only because of the factual dispute and Jacobs' allegations about other similar structures which appear to have been permitted, but also, and more especially, because it does not appear that the Municipality has itself properly considered this question, and the Municipality has moreover unhelpfully provided no input on this issue. That itself indicates a further irregularity with the impugned approvals: namely, that the Municipality failed to have due regard to whether the approved plans would permit a permanent structure, in contravention of the stipulation in clause xvi) of the Resolution that "no additional permanent residence be allowed" (due to a lack of an adequate sewer system and the fact that the camp was mainly developed for short term holiday purposes).
- [39] The Municipality approved Jacobs' August 2019 application for permission to improve his property, to *inter alia* "add a cellar", around 21 September 2019, on the basis that the "repairs and renovations ... be regarded as a temporary structure". The authorisation in October 2020 was to similar effect. There is however no indication that the Municipality – which, as mentioned, did not file an answering affidavit or provide reasons – considered whether the proposed cellar would indeed be a "temporary structure" and thus complied with the Resolution. Nor is there anything to suggest that the Municipality gave due consideration to this issue when it considered the resubmitted plans and granted its approval of them in September 2022.

- [40] A resolution of a Municipal Council must be paid due heed by a municipality.²¹ The officials were accordingly required to consider whether clause xvi) of the Resolution (among others) was being complied with; but the Municipality appears not to have done so – and it bears reiteration that the Municipality has, importantly, not alleged that it did give due cognisance to this important question, let alone furnished evidence to corroborate that. The apparent failure to consider whether the improvements were temporary or permanent was particularly egregious in 2022, as there had already been a complaint that Jacobs had constructed what looked like a concrete swimming pool, which had caused the Municipality to instruct him to *‘remove all illegal construction work’*: a demand that was apparently treated merely as a stop-work order. On this basis, too, the impugned approvals are susceptible to review under section 6(2)(e)(iii) of PAJA.

The alleged derogation from the value of adjoining properties

- [41] The remaining review ground involves an allegation that the Municipality could not have been satisfied, as required by section 7(1)(b)(ii)(aa)(ccc) of the Building Act, that the proposed building on site 53 *‘would not ‘probably or in fact derogate from the value of adjoining or neighbouring properties’*.

²¹ *Manana v King Sabata Dalindyebo Municipality* [2011] 3 All SA 140 (SCA) para [21].

[42] It is now settled that a local authority must positively satisfy itself that the disqualifying factors in subsection 7(1)(b)(ii) do not exist²² – rather than proceeding from the premise that it should approve plans unless satisfied that the proposed building will probably, or in fact, trigger one of the disqualifying factors (or, in other words, unless it is satisfied that one of the disqualifying factors *does* exist).²³ It is not apparent whether the Municipality formed the requisite view in this regard, not least because the Municipality did not file an affidavit or give reasons to explain its position. I nevertheless have significant reservations about this review ground, as it seems entirely speculative. There was no suggestion prior to the bringing of this application that the Jacobs' house would detract from the values of neighbouring properties; nor indeed were there any other actual objections from neighbours. Nor did the applicants adduce an iota of evidence to show that there probably or would in fact be a derogation in the market value of any neighbouring property²⁴ – as, for example, the Constitutional Court in *Walele* contemplated that an applicant might do.²⁵ It was not sufficient for the applicants merely to assert, as they did, that Jacobs' construction was likely to have a deleterious effect on neighbouring properties' values by virtue of looking superior to them. Assuming that the building was in accordance with the Resolution and Lease

²² *Walele supra* fn.18 para 55; *Camps Bay Ratepayers and Residents' Association v Harrison* 2011 (4) SA 42 (CC) para 33; *Trustees, Simcha Trust v Da Cruz and Others* 2019 (3) SA 78 (CC) para [22].

²³ As held by the Supreme Court of Appeal in *True Motives 84 (Pty) Ltd v Mahdi and Another* 2009 (4) SA 153 (SCA) para 21, overruled in *Turnbull-Jackson v Hibiscus Coast Municipality and Others* 2014 (6) SA 592 (CC).

²⁴ As explained in *Camps Bay Ratepayers supra* fn.22 para 38, "value" must in the context of the section but understood as "market value".

²⁵ *Walele supra* fn.18 para [55].

Agreement, and thus the conditions imposed under the By-law, that was not a likely inference from the approved plans. It was more probable that the new structure would have no effect on the neighbouring properties, or might even enhance their value (by showing what was possible). There is consequently nothing on the papers to indicate that the Municipality could not reasonably have been satisfied that the approved structure would not be likely to derogate from the value of other properties in the Caravan Park. As in *Camps Bay Ratepayers*,²⁶ the applicants' real complaint appears to be a section 7(1)(a) one: i.e., an argument that the Municipality could not have been "satisfied that the application in question complies with the requirements of [the Building] Act and any other applicable law". That complaint has been addressed above.

THE FURTHER RELIEF SOUGHT BY THE APPLICANTS

[43] In their notice of motion, the applicants sought an order that Jacobs be directed to demolish the building, basement and foundations constructed on his stand. However, at the hearing, they only persisted in seeking the removal / demolition of the basement or cellar, which was alleged to be a permanent structure, and thus forbidden under the Resolution and the Lease Agreement.

[44] The applicants did not separately motivate this relief in the founding affidavit. Nor did they identify the empowering provision which would permit that relief. The impression created is that the applicants believed that this relief was self-

²⁶ *Camps Bay Ratepayers supra* fn.22 paras [41] to [43].

evident and would follow as a matter of course. But, if so, they were badly mistaken.

[45] In terms of section 8 of PAJA, the usual relief in the event of a judicial review succeeding is for the matter to be remitted back to the decision maker for reconsideration (ss 8(1)(c)(i)). It is only in exceptional cases that a court will grant an order “substituting or varying the administrative action or correcting a defect resulting from the administrative action” (ss 8(1)(c)(ii)). Other relief in terms of section 8(1) of PAJA must moreover be motivated as “just and equitable”.

[46] While section 21 of the Building Act permits a demolition order if a magistrate “is satisfied that such erection is contrary to or does not comply with the provisions of this Act or any approval or authorization granted thereunder”, that section is only applicable in the event of an application being brought by a local authority or the Minister. Persons (such as the applicants) bringing an application to review and set aside the unlawful approval of building plans by a local authority would not have standing to pursue remedies provided for in section 21. Such persons would be restricted to seeking a mandamus, in appropriate circumstances, compelling the municipality to act in terms of section 21;²⁷ and the applicants have not sought such relief. Or they could

²⁷ *BSB International Link CC v Readam South Africa (Pty) Ltd and Another* 2016 (4) SA 83 (SCA) para [23].

invoke the court's common-law discretion in circumstances where a party's rights have been encroached upon.²⁸

[47] I do not consider a demolition order to be just and equitable in this context. This case does not involve a situation such as the one considered by the Supreme Court of Appeal in *Lester*,²⁹ where a person has undertaken building works without any approval or authorisation. Whether or not Jacobs commenced construction before all approvals were granted (as the applicants alleged), the fact is that Jacobs' building plans were all approved by the Municipality. If, as I have concluded, the Municipality acted irregularly in so approving, the approvals must be set aside, and the applications must be returned to the Municipality for reconsideration. It would not be fair or just to compound Jacobs' prejudice by ordering him to demolish part of the building that was previously authorised, but has now lost its authorisation. That would also, in any event, be inappropriate when it is unclear what will happen on reconsideration. Were I to order that the building's basement and foundations be demolished in the interim, I would effectively be substituting my own decision for that of the Municipality.

[48] There would also be the further problem that, as pointed out by the Supreme Court of Appeal in *BSB International*, a court would have to be satisfied, before granting a partial demolition order, that the structural integrity and safety of the

²⁸ *BSB International supra* paras [24] to [26], [39].

²⁹ *Lester v Ndlambe Municipality and Another* 2015 (6) SA 283 (SCA). It appears from the judgment that Lester had not only built without approval, but had disregarded various court orders against him, resulting in seven court applications over more than a decade.

building would not be compromised.³⁰ That is a material consideration in the present case, given that the applicants seek the demolition of the foundations or cellar, which may well undermine the rest of the building.

- [49] As noted above, the Municipality also has a discretion as to how to deal with non-compliant structures. There are evidently other non-compliant concrete structures in the Caravan Park which the Municipality has seemingly tolerated. For this reason, too, it would be inappropriate for me to direct what should happen to the building and other improvements on site 53 of the Caravan Park in the absence of municipal authorisations. Nor, in any event, has any case been made out for why the court should insert itself into that process.

CONCLUSION AND COSTS

- [50] For the reasons given above, the two impugned municipal approvals of building plans for stand 53 (granted on 26 September 2019 and 18 August 2022³¹) must be reviewed and set aside. While it is unclear what exactly was entailed by the Municipality's decision to approve the erection of a temporary building on stand 53 on 7 October 2020, that decision should also fall together with the aforementioned building approvals.

³⁰ *BSB International supra* fn. 27 para 29.

³¹ The notice of motion seeks to set aside approvals granted on 26 September 2019 and 5 September 2022. It is not however apparent why the applicants have referred to the second approvals being given on 5 September 2022, as the founding affidavit refers to the building plan being endorsed on 18 August 2022, and the Municipality's memorandum of 29 November 2023 likewise states that the new building plan application was approved on 18 August 2022.

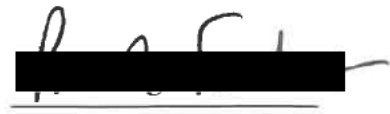
- [51] The applicants have not however made out a case for the further relief sought in prayer 4 of the notice of motion (demolition) and that relief is therefore refused. The default order in such circumstances – the remittal of the applications back for reconsideration – should instead be made, save that, in order to cater for the potential amendment of the earlier building plan application(s), it would seem appropriate to leave open the possibility that Jacobs might submit a fresh application to the Municipality, which would then have to be considered in the light of this judgment. It will be the prerogative of the Municipality to decide what to do in the event of any of the second respondent's repairs, renovations and improvements not being authorised (and potentially, too, what should happen prior to any valid authorisation), and no order is therefore appropriate in that regard.
- [52] The applicants have been substantially successful and should accordingly be awarded their costs of suit. I considered whether to deduct the costs attributable to the irregular treatment of the RoD, but, as the prejudice occasioned thereby was minimal, and anyway not objected to by Jacobs, I shall not do so.
- [53] There was no case made out for why counsel's costs should not be on the default scale envisaged by Uniform Rule 67A(3), read with rule 69, and, insofar as may be necessary, I shall accordingly order that this scale of taxation (scale A) applies.

ORDER

[54] I accordingly make the following order:

1. Condonation is granted to the second respondent for the late delivery of his answering affidavit.
2. The decision of the first respondent ("the Municipality") on 26 September 2019 to approve building plans submitted by the second respondent for repairs and renovations at site 53, Leentjiesklip Caravan Park, Langebaan ("the Caravan Park") is reviewed and set aside.
3. The decision of the Municipality on 7 October 2020 to approve the erection of a temporary building on site 53 of the Caravan Park is reviewed and set aside.
4. The decision of the Municipality on 18 August 2022 to approve building plans submitted by the second respondent for repairs and renovations at site 53 of the Caravan Park is reviewed and set aside.
5. The Municipality must, in the light of this judgment, reconsider the second respondent's application to the Municipality for the approval of building plans for the building at site 53 at the Caravan Park, as submitted in May 2022, alternatively consider any amended application which the second respondent submits in respect of site 53.

6. The second respondent is to pay the costs of the application on a party and party basis, with counsel's costs being taxed on scale A.

A handwritten signature in black ink, appearing to read 'P Farlam', is positioned above a solid black rectangular redaction box. The signature is written in a cursive style.

P FARLAM

For the applicant: Adv C L Burke

Instructed by: Barnaschone Attorneys (Mr N Barnaschone, Ms E Van der Merwe, Mr K Creighton)

For the first respondent: Marais Müller Hendricks Inc. (C S Hendricks)

For the second respondent: Adv J-H Gous

Instructed by: Schoeman & Hamman Inc. c/o Cloete Baker & Partners

