

**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN**

CASE NO: D5113/2024

In the matter between:

FIONA HANSA N.O	First Applicant
SAMEERA AHMED HANSA N.O	Second Applicant
AHMED MAHOMED HANSA N.O	Third Applicant
SAYED AHMED EBRAHIM FAKROODEEN N.O	Fourth Applicant

and

ETHEKWINI MUNICIPALITY	First Respondent
MOHAMED IQBAL MALEK N.O	Second Respondent
MASEEHA NOOR MAHOMED N.O	Third Respondent
MUHAMMAD NOOR MAHOMED N.O	Fourth Respondent
NAEEMA NOOR MAHOMED N.O	Fifth Respondent
RICHARD BRUCE DONACHIE N.O	Sixth Respondent

ORDER

1. The decision of the first respondent to approve the building plans submitted on behalf of the second to sixth respondents in respect of the erection of buildings currently in the process of construction on the immovable property known as Remainder of Erf 6[...] Durban, Registration Division FU, Province of KwaZulu Natal and having the street address of 1[...] M[...] Road, Morningside, Durban is reviewed and set aside.

2. It is declared that the building under construction on the immovable property is in contravention of the first respondent's applicable town planning controls and is unlawful in that:

i) The building consists of three storeys, none of which comprises a "basement" and accordingly does not comply with the requirement that the building consist of a maximum of two storeys; and

ii) Each of the three storeys exceeds the maximum permitted storey height of 4.5 metres.

3. The respondents are ordered, jointly and severally, the one paying the other to be absolved to pay the costs of the application until 20 May 2024, such costs to include the costs consequent upon the employment of two counsel, counsel's fees to be taxed on Scale C.

4. The first respondent is ordered to pay the costs of the application from 21 May 2024 onwards, such costs to include the costs consequent upon the employment of two counsel, counsel's fees to be taxed on Scale C.

JUDGMENT

SHAPIRO AJ

OVERVIEW

[1] The applicants are the trustees for the time being of the 648 Musgrave Trust, which owns an immovable property situated at 2[...] I[...] Road, Morningside, Durban¹ (“the I[...] property”). The second to sixth respondents are the trustees for the time being of the MLM Family Trust, which is building a dwelling on a property which it owns at 1[...] M[...] Road, Morningside, Durban² (“the M[...] property”).

[2] The applicants seek orders declaring that the decision of the first respondent (“the Municipality”) to approve building plans submitted on behalf of the second to sixth respondents to build a dwelling on the M[...] property be reviewed and set aside, and declaring that the building under construction at the M[...] property contravenes the Municipality’s town planning controls and is unlawful.

[3] The application is opposed by the Municipality. The second to sixth respondents have not actively opposed the application, despite delivering a Notice of Opposition on 20 May 2024.

THE FACTS OF THE CASE

The relative position of the I[...] and M[...] properties

[4] I[...] Road and M[...] Road run more or less parallel to each other in Morningside, Durban. I[...] Road is to the east of M[...] Road, closer to the ocean and lower than M[...] Road.

[5] The land between M[...] and I[...] Roads slopes relatively steeply down towards the ocean. M[...] Road is higher and the land steps down at the point of a 3

¹ The property is described as Portion 2 of Erf 6[...] Durban, Registration Division FU, Province of KwaZulu Natal in extent 1864 square metres.

² The property is described as Remainder of Erf 6[...] Durban, Registration Division FU, Province of KwaZulu Natal in extent 3478 square metres.

metre-plus retaining wall which forms the boundary between the two properties. The I[...] property is nevertheless higher than M[...] Road.

[6] Until 2022, the erstwhile (and now demolished) double storey dwelling that was built on the M[...] property was of reasonable height and was set back some distance from the common boundary. The applicants' property effectively had complete privacy from the old M[...] property and even if people approached the common boundary wall, their view of the entertainment area, front lawn and swimming pool of the I[...] property was shielded by the single-storey dwelling³.

The demolition of the old dwelling, the commencement of the construction of the M[...] property in April 2022 and subsequent events

[7] In about April 2022, the third applicant noticed extensive building works commencing at the M[...] property, starting with the demolition of the existing dwelling.

[8] Gradually, the third applicant became concerned that a three-storey building was being built on the property. A representative of the MLM Family Trust, Abdul Noor Mohamed, declined to provide the third applicant with the approved building plans – and requests to the Municipality were equally unsuccessful in this regard.

[9] On 15 April 2023, the third applicant complained to the Municipality in writing that “a 3 storey building is being erected on the site” and enquired “on what basis approval [was] given for a 3 storey house to be built to tower over mine... [which]... looks directly over my pool...”. He did not receive a positive response to his complaint, save to be told on 15 May 2023 that the plans had been approved during June 2022 but that there were “deviations on the Lower Ground Floor” and that a Contravention Notice had been issued.

[10] The exchange of further correspondence with the Municipality did not advance matters, and the response ultimately received was that the zoning of the

³ This information is contained in the founding affidavit and was not disputed by the Municipality.

property permitted two storeys to be built plus a basement and that the plans did not require the consent of neighbours.

[11] The third applicant arranged for photographs of the M[...] property to be taken in his presence – some of which will appear further on in this judgment.

[12] Further, and in anticipation of further proceedings, the applicants retained the services of Mohamed Shoib Sayed, a professional architectural technologist, and Lawrence Heinrich Ausmeier, a professional land surveyor with 45 years of experience. Both Mr Sayed and Mr Ausmeier deposed to detailed affidavits in this application.

[13] The M[...] property is built on three levels, and each level is no less than 4.5 metres high. The dwelling extends over more than 1200 square metres.

[14] Although construction of the M[...] property has not been completed, the third applicant has alleged that the M[...] property:

- a) towers over the I[...] property such that the living, entertainment and pool areas are visible to anyone who occupies the M[...] property;
- b) casts a “monstrous” shadow over the I[...] property from shortly after midday (when previously light would reach the property until close to sunset);
- c) is an eyesore, is visible from the roadside of the I[...] property on I[...] Road notwithstanding the difference in elevation of the properties and deviates from the overall aesthetic / appearance of the neighbourhood and homes in proximity to it⁴.

[15] The applicants also alleged that the construction has led to a significant reduction in the value of their property, from R10.5 million in 2021 to R6.5 million in 2023.

⁴ None of these allegations are disputed by the Municipality in any meaningful way.

[16] The applicants relied on valuations provided to them by Barrett Pearson, a full status property practitioner who has been in practice since 2008. Mr Pearson also deposed to a detailed affidavit in this application.

The findings of Mr Sayed and Mr Ausmeier

Mr Sayed

[17] Mr Sayed was retained to establish the mean natural ground level, without any additional earthworks, as it existed prior to the conception of the M[...] property.

[18] Mr Sayed was provided with copies of the approved “as built” architectural drawings for the erstwhile property, photographs obtained from estate agencies and computer screen images from “Google Maps” which included both satellite derived aerial images and images taken from a vehicle roof mounted 360° camera from M[...] Road at various dates over several years. He also conducted personal inspections, viewing the M[...] property from the I[...] property and from M[...] Road.

[19] Mr Sayed explained in detail how he was able to determine the natural ground level surrounding the demolished dwelling and the process that he followed in doing so.

[20] According to Mr Sayed’s investigations, the natural ground level surrounding the demolished dwelling was 91.65 metres above mean sea level. On the southwestern side of the property, closest to M[...] Road, there was a slope downwards from 94.85 to 91.65 metres. This related to a driveway which existed on the southern boundary leading to the main entrance of the demolished dwelling and the small section of raised natural ground level was restricted to that edge of the property. The M[...] property under construction extends partially into that space, but the encroachment is described as “limited”.

[21] Mr Sayed also had sight of the approved building plans for the M[...] property. Mr Sayed expressed the view that there was no clear indication of the pre-existing natural ground level on the plans nor was there any express statement that the

lowest level constituted a “basement” with reference to the extent to which it was located more than 50% below the pre-existing natural ground level. To Mr Sayed, the approved plans did not provide any basis upon which it could be determined that the depicted three-storey building was capable of valid approval.

Mr Ausmeier

[22] Mr Ausmeier was retained by the applicants to survey the M[...] property to determine the levels of various points on the property as well as the location and gross coverage of the structures on the property. In doing so, Mr Ausmeier utilised drawings produced by Mr Sayed and surveyed the property himself. His surveys were based on Town Survey Mark⁵ 395N1 with a check onto TSM 352N1 and the connection onto the Town Survey Marks was done using a Global Positioning System which is accurate to 2 to 3 centimetres horizontally and 3 to 4 centimetres vertically. All measurements onto the building were made using a Trimble M3 Total Station⁶, which is accurate to 2 millimetres both horizontally and vertically.

[23] Mr Ausmeier determined the following:

- a) the ground level of the new building is located at 90.97 metres above mean sea level;
- b) the storey height of the ground floor of the building is 4.510 metres (90.97 to 95.48 metres);
- c) the storey height of the first floor (from first floor to second floor) is 4.64 metres (95.48 to 100.12 metres); and
- d) the storey height of the second floor (from the level of the second floor to the ceiling, being the underside of the concrete slab) is 4.820 metres (100.12 to 104.94 metres).

⁵ A “Town Survey Mark” is a fixed point on the ground, typically within urban areas, used as a reference point for surveying and mapping. It's part of a larger system of control points that establishes a framework for local surveys.

⁶ A piece of robotic and scanning equipment

[24] It is apposite to set out the Municipality's responses in its answering affidavit to the findings of both Mr Sayed and Mr Ausmeier:

'9. The affidavits by the people referred to as experts do not take the case of the applicants any further. They are mere observations made from photos alleged to have been taken using, inter alia, a drone and they do not reflect the true state of the structure in question. There is no scientific method outlined regarding the manner in which their conclusions except studying of photos and making general observations.

Ad para 65 to 75

59. In these paragraphs the applicants record what they were told by their "experts" which I have no knowledge of and the applicants to the proof thereof.

60. By their own admission, neither the applicants nor their "experts" have ever gained access to the building in question. They simply rely on the photos they took using a drone.

61. Therefore, the correctness of their measurements cannot be as accurate as they purport.

62. The definition of basement has been given above and the fact that the structure in question complies with the definition makes it a double-storey not three-storey structure

Ad para 80

67. I deny the allegations contained in these paragraphs. As mentioned, the calculations which the applicants rely on are not borne out of an actual site inspection of the structure in question. These are just estimates derived from the photos taken by, amongst others, a drone as they allege.'

[25] The Municipality did not deal with the allegations contained in the affidavits of Mr Sayed or Mr Ausmeier at all.

[26] A plain reading of those affidavits reveals that neither Mr Sayed nor Mr Ausmeier contented themselves just with relying on photographs taken using a drone. Further, access to the building itself did not disable either gentleman from taking measurements at points around the property – or from considering the contents of previous plans.

[27] Both Mr Sayed and Mr Ausmeier explained the method that they adopted, and Mr Ausmeier described the equipment that he used.

[28] If the Municipality wished to dispute the contents of the affidavits and factual findings which both Mr Sayed and Mr Ausmeier made, it was obliged to address these facts seriously and unambiguously. In circumstances where both Mr Mohanlal⁷ and Mr Dlamini⁸ of the Municipality effectively claimed specialist knowledge and experience to which deference was due, and the facts if they differed from the applicants' experts were within their knowledge, a bare denial of the allegations was entirely insufficient and did not raise a dispute of fact⁹.

[29] I therefore accept the findings and calculations of both Mr Sayed and Mr Ausmeier.

THE APPLICABLE STATUTORY SCHEME

[30] Both the National Building Regulations and Building Standards Act¹⁰ and the Municipality's Municipal Land Use Scheme: Central Sub-Scheme apply in this matter.

[31] I set out the relevant extracts of the Act below:

⁷ The Submission and Assessment Coordinator of the Municipality, who approved the building application and then deposed to the answering affidavit

⁸ The Building Control Officer

⁹ *Wightman t/a JW Construction v Headfour (Pty) Ltd and Another* 2008 (3) SA 371 (SCA) at para [13]

¹⁰ Act 103 of 1999 ("the Act")

4 Approval by local authorities of applications in respect of erection of buildings

(1) No person shall without the prior approval in writing of the local authority in question, erect any building in respect of which plans and specifications are to be drawn and submitted in terms of this Act.

6 Functions of building control officers

(1) A building control officer shall-

- (a) make recommendations to the local authority in question, regarding any plans, specifications, documents and information submitted to such local authority in accordance with section 4 (3);
- (b) ensure that any instruction given in terms of this Act by the local authority in question be carried out;
- (c) inspect the erection of a building, and any activities or matters connected therewith, in respect of which approval referred to in section 4 (1) was granted;
- (d) report to the local authority in question, regarding non-compliance with any condition on which approval referred to in section 4 (1) was granted.

7 Approval by local authorities in respect of erection of buildings

(1) If a local authority, having considered a recommendation referred to in section 6 (1) (a)-

(a) is satisfied that the application in question complies with the requirements of this Act and any other applicable law, it shall grant its approval in respect thereof;

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

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

(aa) is to be erected in such manner or will be of such nature or appearance

that-

(aaa) the area in which it is to be erected will probably or in fact be disfigured
thereby;

- (bbb) it will probably or in fact be unsightly or objectionable;
- (ccc) it will probably or in fact derogate from the value of adjoining or neighbouring properties;
- (bb) will probably or in fact be dangerous to life or property,

such local authority shall refuse to grant its approval in respect thereof and give written reasons for such refusal.

[32] It is undisputed that the M[...] property is zoned “Special Residential: 1200”.

[33] According to the Development Facilitation Tables contained in section 7 of the Sub-Scheme, the property is permitted to have a maximum of two storeys (excluding a basement).

[34] A basement is defined in the Sub-Scheme to be:

‘the lowest part of any building which part is constructed with more than 50% of its volume below ground level. Ground level shall mean natural ground level, without any additional earthworks, as it existed prior to the conception of the building or development in question.’

[35] A storey means:

‘that part of the building which is situated between two floors, or if there is no floor above it, the underside of the ceiling. Such storey shall not exceed 4,5 m for residential purposes. Save that:

- ii) In the event of a storey being higher than the height as indicated above, it shall be counted as two storeys;
- iii) the prescribed height storey, as indicated above, may be relaxed, provided that the total combined Height and number of all stories prescribed in the Development Facilitation Table is NOT exceeded...
- v) a basement shall not count as a storey.’

[36] “Ground Floor” is defined to mean:

‘the storey of a building or portion of a building on or nearest the mean finished ground level immediately surrounding the building, providing it is not a basement.’

[37] So, the Municipality was:

- a) entitled to approve an application if it complied with the requirements of the Act and the Sub-Scheme; and
- b) obliged to refuse the application if it was not satisfied that the application complied with the statutory scheme or if it was satisfied that that the building fell afoul of any of the factors contemplated in section 7(1)(b) of the Act.

[38] Therefore, if the Municipality approved an application either that did not comply with the statutory scheme or if it failed properly to apply the provisions of section 7(1)(b) of the Act, such a decision would be unlawful and liable to be set aside on review.

THE APPLICANTS’ COMPLAINTS

[39] I turn to deal with the gravamen of the applicants’ challenges to the Municipality’s decision and to the lawfulness of the ongoing construction of the M[...] property.

[40] The applicants complain that the Municipality’s decision to approve the plans was unlawful and contrary to the provisions of both section 7(1)(a) and (b) of the Act and that the continued construction of the M[...] property is unlawful because:

- a) the building consists of three storeys, none of which comprises a “basement” and does not comply with the requirement that the building consist of a maximum of two storeys;

- b) each of the three storeys exceeds the maximum permitted height of 4.5 metres;
- c) the building is an eyesore, disfigures or detracts from the surrounding area and derogates from the value of adjoining properties.

THE SECTION 7(1)(a) ATTACK – APPROVAL OF THE PLANS WAS UNLAWFUL

Was the lowest level of the proposed building a basement?

[41] The definition of a “basement” has been set out above.

[42] The definition in the Sub-Scheme is carefully drawn, and it makes clear that the determination of “ground level” is not related to the level of the road from which persons could gain access to the property or even to the highest point of that property, if the property slopes. If the level was to be determined simply with reference to the highest and lowest points of the site and a determination of whether a part of the building was constructed with more than 50% of its volume below the highest point on a property, the definition would not have included the words from “without any additional earthworks” to the end of the sentence. Those concluding words have meaning.

[43] Applying the definition of a “basement” in its express terms, it requires an assessment of what existed at a site previously.

[44] In this matter, “ground level” must then mean the level of the ground as it was when the previous dwelling existed. The level of the platform on which the now-demolished dwelling was constructed was “ground level”. In the absence of a basement, it had to be. If a basement was to be constructed on the new dwelling, it had to have more than 50% of its volume below the level at which the demolished house was constructed, or more than 50% below the existing ground level that sloped upwards towards the highest point of the property.

[45] If the “basement” proceeded upwards from platform level, and not downwards, it could not be a basement. Even if part of it did proceed downwards or part of the existing slope was excavated to permit construction of the building, that level could not be categorized as a basement unless more than 50% of its volume was below the platform or the existing ground level¹¹.

[46] The plans that were submitted to the Municipality on behalf of the second to sixth respondents¹² contemplated three levels to the construction, labelled as "Lower Ground Floor", "Ground Floor" and "First Floor".

[47] The plan in respect of the "Lower Ground" floor described *inter alia* a large entertainment area around an indoor and outdoor pool. The elevation diagrams (and specifically the Southwest Elevation Fire Plan diagram) depict the proposed dwelling being constructed on level ground towards where the entertainment area of the property was to be constructed. The outdoor pool was to be constructed at a slightly lower level than the entertainment area and indoor pool, as evidenced by four steps leading from the entertainment area down to the level of the outdoor pool.

[48] The "Lower Ground Floor Plan" submitted to the municipality did not disclose how much of the "Lower Ground" level was to be constructed on the existing platform and how much of that level would require excavation from the sloping, natural ground level as it rose to the highest point of the property.

[49] In the Municipality’s answering affidavit, Mr Mohanall alleged that “In terms of the building plans, the basement is depicted to be in compliance with the Act” and that the “structure remains a double-storey house as submitted in the plans”.

[50] The confirmatory affidavits of Mr Dlamini¹³ and Ms Norton¹⁴ do not take the matter any further. They simply confirm the allegations in the answering affidavit as those allegations relate to their involvement in the process of approving the plans.

¹¹ It will be recalled that Mr Sayed assessed the part of the lower level that would have intruded into the slope going up towards Mentone Road to be small and that there is no factual dispute to this raised by the Municipality.

¹² These were submitted at part of the Municipality’s Record of Decision

¹³ The Building Control Officer who recommended that the plans be approved

¹⁴ A senior manager in the Municipality’s Land Use Management Branch

[51] I do not agree that the building plans depict a structure that would be “in compliance with the Act”¹⁵.

[52] The Southwest Elevation plan reflects a diagonal line marked “NGL”¹⁶ which bisects the lowest level of the proposed building from the underside of the slab above at one end to the finished floor level of the slab at the other end.

[53] The Municipality appears to have accepted that the natural ground level at site was at the slope depicted in the plan. This, in the face of an existing dwelling quite patently built on a level platform and not on a slope and a level that was going to contain a swimming pool, which necessarily required a level surface. Further information, consideration and assessment was obviously required.

[54] The designed finished floor level of the lower level was reflected as being 91.10 metres above mean sea level. In circumstances where natural ground level was no higher than approximately 91.65 metres above mean sea level¹⁷, the lowest level was therefore at best only 0.55 metres below natural ground level¹⁸.

[55] If the stated height of the level was 4.66 metres¹⁹, this meant that 4.11 metres of the level was above natural ground level. There is no logical way that more than 50% of the volume of the level could then have been below natural ground level.

[56] If there was, and the Municipality determined it to be so, no explanation for this conclusion has been provided and the Record does not disclose how such a conclusion could have been reached.

¹⁵ There was certainly non-compliance with the Act of which the Municipality were aware. On 15 May 2023, Ms Nomfundo Soni who is a building inspector at the Municipality confirmed to the third applicant that there had been “deviations” in respect of the “Lower Ground Floor” and that a Contravention Notice had been issued. However, the Notice was not put up by the Municipality in the Record, and nothing was said about it in the answering affidavit.

¹⁶ This must mean “natural ground level”.

¹⁷ Which, again, has not been disputed by the Municipality

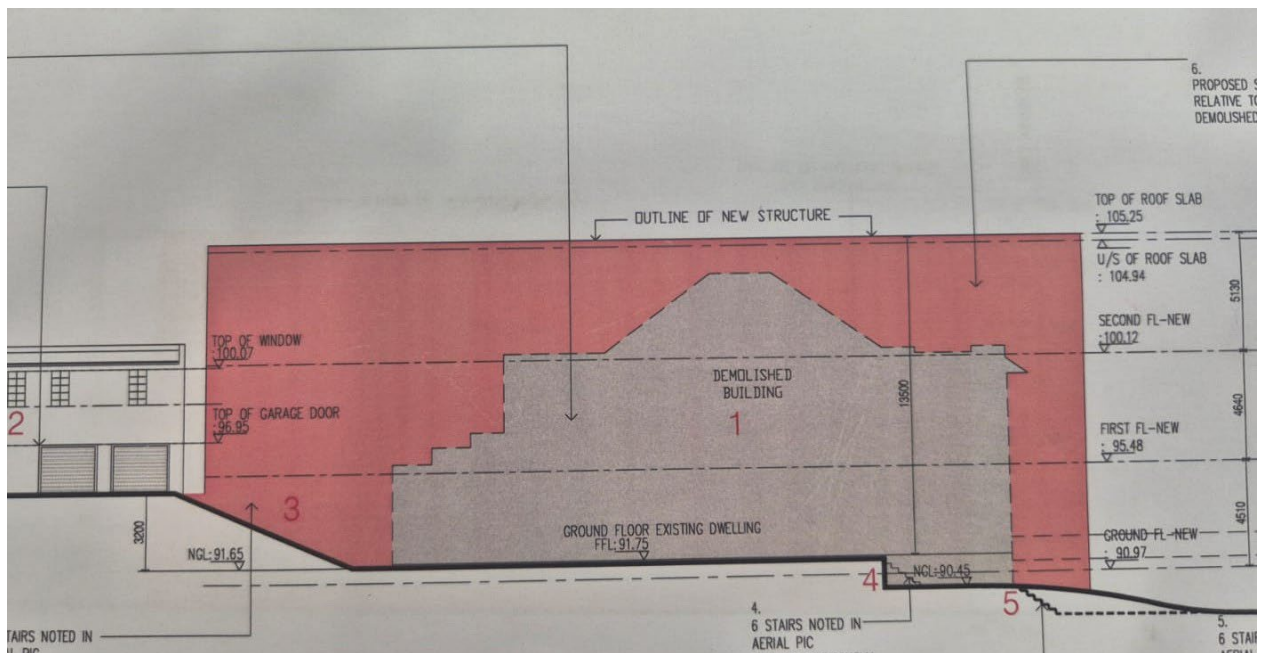
¹⁸ If there was any excavation at all – which the photographs to which I refer below suggest did not occur.

¹⁹ As it was on the submitted plans

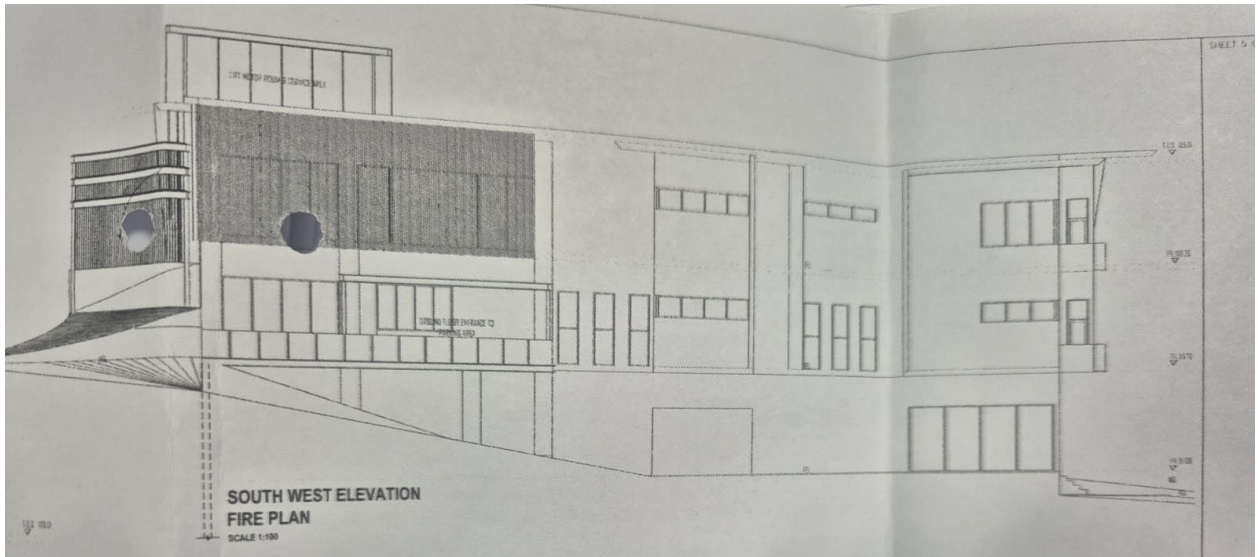
[57] There is a second way in which the enquiry could have been undertaken.

[58] Both the Southwest Elevation Fire Plan²⁰ and the Southwest Elevation plan prepared by Mr Sayed and which superimposed the demolished building on the outline of the new structure make clear that any part of the "Lower Ground" level that may have required excavation towards the M[...] Road side of the property prior to construction was not near 50% of the total volume of the level. It certainly did not constitute more than 50%, which is what the definition required.

[59] For convenience, Mr Sayed's and the submitted elevation plans are reproduced below in order:



²⁰ Submitted on behalf of the second to sixth respondents



[60] The applicants estimated that, at most, 12% of the "Lower Ground" level was below natural ground level²¹.

[61] Even if the percentage is higher than 12%, logic combined with a rational assessment of the plans and the existing level of the ground demonstrate that the lowest level was not more than 50% below natural ground level.

[62] If the Municipality did undertake this assessment, it has not alleged anything about the process it followed, and none of the documents contained in the Record do so either. To the contrary, Mr Mohanlal referred only to the Southwest Elevation plan depicted above as if it was dispositive. He did not explain how or why he formed that view, or how he could have done so in the absence of a physical inspection of the site and report by the appropriate official at the Municipality. He lacked vital information like the natural ground level around the property and the proposed level of the lower ground level at all points of that level.

[63] It seems to me that the Municipality applied the wrong standard when assessing whether the lowest level of the proposed dwelling constituted a basement²². The Municipality did not utilise the existing ground level as it was prior to demolition of the erstwhile dwelling to determine whether the lower level complied

²¹ This being a small percentage of the floor accords with Mr Sayed's findings as well.

²² Especially where neither Mr Dlamini nor Mr Mohanlal inspected the site or the building.

with the definition of a basement and instead mechanically considered the drop between the higher levels of the property and the lower levels as they approached the applicants' property – simply by considering a diagonal line on a plan without context and divorced from the reality of the situation.

[64] This much was confirmed in argument by Mr Mshengu, who appeared on behalf of the Municipality.

[65] The plans functionally contemplated a three-level development, rising from ground level, and this is exactly what was built. Two of the photographs of the new dwelling put up by the applicants make this clear:





[66] Two of the levels of the dwelling extend above the roof level of the applicant's one-storey dwelling:



[67] If two storeys can be seen above the level of a one-storey dwelling – then almost by definition, the new dwelling is not two storeys high with a (majority subterranean) basement.

[68] In my view, the lowest level of the second to sixth respondents' dwelling was not a basement as defined and could not have been determined to be so on a proper and rational evaluation of the demolition and building plans and the physical status quo, together with a proper consideration of what constitutes a basement.

[69] It follows that the Municipality acted unlawfully and contrary to the scheme and the Act in approving the building plans for the new dwelling, which constituted a three-storey development (at best, for the second to sixth respondents) and not a two-storey development with a basement.

[70] The Municipality's decision to approve the building plans must therefore be reviewed and set aside on this basis.

THE SECTION 7(1)(b) ATTACK – THE MUNICIPALITY DID NOT SATISFY ITSELF THAT THE M[...] PROPERTY WOULD BE ERECTED IN A MANNER THAT WOULD NOT DISFIGURE THE AREA, BE UNSIGHTLY OR OBJECTIONABLE OR DEROGATE FROM THE VALUE OF ADJOINING PROPERTIES

[71] The correct approach to the interpretation of section 7(1)(b) was set out in *Walele v City of Cape Town and Others*²³. Given the similarities between the facts of that case and this application, I have summarised the reasoning of the majority of the Court at some length:

a) Decision-makers must be satisfied that none of the disqualifying factors outlined in section 7(1)(b)(ii) will be triggered by the erection of the building in question. This is crucial because any approval of plans that facilitate the erection of a building which devalues neighbouring properties is liable to be set aside on review. Approval can be invalidated on this ground regardless of whether the decision-maker was initially satisfied that none of the disqualifying factors would be triggered. To avoid this consequence, the decision-maker must be satisfied that none of the invalidating factors exist before granting approval. This interpretation aligns with the obligation to promote the spirit, purport, and objects of the Bill of Rights, balancing the landowner's right of ownership with the rights of neighbouring property owners.

b) The local authority, acting on behalf of neighbouring property owners, must ensure that disqualifying factors are absent before approving plans that otherwise comply with all applicable laws. The City (in that case) failed to provide adequate documentation to support the decision-maker's satisfaction regarding the absence of disqualifying factors. Recommendations from the Building Control Officer must contain sufficient detail to inform the decision-maker's opinion on disqualifying factors. The decision-maker must

²³ 2008 (6) SA 129 (CC) at paras [55] to [71]

independently assess the recommendation and cannot merely accept it without verification of the underlying factors.

c) The City asserted that the decision-maker was satisfied before approving the plans that none of the disqualifying factors would be triggered. However, this contention was not supported by the objective facts provided by the City itself. The documents placed before the decision-maker did not reasonably satisfy the requirement that none of the disqualifying factors would be triggered. The decision-maker's satisfaction had to be based on reasonable grounds, and the mere statement by the City to the effect that the decision-maker was satisfied was insufficient.

d) The determination of whether the decision-maker was satisfied that the disqualifying factors would not be triggered entailed a factual inquiry. The fact that the Building Control Officer had considered those factors was irrelevant unless it was established that this fact was communicated to the decision-maker. The word 'recommendation' did not objectively indicate what was considered by the Building Control Officer before reaching the decision to recommend approval of the plans. The decision-maker was not entitled to assume, from the use of this word alone, that the Building Control Officer had considered the issue of the disqualifying factors.

e) The purpose of the recommendation was to furnish the decision-maker with a basis for their opinion. The decision-maker was obliged to assess and be satisfied of these issues independently. They were not expected to accept the proposal of the Building Control Officer without further verification. The recommendation had to provide sufficient information for the decision-maker to be satisfied that none of the disqualifying factors would be triggered. The facts of the case demonstrated that the Building Control Officer had information concerning the issues which the decision-maker was required to consider, but this information was not placed before the decision-maker. The recommendation is the proper means by which information on disqualifying factors can be placed before the decision-maker. The endorsement and signature of the Building Control Officer did not constitute a recommendation

as envisaged in sections 6 and 7 of the Building Standards Act.

f) Although the Building Standards Act did not strictly require this, it was expressed as being helpful if the Building Control Officer invited representations from owners of neighbouring properties about the impact the proposed building might have on their properties. This approach would help in dealing with issues relating to disqualifying factors and significantly reduce the chances of approval of plans in cases where some disqualifying factors existed but were not discovered by the local authority. The existence of such factors, if proved, constituted a valid ground for setting aside the approval after it had been acted upon, at high cost to all parties concerned.

[72] In *Turnbull-Jackson*²⁴, the Constitutional Court endorsed the reasoning in *Walele*. In *Simcha Trust*²⁵, writing for a unanimous court, Theron J held that *Walele* required “that a local authority must be positively satisfied that there are no disqualifying factors present” and that the correct formulation of the reasons to be given by the local authority was not that the relevant officials “could find no reason” to be satisfied that the building would not disfigure the area or that the official was “not satisfied” that the area would be disfigured. The correct formulation was that the relevant official was “satisfied that the area will *not* be disfigured”.

[73] The process followed by the Municipality is described in the following terms in the answering affidavit:

‘24. After being captured and allocated a plan number, the application was assigned to [Mr Dlamini].

25. After due consideration, Mr Dlamini determined that circulation to external commenting departments and/or persons was not necessary.

26. The application was considered by Mr Dlamini in terms of section 6 of the Act and recommended to me for approval on the 8 June 2022.

²⁴ *Turnbull-Jackson v Hibiscus Coast Municipality and Others* 2014 (6) SA 592 (CC) at paras [71] and [95]. It had been argued that the reasoning in *Walele* was obiter dictum and not binding.

²⁵ *Trustees, Simcha Trust v Da Cruz and Others* 2019 (3) SA 78 (CC) at paras [22] to [24]

27. After verifying the recommendation and considering the application in terms of section 7 of the Act, I was satisfied that: the application complies with all the legal requirement and that one of the disqualifying factors will be triggered by the erection of the building concerned.'

[74] This is the sum total of the Municipality's explanation of the process followed by both Mr Dlamini and Mr Mohanlall.

[75] The Record does not contain any reports, either to or from Mr Dlamini, and the only relevant documents produced by the Municipality are the following two forms:

BCO RECOMMENDATION RECORD

Application Number : CE22060017
 Street Address : 12 Mentone Road, Morningside
 BCO Recommendation

ASSESSMENT / SNR ASSESSMENT OFFICER:
 Delegation: Building Control Officer
 Themba Dlamini

I, the undersigned, confirm that the aspects identified in this report together with the application to build, plans, supporting documentation and possible departmental input were considered in my assessment of the application in terms of sec.4(1) -

I further confirm that the application (Tick appropriate boxes)

☒ COMPLIES ☐ DOES NOT COMPLY with the relevant applicable laws, and the building to which the application relates
☒ WILL NOT ☐ WILL in my opinion be erected in such manner or be of such nature or appearance that-

- (a) the area in which it is to be erected will probably or in fact be disfigured thereby;
 (b) it will probably or in fact be unsightly or objectionable;
 (c) it will probably or in fact derogate from the value of adjoining or neighbouring properties;
 (d) it will probably or in fact be dangerous to life or property.

BUILDING CONTROL OFFICER Comments

Accordingly, it is recommended in terms of Section 6(1)(a) of Act 103 of 1977 that the above application be: (Tick appropriate box)

☒ APPROVED Subject to the below department input
☐ REFUSED (Reasons for the recommendation are as set out above and any un-cleared reports from the following departments.)

Date:

08-Jun-2022

Name:

Themba Dlamini

Signature:

269 21

DEVELOPMENT PLANNING, ENVIRONMENT & MANAGEMENT UNIT
Development Management Department
Development Applications Branch
 Central
 166 KE Masinga Road (Old Fort Road) Durban 4000
 P O Box 680 Durban 4000
 Tel: 031 311 7069/7070/7169

 **LOCAL AUTHORITY DECISION RECORD**

Application Number **CE22060017** TEAM LEADER :
 Street Address **12 Mentone Road, Morningside** Delegation Local Authority
Mohanlal Yashin

Local Authority Decision

I, the undersigned confirm that in arriving at my decision I have considered the recommendation of the BCO, and chief fire officer (where applicable) together with the plans, supporting documents and departmental reports and other related issues aspects.

BCO Recommendation APPROVED Themba Dlamini

I further confirm that the application (Tick appropriate boxes)

☒ **COMPLIES** ☐ **DOES NOT COMPLY** with the requirements of the Building Standards Act,

☒ **COMPLIES** ☐ **DOES NOT COMPLY** with any relevant applicable laws,

and the building to which the application relates, in my opinion, be erected in such manner or be of such nature or appearance that-

☒ **IT WILL NOT** ☐ **IT WILL, OR IN FACT**

1a) disfigure the area in which it is to be erected;
 1b) be unsightly or objectionable;
 1c) derogate from the value of adjoining or neighbouring properties;
 2) be dangerous to life or property.

Local Authority Refusal:

Accordingly, in terms of Section 7 of Act 103 of 1977 the above application is:

☐ **REFUSED** ☒ **APPROVED** ☐ **NOT DECIDED**

Local Authority Internal Notes:

Date: 29-06-2022 Name: Mohanlal Yashin Signature: 

[76] The recommendation and approval appear, almost literally, to be a “tick-box” exercise. Certainly, both are bereft of any reasoning, assessment or observation.

[77] There is no information of how Mr Mohanlal satisfied himself that the disqualifying factors in section 7(1)(b) were not present or how he considered Mr Dlamini’s “recommendation” when it did not actually recommend anything or explain why the two tick-boxes that were selected were chosen.

[78] As in *Walele*, the plans and limited reports before the Municipality: 'could not reasonably have satisfied the decision-maker that none of the disqualifying factors would be triggered. None of these documents refers to those factors. If indeed the decision-maker was so satisfied on the basis of these three documents, his satisfaction was not based on reasonable grounds. The documents fall far short as a basis for forming a rational opinion... The decision-maker must show that the subjective opinion it relied on for exercising power was based on reasonable grounds. In this case, it cannot be said that the information, which the City admitted had been placed before the decision-maker, constituted reasonable grounds for the latter to be satisfied.'²⁶

[79] This is not to say that municipal officials will always have to carry out site inspections before being "satisfied" or that the submission of plans without more will always fall foul of section 7(1)(b). Each case will turn on its own facts and what is reasonable in one application will not necessarily be reasonable in another.

[80] What is required however is not only that the relevant officials actively engage with and apply their minds to the section 7(1)(b) requirements, but that they engage in a demonstrable, sustainable and rational process whilst coming to their subjective opinion. Put differently, the relevant officials must not only apply their minds appropriately but must be seen to have done so.

[81] On the information that was before the Municipality, a traditional, double storey dwelling of 394 square metres that had fitted in with the aesthetic of the neighbourhood was going to be replaced by a significantly larger dwelling of more than 1200 square metres of a different and more modern design.

[82] The minimum height of each of the three levels of the proposed dwelling was 4.5 metres, which meant that every level was effectively double volume.

[83] There was no attempt to evaluate whether the proposed design of the extremely large dwelling would disfigure the area - something that a visit to the area

²⁶ *Walele*, para [60]

would have resolved, one way or another. Similarly, there was no assessment of whether the proposed design (especially given its significant size and height) would be unsightly or objectionable.

[84] There was neither appreciation nor consideration by the municipality of the effect of such a large structure on the neighbouring properties or how it would impact their rights.

[85] The applicants delivered an affidavit by Mr Pearson, who not only set out his experience but also explained why, in his opinion, the building derogated quite significantly from the value of the I[...] property.

[86] The municipality dismissed the affidavit as irrelevant, and did not engage with the allegations notwithstanding the provisions of section 7(1)(b)(ii)(aa)(cc) of the Act. In the absence of countervailing evidence, there is no reason to reject Mr Pearson's opinions, and I am satisfied that the M[...] property will probably reduce the value of the I[...] property.

[87] Mr Mshengu relied on the judgement in *Camps Bay*²⁷ to argue that a hypothetical buyer would expect that an existing building on a property could be replaced by a new building that was more intrusive. Therefore, he argued that the realisation of a risk already discounted would generally not have an influence on the market price and the fact of such construction would not then on its own derogate from the value of the subject property.

[88] Whilst this may be so, the argument ignores the qualification contained in paragraph [40] of that judgment, to the effect that:

'Derogation from market value...only commences: (a) when the negative influence of the new building on the subject property contravenes the restrictions imposed by law; or (b) because the new building, though in accordance with legally imposed restrictions, is, for example, so unattractive or intrusive that it exceeds the legitimate expectations of the parties to the

²⁷ *Camps Bay Ratepayers and Residents Association and Another v Harrison and Another* 2011 (4) SA 42 (CC) at paras [38] and [39]

hypothetical sale. In (a) the cause of the depreciation will flow from a non-compliance with section 7(1)(a). It is only in the event of (b) that section 7(1)(b)(ii) comes into play.'

[89] Both considerations apply in this case.

[90] This question was considered in *Simcha Trust*²⁸ as well. In the context of a derogation of value, the Court held that a decision maker:

'must be positively satisfied that a hypothetical purchaser of a neighbouring property would not harbour legitimate expectations that the proposed development application would be denied because it was so unattractive or obtrusive' and that 'local authorities...are the caretakers of the community interest in relation to building applications [which] impels them to consider the impact of a building proposal on the surrounding area and particularly the neighbours.'

[91] In my view, Municipality approached the requirements of section 7(1)(b) of the Act as little more than a formalistic exercise to which lip service had to be paid.

[92] There was no discernible attempt to evaluate the requirements and no rational basis on which either Mr Dlamini or Mr Mohanlall could reasonably have concluded that the disqualifying factors were not present.

[93] On this basis alone, the Municipality's decision to approve the plans was unlawful.

[94] In addition and on the papers before me, and to which no sustainable challenge was levelled by the Municipality, the applicants have established that the proposed dwelling:

- a) will probably disfigure the area in which it was to be erected;

²⁸ at paras [29] to [33]

- b) is unsightly or objectionable;
- c) will probably or in fact derogate from the value of the I[...] property, which is a neighbouring property.

[95] Three of the four disqualifying factors contained in section 7(1)(b) are present and therefore the Municipality's decision to approve the application was irrational and unlawful and must be set aside on review.

IS THE CONSTRUCTION OF THE M[...] PROPERTY CONTRARY TO THE MUNICIPALITY'S TOWN PLANNING CONTROLS AND THEREFORE UNLAWFUL?

Do the heights of the building's storeys as built comply with the Municipality's town planning controls?

[96] The applicants have also sought orders declaring that the building under construction is in contravention of the controls in the Sub-Scheme and therefore unlawful because each of the three storeys of the building exceeds the maximum permitted height of 4.5 metres.

[97] The definition of a "storey" in the Sub-Scheme has been set out above.

[98] In terms of the plans that ostensibly were considered by the Municipality, the height of the lower ground level was 4.66 metres (from a finished floor level above mean sea level of 91.10 metres to a finished floor level of the floor above of 95.76 metres).

[99] In argument, Mr Mshengu submitted that the appropriate way to measure the height of the storey was from floor level to the underside of the ceiling slab above, and that the height of the ceiling slab should not be taken into account.

[100] Firstly, this is not consistent with the definition of "storey", and, in any event, "storey" is defined in the National Building Regulations promulgated in terms of the

Act²⁹ as "that part of the building, which is situated between the top of any floor and the top of the floor next above it". This includes the height of the slab between the floors.

[101] This definition of "storey" will also be relevant below.

[102] In circumstances where the storey height of the lower ground level of the dwelling exceeded 4.5 metres, the storey should have been counted as two storeys.

[103] This would have meant that the proposed dwelling was in fact four storeys and not three storeys.

[104] Whilst the prescribed height requirement can be relaxed, this can only be permitted if the combined height of the dwelling does not exceed the height or storey level prescribed in the Development Facilitation Table.

[105] This relaxation, which was neither sought nor granted, would not have availed the second to sixth respondents as the total height of the development exceeded 13.5 metres, both on the plans submitted and in fact.

[106] The application papers also demonstrate that, as constructed, the storey height of the second level is 4.64 metres, and the height of the third level is 4.82 metres.

[107] The storey height of the third level to the level above, which has been balustraded, is 5.130 metres.

[108] The Municipality cannot rely on a deduction of the height of the respective slabs for the reasons set out above.

[109] Therefore, each level of the building as constructed contravenes the Municipality's town planning controls.

²⁹ National Building Regulations Published under GN R2378 in GG 12780 of 12 October 1990

[110] The Municipality has been aware of this since at least May 2024, when the application was launched. If the measurement of each storey was accurate, there was *prima facie* unlawfulness in the construction of the building which merited investigation.

[111] Instead of investigating these allegations either to compel the second to sixth respondents to abide by the provisions of the Scheme and to cure their unlawful conduct³⁰, or to demonstrate that the storey heights do not exceed the maximum permitted heights, the Municipality has done nothing and has permitted the conduct to continue unabated.

[112] On the papers before me, I can safely conclude that building as constructed contravenes the Scheme and is therefore unlawful.

[113] Mr Mullins SC, who appeared together with Ms Ploos Van Amstel for the applicants did not persist in arguing that the buildings on the M[...] property exceeded the maximum permitted coverage of 40% of the site area, and I make no findings about this aspect of the application.

COSTS

[114] The applicants have been successful in respect of all the relief that they sought.

[115] There is no reason why costs should not follow the result.

[116] The second to sixth respondents did not actively oppose the application and therefore are only liable for the costs of the application until the delivery of their Notice of Opposition.

³⁰ As the Building Control Officer, at least, was obliged to do: section 6 of the Act; *Walele*, at para [48]

[117] Given the issues at play in the application and the importance of the matter to the applicants, the employment of two counsel was warranted.

ORDERS GRANTED

[118] I grant the following orders:

1. The decision of the first respondent to approve the building plans submitted on behalf of the second to sixth respondents in respect of the erection of buildings currently in the process of construction on the immovable property known as Remainder of Erf 6[...] Durban, Registration Division FU, Province of KwaZulu Natal and having the street address of 1[...] M[...] Road, Morningside, Durban is reviewed and set aside.
2. It is declared that the building under construction on the immovable property is in contravention of the first respondent's applicable town planning controls and is unlawful in that:
 - (i) The building consists of three storeys, none of which comprises a "basement" and accordingly does not comply with the requirement that the building consist of a maximum of two storeys; and
 - (ii) Each of the three storeys exceeds the maximum permitted storey height of 4.5 metres.
3. The respondents are ordered, jointly and severally, the one paying the other to be absolved to pay the costs of the application until 20 May 2024, such costs to include the costs consequent upon the employment of two counsel, counsel's fees to be taxed on Scale C.
4. The first respondent is ordered to pay the costs of the application from 21 May 2024 onwards, such costs to include the costs consequent upon the employment of two counsel, counsel's fees to be taxed on Scale C.

SHAPIRO AJ**Appearances**

Counsel for Applicants:
Ms Z Ploos van Amstel

Mr SR Mullins SC with

Instructed by:

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Date Judgment Reserved:

05 May 2025

Date Judgment Delivered:

23 May 2025