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

CASE NO: 6707/22

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 FRANCES GALLAGHER

Fourth Applicant

JULIAN DAVID RABINOWITZ

Fifth Applicant

CYRIL IAN GLASER

Sixth Applicant

BARBARA RUTH MAYERS

Seventh Applicant

and

LEONHARD GÄRTNER

First Respondent

ANDREAS ROBERT HERMANN PLANK

Second Respondent

JANINE ADUDE STEPHANIE BEATRICE PLANK

Third Respondent

THE CITY OF CAPE TOWN

Fourth Respondent

Heard 26 February 2025

Delivered on 11 April 2025 (by electronic mail to the parties)

JUDGMENT

KHOZA, AJ

Introduction

1. This case raises a question of principle: when does the doctrine of mootness preclude judicial review of unlawful administrative action? The issue arises in the context of a building plan approval that was conceded to be unlawful and was subsequently abandoned. A revised plan was submitted and granted, resulting in a new and independent approval.
2. At the heart of this dispute lies a tension between two foundational tenets: on the one hand, that unlawful administrative actions are valid and binding until they are set aside; on the other, that courts do not adjudicate disputes which no longer raise a live controversy or produce legal consequences. Resolving this tension calls for careful attention to the proper limits of judicial power in administrative law.

3. In March 2022, the applicants instituted these review proceedings to challenge the approval of a building plan by the fourth respondent (“the City”) in February 2021 (“the 2021 plan”) for a second dwelling on Erf 1[...] in Green Point belonging to the first to fourth respondents (“the developers”). They seek to have the City’s approval (“impugned approval”) declared unlawful and set aside and a consequential order directing the developers to demolish all building works on Erf 1[...].
4. However, the City and the developers oppose the review on the ground of mootness. They argue that the relief sought has been overtaken by events, rendering it moot and granting it will have no practical effect. Since this jurisdictional point is dispositive of the case, the parties confined their oral argument at the hearing on 26 February 2025 to the issue of mootness. This approach aligns with the one adopted by the Supreme Court of Appeal (SCA) in *Solidariteit Helpende Hand NPDC and Others v Minister of Cooperative Governance and Traditional Affairs*¹ (“*Solidariteit Helpende*”).
5. The applicants own properties within the vicinity of Erf 1[...]. The first applicant is an association representing residents and ratepayers in the greater Green Point and Mouille Point area.
6. This matter did not spring from nowhere; it marks the latest chapter in a protracted dispute, marked by successive legal proceedings and shifting procedural terrain. To grapple properly with the mootness argument, it is necessary to trace the tangled history of the parties’ long-running legal skirmishes.

Factual and litigation context

7. The developers purchased Erf 1[...] in March 2020 and subsequently applied to the City for the approval of the building plan on the property. The City

¹ [2023] ZASCA 35 (31 March 2023) at para 11.

approved the plan on 22 February 2021. That approval sparked this litigation.

8. Construction on Erf 1[...] commenced in July 2021. By the end of that year, applicants began raising concerns about the lawfulness of the approved plan. To address these concerns, they consulted a professional town planner, Mr Pratt, in November 2021 as well as their attorney, Mr Van Rensburg. They also attempted to halt construction through correspondence with the developers, but these efforts were unsuccessful.
9. Convinced that the 2021 plan and the City's approval were unlawful, the applicants initiated these review proceedings on 4 March 2022, seeking to have the impugned approval set aside.
10. The review grounds on which the applicants impugn the 2021 plan are as follows:
 - 10.1. *Height restriction ground:* The applicants contend that the proposed second dwelling depicted in the approved plan exceeds the height restrictions applicable to Erf 1[,], namely 6 metres as measured from the ground level to the wall plate and 8 metres as measures from ground level to the top of the roof. This argument is based on the premise that the second dwelling constitutes a separate structure from the main dwelling. If, however, the second dwelling is considered part of the main structure, the height restrictions would be less stringent – 8 metres and 10 metres respectively.
 - 10.2. *The ground level and Lidar Map ground:* The applicants argue that the existing ground level of Erf 1[...] should have been based on the City's Lidar Map of February 2021 rather than the survey conducted by the developer's land surveyor, Mr Gluckman. They claim that the Lidar Map reveals lower existing ground level than those assumed by the developers.
 - 10.3. *The sensitivity enquiry ground:* The applicants assert that the approved building is unsightly and objectionable, as it towers over

the gardens and private spaces of adjacent properties and negatively affects the amenities enjoyed by the owners of Erven 2[...] and 2[...]2.

- 10.4. *The setback non-compliance ground:* The applicants contend that incorrect common boundary setbacks were applied. Specifically, they argue that the 0-metre setback relaxation permitted under the Development Management Scheme (“DMS”) of the Municipal Planning By-Law (“By-Law”) was incorrectly applied to both common boundaries, whereas it should have been applied to only one.
- 10.5. *The title deed restriction ground:* The applicants assert that the proposed second dwelling contravenes applicable restrictive title deed conditions. They argue that the main entrance should face Roos Road rather than High-Level Road, as required. Additionally, they contend that the second dwelling was impermissibly built within 25 feet of Rood Road.
11. On 6 April 2022, the applicants obtained an interim interdict from this Court (per Gamble J), pending the determination of the review. The interim interdict was granted on the *prima facie* basis that the proposed dwelling in the building plans contravened the DMS.
12. The developers, advised by professional town and regional planners, were informed they had strong prospects in the review regarding the separate structure and title deed grounds, but not on the Lidar Map or height restriction grounds. Their legal representatives also advised that “the sensitivity enquiry ground” was bad. Consequently, the developers opted to submit a revised plan to the City in April 2022 (“the revised plan”).
13. Although not legally required, the City invited the applicants to comment on the revised plan on 26 April 2023. The applicants objected to the revised plan, reiterating the same review grounds mentioned above. Additionally, they argued that the interim interdict and the pending review prohibited the City from considering the revised plan. The City countered that the interdict only prevented further construction work on Erf 1[...] based on the 2021 plan

and did not restrict the City's statutory power to consider new or revised plans.

14. On 27 November 2023, the City approved the revised plan because it was satisfied that this plan eliminated or cured the defects in the 2021 plan and the parts that are similar in both plans are valid and the applicants' complaints about them are unfounded. Following that approval, the developers resumed construction on Erf 1[...] on 8 February 2024. This prompted further litigation between the parties.
15. The applicants then brought an urgent application to compel the developers to comply with the interim order previously granted. This application was based on their firm belief that Gamble J's order prohibited the developers from resuming construction pending the finalisation of the current review application and that the approval of the revised plans did not alter this legal position. The developers opposed the application. On 12 March 2024, Adams AJ struck it from the roll for lack of urgency, but it was re-enrolled for hearing later.
16. On 8 March 2024, the applicants launched a second review application under case number 4859/2024 to have the City's approval of the revised plan set aside ("second review application"). They also sought an interim order halting construction under the revised plan, pending the determination of the second review. However, on 3 June 2024, Lukheleni J dismissed the interdict application and granted the applicants leave to appeal to the SCA.
17. On 6 June 2024, Fortuin J issued a ruling in the application to compel which conflicted with Lukheleni J's judgment. She held that Gamble J's order barred all construction on Erf 1[...], even with the revised plan, and ordered the developers to cease all building works on the property ("the compliance order"). In contrast, Lukheleni J had found that Gamble J's order did not preclude construction under the revised plan.

18. Fortuin J found, in addition, that the developers' submission of the revised plan and their attempts to "frustrate the interdict" and the pending review application "constituted constructive contempt." This escalated tensions, prompting the developers to seek leave to appeal.
19. Following Fortuin J's interpretation of Gamble J's order, the City filed a reconsideration application in June 2024 in which it sought to amend Gamble J's order by deleting the words "or otherwise". Fortuin J heard this application alongside the applicants' leave to appeal against the compliance order. She granted the reconsideration application and dismissed the application for leave to appeal.
20. However, in granting the reconsideration application, Fortuin J, apart from deleting the impugned words, inserted the phrase – *'or any element contained in the 2021 plan which is subject to the pending review* – which neither party had requested. The modification effectively prevented the developers from continuing construction. As a result, the City applied for leave to appeal the reconsideration order, which remains pending before this Court.
21. Prior to approving the revised plan, the City informed the applicants, on 12 May 2023, that it would consider the revised plan and agreed that the 2021 plan should be set aside. However, it did not concede the entire review, the review grounds or the other relief sought in the notice of motion. It is of the view that some of the review grounds are bad.
22. On 21 June 2023, the developers filed a notice to abide the court's decision in the current review application conditional on no costs order being made against them. By then, the review application had become unopposed, but the applicants failed to pursue it to finality. Instead, in February 2024, they submitted a draft order to the respondents, proposing to settle all the relief sought in Part B of the notice of motion. However, none of the respondents accepted the terms of this proposal.

23. In June 2024, the City proposed a draft order aimed at resolving both the review application and the pending appeal against Fortuin J's compliance order, despite the ongoing dispute over Gamble J's order. The developers accepted the proposed order, but the applicants rejected it.
24. It appears that a disagreement arose between the parties regarding the terms of the proposed order. The applicants expected the developers to include a tender for costs in their notice to abide and for the City to either specify the grounds of review it conceded and tender costs, or oppose the review application. This did not happen, resulting in a deadlock.
25. Although the City disagrees with the relief sought, it chose not to oppose the review and denied liability for costs. The developers aligned themselves with the City's position on mootness. However, the applicants dispute that the matter is moot.
26. Pursuant to the interim orders of Gamble J and Fortuin J, the applicants have successfully halted construction on Erf 1[...], pending determination of Part B of the relief they seek in the review application – which relates to the now abandoned 2021 approval. This determination accordingly hinges on resolving the jurisdictional issue of mootness.

Mootness

27. The general principle is that a matter is moot when a court's ruling will have no practical effect on the parties. A matter is not justiciable where it no longer presents a real, existing or live dispute between the parties that a court's decision or order would practically resolve or affect. Courts do not decide hypothetical questions or pronounce on matters that are academic, nor do they issue orders that have no practical effect.²

² *AB and Another v Pridwin Preparatory School and Others* (CCT294/18) [2020] ZACC 12; 2020 (9) BCLR 1029 (CC); 2020 (5) SA 327 (CC) at para 50. Also see *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others NPC and Another* 2023 (6) BCLR 752 (CC) at para 23; *Legal Aid v Magidiwana* 2015 (2) SA 568 (SCA) at para 2, confirmed on appeal *Legal Aid South Africa v Magidiwana and others* (2015 (6) SA 494 (CC); 2015 (11) BCLR 1346 (CC).

28. Furthermore, a court of first instance does not have jurisdiction to entertain the merits of a matter if a dispute or a cause of action has ceased to exist before judgment – there is no longer a claim before the court for its adjudication.³ Only a court of appeal has a discretion to hear appeals notwithstanding the mootness of the matter.⁴
29. Therefore, a ruling of this Court will only have practical effect on the parties if a live dispute still exists. Otherwise, there comes a point during litigation at which the court must fold its arms.

Key submissions and points of dispute

30. The City's and the developers' case for mootness can be summarised as follows:
- 30.1. The 2021 plan was abandoned and the associated development rights under the impugned approval were relinquished or waived;
 - 30.2. The 2021 plan was replaced and superseded by the revised plan, and it will not be used for construction on Erf 1[...]; and
 - 30.3. As a result, a live dispute no longer exists and setting aside the impugned approval would have no practical effect. The only live issue is one of costs.
31. The developers added that the 2021 plan lapsed due to the operation of section 7(4) of the National Building Regulations and Building Standards Act 103 of 1977 ("the Building Act"). They assert that the lapsing of the 2021 plan renders the matter moot. The applicants reject this argument.

³ *Minister of Justice and Correctional Services and Others v Estate Late Stransham-Ford* [2016] ZASCA 197; [2017] 1 All SA 354 (SCA); 2017 (3) BCLR 364 (SCA); 2017 (3) SA 152 (SCA) paras 25 and 26.

⁴ This power is conferred on a court of appeal by section 16(2)(a)(i) of the Superior Courts Act 10 of 2013.

32. The applicants maintain that a live dispute remains and that the relief they seek would have practical legal consequences. They advance four reasons: first, that the 2021 plan has not lapsed; second, that rights derived from administrative action cannot be waived, and that the approval of the revised plan amounts to impermissible self-help; third, that the City has not articulated the grounds on which it concedes the 2021 approval to be unlawful; and fourth, that administrative action remains valid and binding until set aside by a court.

Has the 2021 plan lapsed?

33. The developers contend that the 2021 plan lapsed by operation of section 7(4) of the Building Act,⁵ owing to a failure to “proceed with” construction for a continuous period of 12 months — specifically, from 8 April 2022 (the date of Gamble J’s interim interdict) to February 2024 (when building activity resumed). They submit that if the plan has indeed lapsed, then the application is moot on that ground alone.
34. The applicants reject this interpretation. They contend that the 2021 plan remains valid because construction commenced in July 2021, well within the 12-month window. They argue that the developers’ interpretation of section 7(4) provision is contrived, leads to absurdity, imposes an unbusinesslike interpretation that would render section 11 of the Building Act⁶ redundant.

⁵ Section 7(4) of the Building Act reads:

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

⁶ Section 11 of the Building Act reads:

Erection of buildings subject to time limit

- (1) If for a period exceeding three months the erection of a building is not proceeded with, the local authority in question may by notice in writing, served by post or delivered, order the owner of such building to resume and to complete the erection of such building within the periods specified in such notice.
- (2) If the owner of a building on or to whom a notice referred to in subsection (1) was served or delivered, fails to resume or complete the erection of such building within the periods specified in such notice, the local authority in question may extend such periods from time to time if such owner satisfies it that such failure was due to circumstances beyond his control.

35. The interpretation of the section 7(4) must be guided by the established principles of statutory construction. In *Cool Ideas 1186 CC v Hubbard* (“*Cool Ideas*”), the Constitutional Court affirmed that the ordinary grammatical meaning of statutory language should prevail, unless it leads to absurdity.”⁷ This approach accords with the Supreme Court of Appeal decision in *Natal Joint Municipal Pension Fund v Endumeni Municipality* (“*Endumeni*”), where Wallis JA held that the statutory interpretation must consider the text, context and purpose of the provision.⁸
36. The same interpretative principle was endorsed in *Commissioner for Inland Revenue v Golden Dumps (Pty) Ltd* (“*Golden Dumps*”), where the Appellate Division held that effect must be given to every word and that no word, phrase or sentence should lightly be regarded as superfluous.⁹
37. Section 7(4) serves a distinct purpose separate from section 11. It is designed to prevent building plan approvals from remaining valid indefinitely. By requiring the timely commencement or continuation of building works, it enables local authorities to maintain effective oversight of development and

(3) If the owner of a building on or to whom a notice referred to in subsection (1) was served or delivered, fails to resume or to complete the erection of such building within the periods specified in such notice or, when applicable, within such periods as extended in accordance with subsection (2), and the local authority in question is of the opinion that such building is unsightly or dangerous to life or property or derogates from the value of adjoining or neighbouring properties, such local authority may by notice in writing, served by post or delivered, order such owner to demolish such building, to remove the material of which such building consisted and any other material or rubbish from the site in question, and to otherwise clean up such site within the period specified in the last-mentioned notice.

(4) If the owner of a building fails to comply with a notice served on or delivered to him in accordance with subsection (3) in respect of such building, the local authority in question may demolish such building, remove the material of which such building consisted and any other material or rubbish from the site in question and otherwise clean up such site, and may recover the costs thereof from such owner: Provided that such local authority may sell such material and may utilise the proceeds of such sale to defray the costs of such demolition, removal or clean-up and shall pay the balance, if any, of such proceeds to such owner.

(5) Any approval granted by a local authority in accordance with section 7(1)(a) in respect of any application shall lapse as soon as a notice in terms of subsection (3) is served on or delivered to the owner of the building in question in respect of such building.

⁷ 2014 (4) SA 474 (CC) at para 28.

⁸ 2012 (4) SA 593 (SCA) at para 18.

⁹ 1993 (4) SA 110 (A) at 116F-117A.

ensures that approvals remain aligned with prevailing planning considerations.

38. Section 11, by contrast, addresses the problem of partially built or abandoned structures. It operates as an enforcement mechanism, empowering a local authority to issue compliance notices where construction has commenced but then grind to a halt for more than three months. In essence, it is legislative nudge to keep developers moving and ensure that the urban landscape is not scattered with the remnants of half-built developments.
39. Section 7(4) of the Building Act is framed in disjunctive terms. It provides that a building plan approval will lapse after 12 months unless either the erection of the building has been “commenced” or it has been “proceeded with” within that period. The two disjunctive conditions – “commenced” and “proceeded with” – are expressed in the alternative and must be given a distinct and purposive meaning in accordance with the principles of statutory interpretation.
40. The first condition – “commenced” – refers to the initiation of actual physical construction such as excavation, laying of foundations, or other substantial preparatory works. The second condition – “proceeded with” – presupposes that construction has already begun and requires that building works be actively continued during the 12-month period.
41. These two limbs of the disjunction serve distinct legal functions. If either is satisfied within 12 months of approval, the plan does not lapse. Put differently, the developer need only break ground within that period, or, alternatively, continue previously commenced construction during that period. Section 7(4) requires only one of the conditions to be met to preserve the validity of the approval.

42. In this case, the 2021 plan was approved on 22 February 2021. It would have lapsed on 22 February 2022, unless either the erection of the building was commenced, or proceeded with during that 12-month period.
43. Construction commenced in July 2021, well within the 12-month window. The first disjunctive condition was therefore satisfied, preserving the validity of the approval beyond February 2022. The fact that construction was subsequently halted by Gamble J's interim order on 8 April 2022 is immaterial for purposes of section 7(4), since requirement for commencement had already been fulfilled prior to expiry of the prescribed period.
44. I accordingly conclude that the 2021 plan did not lapse by operation of section 7(4). It remained in force when the revised plan was approved in November 2023. This interpretation does not render section 11 redundant.
45. But the fact that the 2021 plan did not lapse raises this question: does it continue to exist *in fact* and *in law* following its abandonment and replacement by the revised plan? I return to this question after the next section.

The effect of abandonment and supersession on mootness

46. The question of mootness may turn on whether the developers' waiver of rights has extinguished the legal dispute that would otherwise sustain judicial review.
47. The applicants contend that the rights conferred by the 2021 approval cannot be waived in a manner that extinguishes the decision itself. Nor, they argue, can such waiver shield an otherwise unlawful administrative act from judicial scrutiny. On their view, administrative action is inherently public in nature, produces external legal effect, and remains subject to review regardless of whether the beneficiary continues to rely on it.

48. In support of this submission, the applicants rely on *SA Eagle Insurance Co Ltd v Bavuma* (“*Bavuma*”), contending that administrative decisions such as building plan approvals implicate the public interest and cannot be unilaterally waived or abandoned.¹⁰ They argue that once such a decision is made, its legal consequences extend beyond private entitlement and remain reviewable by the courts.¹¹
49. In my view, the applicants’ reliance on *Bavuma* is misplaced. That case concerned the waiver of statutory rights in a context where the public interest was directly and substantially implicated. The principle it affirms is that a person may not waive a right that serves a broader regulatory or societal function. It is rooted in the maxim *quilibet potest renuntiare juri pro se introducto* — a person may renounce a law enacted for their own benefit— but only where the right in question is truly personal, and its waiver does not intrude upon the public interest.
50. This raises the central question in the present case: does the approval of a building plan on privately owned land implicate the public interest in a manner that precludes its waiver? In my view, it does not.
51. In *Walele v City of Cape Town*,¹² the Constitutional Court made clear that the approval of building plans — where those plans comply with applicable zoning and building regulations, and do not trigger the disqualifying factors in section 7(1)(b)(ii) of the Building Act — does not affect the rights of neighbouring owners or implicate broader public interests. Such approvals, the Court held, are regulatory in nature and confined to the relationship between the applicant and the local authority. Neighbours, it affirmed, have no automatic right to be heard in such proceedings.¹³
52. The 2021 plan in this case complied with existing land use rights and applicable statutory frameworks. There is no indication that the approval

¹⁰ Amler’s Pleadings, Tenth Edition (2024) LexisNexis, p 390.

¹¹ [1995] 2 All SA 190 (A) at para 9.

¹² 2008 (6) SA 129 (CC).

¹³ *Walele* at paras 27 to 45.

required any deviation from planning instruments, involved public participation, or had external legal consequences beyond enabling the developer to build. Unlike the legislative scheme in *Bavuma*, which concerned rights designed to protect broader public interests, the approval at issue here was administrative in nature and conferred rights that were private and personal to the beneficiary. The *Bavuma* principle accordingly finds no application here.

53. The City and the developers contend that the matter is moot because the developers have expressly abandoned the 2021 plan and waived the development rights arising from its approval—rights which they were lawfully entitled to relinquish.

54. In support of this submission, they rely on the decision of the Appellate Division in *Cape Coast Exploration Ltd v Scholtz* 1933 AD 56 (“*Cape Coast Exploration*”) where Wessels CJ held that:

“There is certainly nothing to prevent the owner of a statutory right or privilege from renouncing or abandoning such a right or privilege to which he is entitled. If therefore an owner or discoverer asks to have her certificate withdrawn, he is at liberty to do so.”¹⁴

55. They also invoke Baxter’s observation that an administrative decision may be revoked with the consent of its beneficiary, and that a public authority is generally required to seek judicial review unless: (a) the affected parties’ consent to its abandonment; or (b) it can be shown that those parties would benefit from its withdrawal.¹⁵

56. Both *Cape Coast Exploration* and Baxter’s commentary affirm the principle that rights derived from administrative action may, in appropriate circumstances, be lawfully abandoned by the person in whom they vest. That principle is consistent with settled law on waiver and its consequences.

¹⁴ See L Baxter *Administrative Law* (1984) Juta p 374, footnote 208.

¹⁵ *Supra*, p 379.

that once a right is validly abandoned, it is extinguished and cannot be revived.¹⁶ Put differently, a waiver brings an end to the right and precludes its future enforcement.¹⁷

57. Read together, *Cape Coast Exploration* and *Baxter* confirm that administrative rights may be lawfully waived, and that such waiver carries final legal effect. That position is not displaced by the *Bavuma* principle, which has no application in the absence of a broader public interest. The applicants' contention that the developers could not abandon the rights under the 2021 approval is therefore without merit.
58. In the result, the developers' express abandonment of the rights conferred by the approved 2021 plan extinguished any ongoing legal dispute. The approval no longer carries legal consequence, is no longer relied upon by any party, and no longer forms the basis for any enforceable entitlement.
59. The applicants' further contention — that the 2021 plan could be relied upon by the developers' successors in title — must also fail. The rights under the impugned approval have been validly extinguished. There is nothing left to revive. On this point alone, the matter has become moot.
60. That conclusion disposes of the applicants' waiver-based objections. I turn briefly to their further contention — that the 2021 approval was impermissibly superseded by the subsequent decision. The applicants contend that, by approving the revised plan, the City effectively corrected its own earlier approval and this constituted "self-help" — a step they argue is legally impermissible.
61. The City disavows this characterisation. It submits that it exercised its statutory power to consider and approve a new building plan — a power that may be used to regularise or rectify deficiencies in an earlier approval. That

¹⁶ *Amler's Pleadings*, 10th ed (2024) p 390.

¹⁷ *Laws v Rutherford* 1924 AD 261.

authority is not unusual; many statutes permit administrators to revisit earlier decisions, whether expressly or impliedly.¹⁸

62. I am inclined to agree with the City for three reasons. First, sections 4 and 7 of the Building Act empower it to consider and approve new plans that meet statutory requirements. The revised plan was submitted as a fresh application, and the City was bound to assess it as such. Second, the SCA in *Camps Bay Ratepayers and Residents Association v Harrison*¹⁹ recognised that local authorities hold an implied power to approve amendment or replacement plans. And third, this Court confirmed in *Searle v Mossel Bay Municipality*²⁰ that the approval of a replacement plan effectively displaces the original, rendering any dispute over the earlier approval legally spent
63. The answer to the question posed in paragraph 45 — whether the 2021 plan continues to exist in fact and in law — is **no**. While the plan may remain on record, it no longer carries legal currency. It was abandoned in practice and overtaken by the approval of the revised plan. The developers do not rely on it; the City has treated it as superseded; and no rights or obligations are asserted under it. Whatever legal force it once held has been extinguished and cannot be revived.
64. In my view, that alone is enough to establish mootness. This court should fold its arms. But the applicants are not quite done. They press two further arguments which, if my conclusion on mootness at this stage is wrong, I am obliged to address.

Do partial concessions keep the dispute alive?

65. The applicants contend that a live dispute lingers because the City has not conceded each and every ground of review. In their view, even if the 2021

¹⁸ See the discussions in Cora Hoexter and Glen Penfold *Administrative Law in South Africa* 3 ed (2021), p 380 – 388 and Lawrence Baxter *Administrative Law* (1984) p 376 – 377.

¹⁹ [2010] 2 All SA 519 (SCA).

²⁰ (1237/09) [2009] ZAWCHC 9 (12 February 2009).

plan and the rights its approval conferred have been abandoned, they remain entitled to a judgment from this Court that pronounces on the issues and settles the *lis* between the parties — a ruling, they say, that would be binding going forward.

66. They rely on the judgment of this Court in *Camps Bay & Clifton Ratepayers Association and Others v Al Khalifa Family Trust and Another*²¹ (“*Al Khalifa*”) where Rogers J (as he then was) proceeded to adjudicate a review application despite partial concessions by the City of Cape Town. At paragraph 9 of the judgment, he explained:

[9] Since the CCT has only conceded certain grounds of review and because KFT has not formally conceded any of the grounds, I shall have to deal with all of them. This is in any event necessary because the grounds on which I uphold the review will or may bind the parties going forward. It is unfortunate that I should have to do so without the benefit of argument from the CCT and KFT. Because there are multiple grounds on which each of the approvals is attacked, and because there are also complaints about building work which is not authorised by the latest approved plans, the judgment is much longer than I would have liked.

67. That proposition misses the mark. *Al Khalifa* is readily distinguishable on the facts. There, the applicants challenged both the original approval and a set of rider plans. While the City made partial concessions, the developers pressed ahead, opposing the review and intending to build in terms of the contested approvals. A live controversy remained on the table. Rogers J was obliged to deal with the merits — his ruling would shape the legal rights of the parties going forward.
68. Not so here. The developers have walked away from the 2021 plan, waived the rights that flowed from its approval, and committed to proceeding with

²¹ [2020] ZAWCHC 181 (15 December 2020).

construction under the revised plan. They no longer seek to defend the original approval, nor to act on it. Unlike in *Al Khalifa*, there is no continuing reliance on the disputed decision. The legal footing for the review has simply fallen away.

69. During oral argument, the applicants advanced two further points to keep the dispute alive. First, they submitted that the boundary setback issue remains unresolved and warrants adjudication, noting that this ground was found to be arguable in *Al Khalifa*. Second, they argued that the respondents' concessions on height restrictions and layout were not made under oath, and that the lawfulness of the 2021 plan has not been expressly conceded or answered — leaving the merits, in their view, still on the table.
70. These arguments do not hold. The fact that a ground of review was previously found arguable, in another case, does not justify adjudication in this case in the absence of an active dispute. What the applicants are pressing for is not the resolution of an actual controversy, but a ruling in the abstract — a judgment for judgment's sake. This is indicative of a conceptual misunderstanding of the distinction between the grounds of review and the effect of the administrative action once it is no longer relied upon.
71. What the applicants seek here bears a striking resemblance to what this Court declined to do in *Habitat Council v The City of Cape Town and Others* ("*Habitat Council*").²² There, Gamble J cautioned against delivering a judgment merely to "*castigate the City for its constitutional delinquency*" and "*to tell the City that it was wrong and that in future it should do its job better.*"²³ This is, in effect, what the applicants now invite this Court to do. I decline that invitation.
72. In my view, the City's refusal to concede specific review grounds does not resuscitate a dispute that has otherwise run its course. But the applicants are not quite done. Shifting ground, they advance a further argument: that

²² 2022 (6) SA 383 (WCC).

²³ *Habitat Council* at paras 76 to 77.

the 2021 approval continues to exist in fact and in law, and that this alone is enough to keep the matter justiciable.

Does a court have jurisdiction absent legal consequences and a live dispute?

73. The applicants contend that the impugned approval constitutes administrative action that remains valid and binding until set aside by a court. They argue that, unless it is formally invalidated, the 2021 plan approval continues to carry legal consequences — consequences that could, in theory, be relied upon by the developers or their successors in future. On that basis, they submit that a setting-aside order would still serve a practical legal purpose
74. The applicants anchor their argument in the principle of administrative law articulated in *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others*²⁴ (“*Oudekraal*”), and endorsed in later decisions including *MEC for Health, Eastern Cape v Kirland Investments (Pty) Ltd*²⁵ (“*Kirland*”) and *Merafong City Local Municipality v AngloGold Ashanti Ltd*²⁶ (“*Merafong*”).
75. The principle is well established: administrative decisions—whether lawful or not—remain legally effective and binding until set aside by a court of law. Until that point, they may continue to produce legally operative consequences. In support of this contention, the applicants rely on the following passages from the majority judgment in *Merafong*:

[41] The import of *Oudekraal* and *Kirkland* was that government cannot simply ignore an apparently binding ruling or decision on the basis that it is invalid. The validity of the decision has to be tested in appropriate proceedings. And the sole power to pronounce that the decision is defective, and therefore invalid, lied with the courts.

²⁴ 2004 (6) SA 222 (SCA).

²⁵ 2014 (3) SA 481 (CC).

²⁶ 2017 (2) SA 211 (CC).

Government itself has no authority to invalidate or ignore the decision. It remains legally effective until properly set aside.

[42] The underlying principles are that the courts' role in determining legality is pre-eminent and exclusive; government officials, or anyone else for that matter, may not usurp that role by themselves pronouncing on whether decisions are unlawful, and then ignoring them and, unless set aside, a decision erroneously taken may well continue to have lawful consequences...

76. However, the applicants overstate the reach of the *Oudekraal* principle. Their submission proceeds from the premise that every administrative action must be judicially set aside before it can lose legal or factual effect. I do not agree. That is not, in my view, what *Oudekraal* intended. If that were so, the doctrine of mootness would never apply in cases involving administrative decisions.
77. As the SCA has clarified, the purpose of the *Oudekraal* principle is to preserve legal certainty and promote the orderly functioning of the state. It does so by ensuring that administrative decisions are not unilaterally disregarded merely because they are believed to be invalid. Such decisions, though potentially unlawful, exist in fact — and their factual existence may carry legal consequences. Until set aside by a court, they retain binding force and may serve as the lawful basis for further administrative or private acts. In this regard, the SCA held:

[31] Thus the proper inquiry in each – at least at first – is not whether the initial act was valid but rather whether its substantive validity was a necessary precondition for the validity of consequent acts. If the validity of consequent act is dependent on no more than the factual existence of the initial act then the consequent act will have legal effect for so long as the initial act is not set aside by a competent court.

78. Properly understood, the *Oudekraal* principle rests on the premise that legal consequences may continue to flow from the mere factual existence of an

administrative act, even if that act is unlawful. As Cameron J aptly observed, the notion that an unlawful act can provide legally effective consequences is a central conundrum of *Oudekraal* that is constitutionally sustainable and necessary because its factual footprint may, for better or worse, lay the groundwork for subsequent lawful action built upon it.²⁷

79. This is where *Oudekraal* and mootness meet: while *Oudekraal* addresses the legal consequences of an administrative act that remains formally in existence, the doctrine of mootness focuses on whether setting aside such an act would have any practical legal effect. If not, the court's jurisdiction is not engaged.
80. In the present matter, the only arguable legal consequence flowing from the impugned approval would be if the developers or successors in title were to dust off the 2021 plan and attempt to build in accordance with it, drawing on the impugned approval's formal existence. But that eventuality is not on the cards here. Neither the developers nor their successors in title are in any position to breathe life back into rights that have long since been extinguished.
81. Neither *Oudekraal*, *Merafong*, nor the other authorities on which the applicants rely obliges a court to adjudicate disputes where a factual existence of an administrative decision bears no legal consequence. A court's jurisdiction is engaged only where the impugned act continues to produce tangible legal effects. That is not the case here. On the contrary, the matter is moot and falls outside the reach of judicial determination.
82. The applicants seek to resist this conclusion by invoking the *Stransham-Ford* principle, contending that courts lack jurisdiction only where the underlying cause of action has been extinguished. They argue that because the impugned approval has not been judicially set aside, the cause of action remains extant and justiciable.

²⁷ *Merafong* at para 36.

83. *Stransham-Ford* does not assist the applicants. It is both factually and legally distinguishable. That case concerned a terminally ill applicant who sought judicial authorisation for physician-assisted death. Before the High Court could determine the matter, the applicant passed away. The SCA held that his death extinguished the cause of action, rendering the matter moot, since the order sought could no longer serve any purpose. The only potential beneficiary was no longer alive.
84. The principle in *Stransham-Ford* has been applied consistently in subsequent cases²⁸ including *Solidariteit Helpende*, where the applicants challenged COVID-19 regulations prohibiting religious gatherings. Before the hearing, the regulations were amended to lift the prohibition. The High Court dismissed the matter due to mootness. The SCA upheld that finding, concluding that by the time the matter was heard, all regulations had been repealed, leaving nothing to review or set aside.
85. *Stransham-Ford* underscores a foundational principle: the existence of an administrative action or a cause of action does not, on its own, confer jurisdiction on this Court to consider the merits in the absence of a live dispute or any legal consequences. An administrative action is not litigated in abstract – it must be anchored in a concrete and ongoing controversy. Without that, the court is left swinging at shadows. Once that underlying dispute is resolved, so too is the basis for adjudication.
86. In *Stransham-Ford*, the live dispute was extinguished by the applicant's death – the legal flame, so to speak, flickered out before judgment could be handed down. In *Solidariteit Helpende*, the dispute dissolved when the regulations were repealed, the legal ban they had imposed no longer existed, and with it, the controversy fell away. By contrast, in this matter, the lawfulness and legal effect of the 2021 plan has lost traction because of the

²⁸ For example, this Court has applied the principle in *Vinpro NPC v President of the Republic of South Africa* [2021] ZAWCHC 261 (3 December 2021); *Studenteplein v Stellenbosch* [2022] ZAWCHC 183 (15 September 2022).

developers' subsequent action and current stance. In short, there is no longer any axe to grind.

87. Even if there was once an axe to grind, the battlefield has shifted. The City's approval of the revised plan, which effectively superseded the 2021 plan, rendered the dispute academic. As confirmed in *Searle*, the approval of a replacement plan extinguishes any legal controversy arising from the original. The dispute concerning the 2021 plan has thus voyaged to the second review application, where it now properly belongs.
88. As concluded in paragraphs 59 and 63 above, there is no longer a live dispute requiring adjudication. Here too, the court must fold its arms.

Conclusion

89. This case underscores that the doctrine of mootness applies with undiminished force in the realm of administrative law. Courts are not in the business of settling abstract disputes or issuing advisory opinions dressed up as judgments. Once the legal consequences of the impugned decision have fallen away, the courtroom ceases to be a forum for resolution. Judicial restraint in such a setting does not dilute the rule of law — it safeguards the constitutional boundaries within which the judicial function must operate.
90. In the circumstances, the review application must therefore be dismissed, with costs. But what costs are warranted in the circumstances of this case?

Costs

91. The general principle is that costs follow the result. A successful party is ordinarily entitled to its costs unless the court finds that there are circumstances justifying a different order. The discretion to awards costs

must be exercised judiciously having regard to the facts, the conduct of the parties, and broader interests of justice considerations.²⁹

92. That principle is not inflexible, The Court may, in appropriate cases, depart from it – particularly where success is partial or hollow, where a party has contributed to the dispute or where broader considerations of fairness and public interest demand a different outcome.
93. Punitive costs orders, such as those on the attorney-and-client scale, are reserved for exceptional cases where a party has acted vexatiously, frivolously, abusively or in a manner deserving of judicial censure. Conduct such as persisting with litigation that has become moot, or rejecting a reasonable offer of settlement may justify such an order.³⁰
94. In this case, the relief sought by the applicants has been unopposed since June 2023. After receiving the developers' revised plan, the City advised the applicants in May 2023 that it no longer opposed the review and accepted that its earlier approval should be set aside.
95. On 21 June 2023, the developers filed a notice to abide the outcomes of the review application. From that point, the matter was clearly unopposed. The applicants however took no steps to bring it to finality or obtain the relief they now seek.
96. When the City approved the revised plan on 27 November 2023, the application became moot. The applicants took no action until February 2024, after construction resumed in terms of the revised plan.
97. In February 2024, the applicants proposed an order setting aside both approvals, interdicting the City's future exercise of public powers to approve building plans over Erf 1[...], and seeking costs on an attorney-and-client

²⁹ Cilliers, Loots and Nel, *Herbstein & Van Winsen's The Civil Practice of the High Courts of South Africa*, 5th Edition, Volume 2, pp 954 – 957.

³⁰ Cilliers *supra*, p 967 and pp 971- 973.

scale. The City rejected the proposed order. The applicants thereafter launched a second review application.

98. In June 2024, the City proposed a draft order to resolve this application and the associated matters on appeal. The draft order recorded that the matter had become moot and included a favourable costs order for the applicants up to that date, to be born by the developers. The developers accepted the terms of the draft order, including liability for review costs.
99. The applicants rejected them without providing cogent reasons. This is regrettable. They were entitled to their costs for what was, at its inception, a meritorious review. The opportunity to recover those costs was lost by their own refusal.
100. As stated, from June 2023, the matter was unopposed. Yet the applicants declined to finalise it. Instead, it relied on the earlier interim order by Gamble J and compliance order by Fortuin J to continue to half construction even under a validly approved revised plan. In my view, this litigation ceased to function as a *bona fide* review and became a mechanism to frustrate lawful construction.
101. The developers have achieved substantial success in these proceedings. While they failed to establish that the 2021 plan had lapsed under the Building Act, they succeeded in the overall result: the validity of the 2021 plan was rendered moot by the approval of the revised plan. They seek a costs order, including costs of two counsel.
102. The developers were the originators of this dispute. They submitted an unlawful plan, obtained its approval and only conceded its defects after litigation had commenced. It was only thereafter that they renounced their rights and submitted a revised plan. However, their later offer to resolve the matter including costs, was unreasonably rejected.

103. I am accordingly inclined to grant the developers a costs order – but only for the costs occasioned by the applicants’ persistence with the review from 27 November 2023 onwards, the date on which the application became moot.
104. The City seeks a punitive costs order against the applicants. It raises two grounds for this order: first, that the applicants persisted with a moot application at public expense; and second, that they made unsubstantiated and gratuitous allegations of bias and procedural impropriety against the City and its officials – allegations were never withdrawn or substantiated.
105. While the City has been wholly successful in resisting the application, I am not persuaded that a punitive costs order is warranted. It was the City’s approval of the 2021 plan that precipitated this litigation, which at inception was well-founded. The City has not explained how the unlawfulness of the plan, it later conceded, escaped its detection at the approval stage. These considerations weigh against an exceptional order.
106. That said, once it received the revised plan, the City acted responsibly. It did not oppose the review, accepted that the prior approval should be set aside, and made repeated efforts to resolve the matter. Its attempts at resolution were constructive and failed through no fault of its own.
107. The same cannot be said of the applicants. Between May and November 2023, they had ample opportunity to finalise the matter while it remained unopposed. After November 2023, they were aware of the mootness defence, yet they persisted – proposing sweeping and untenable relief in February 2024 and rejecting a reasonable offer in June 2024 that would have disposed of the matter on favourable terms for them.
108. In the circumstances, although I decline to grant a punitive costs order, I am satisfied that the applicants should bear the costs incurred by the City and the developers from 27 November 2023, including costs of two counsel.

109. This allocation of costs reflects the principle that while applicants were justified in initiating these proceedings, their refusal to withdraw or settle after the matter became moot shifted the burden of liability in relation to costs.

110. I therefore make the following order:

110.1. The application is dismissed.

110.2. The applicants are directed to pay:

110.2.1. The City's costs incurred from 27 November 2023 onwards, including the costs of two counsel, such costs to be taxed on Scale C for Senior Counsel and Scale B for Junior Counsel; and

110.2.2. The developers' costs incurred from 27 November 2023 onwards, including the costs of two counsel, such costs to be taxed on Scale C for Senior Counsel and Scale B for Junior Counsel.

GSS KHOZA
ACTING JUDGE OF THE HIGH COURT
WESTERN CAPE DIVISION

APPEARANCES

For the applicants: Adv D Irish SC, with Adv D Lubbe, instructed by Mr LJ van Rensburg and Co.

For the first to third respondents: Adv J Muller and Adv D Baguley, instructed by Slabbert Venter Yanoutsos Inc.

For the fourth respondent: Adv R Paschke SC, with Adv M de Beer, instructed by
Fairbridges Wertheim Becker