

SAFLII Note: Certain personal/private details of parties or witnesses have been redacted from this document in compliance with the law and [SAFLII Policy](#)

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

Case No: 421/25

In the matter between

THANAPAL PILLAY

APPLICANT

AND

THE WHALE ROCK HEIGHTS HOMEOWNERS

1st RESPONDENT

ASSOCIATION

DEON STEENKAMP

2nd

RESPONDENT

BITOU MUNICIPALITY

3RD

RESPONDENT

Date of Hearing : 12 September 2025

Date of Delivering : 09 October 2025

JUDGMENT

THULARE J

ORDER

- (a) The applicant's non-compliance with the Uniform Rules of Court in respect of time periods and form, are condoned and the application is heard as one of urgency.
- (b) The 1st respondent's approvals of the building plans in respect of the 2nd respondents building plans on erf 8[...] within the Estate, and the 1st respondents' decision to condone departures from the 1st applicant's Architectural Controls in respect of the buildings on that erf 8[...], are reviewed and set aside.
- (c) The matter is remitted back to the 1st respondent to consider the 2nd respondents building plans, and decide thereon, having regard to the alleged adverse impact on the Estate, neighbouring buildings and the 1st applicant's members as well as the 1st applicant's architectural controls
- (d) The 2nd respondent is interdicted and restrained, pending the 1st respondent's consideration of his building plans and the 1st respondent's decision thereon, having regard to the alleged adverse impact on the Estate, neighbouring buildings and the 1st applicant's members as well as the 1st applicant's architectural controls, from continuing building operations on erf 8[...] in the Estate.
- (e) The 2nd respondent shall file the record of the decision of the General Meeting of the 1st respondent's members on his building plans in respect of erf 9[...] in the Estate, within 10 days of such decision.
- (f) The 2nd respondent shall pay the costs of this application, including the qualifying costs of the experts Friedman and Neufield, as well as the costs of

Senior Counsel on Scale C, and the costs of appointing correspondent attorneys to assist with the file pagination in George.

[1] This is an urgent opposed application for the review and setting aside of the approval by the 1st respondent of the 2nd respondents building plan in respect of the building currently being erected on Erf 8[...]. Whale Rock Heights Private Estate, Plettenberg Bay as well as the approval by the 3rd respondent of such building plan. The 1st respondent did not oppose the relief sought against it. The applicant abandoned the relief sought against the 3rd respondent. The 3rd respondent also filed a notice to abide by the decision of the court. Only the 2nd respondent opposed the relief sought by the applicant. The 2nd respondent's opposition to urgency is somewhat conflicted, in that he opines that he wished to finish his intended family home so that he and his family can move into it, and wished to expeditiously complete the building, but in the same breath submitted that there was no urgency. I accept that the matter is urgent.

[2] The applicant is a homeowner in the Estate and the 2nd respondent is the owner of an erf in the Estate, on which a house is under construction and nearing completion. The applicant and the 2nd respondent (the parties) are both members of the 1st respondent. Their properties are on the opposite side of the road from each other. The 1st respondent has a Constitution, Architectural Guidelines and Rules, Conduct Rules, Building Regulations and Building Control Plans. The applicant's case was that the 1st respondent could only approve the 2nd respondents plans that complied with these instruments. This is clear amongst others from clauses 4 and 5 of its notice of motion, which sought interdicting and restraining, as well as re-

submission of compliant plans, based on this alleged non-compliance. The 2nd respondents case was that the approvals by the 1st respondent (the Association) and by the 3rd respondent (the Municipality) were based on two separate regulatory regimes and could co-exist independently of each other, and that only the Municipality's approval, which also consisted of two separate aspects, to wit planning and building, entitled him to erect a structure on his property [para 129.2 of his answering affidavit]. The 2nd respondent also particularly denied that he was building a house in contravention of any regulatory framework, whether that of the Association or the Municipality.

[3] According to the applicant, 2nd respondent had said under oath that he and his architect at the time that the final building plans were drawn, did not consider the 17.5 degrees requirement as important, and that 2nd respondent accepted the calculation of the architect that the slope of the roof was only 10 degrees. In the papers before me, the 2nd respondent denied that the 17.5-degree roof requirement was peremptory. His case was that he was building in accordance with plans which had been approved by the municipality. The 2nd respondent submitted an application to the 1st respondent for him to complete construction in accordance with what had already been agreed to and approved but for the roof structure which would be revised to conform to the desired 17.5-degree pitch and to deliver an as built plan to the 1st respondent by 13 June 2025. On 30 May 2025 the 1st respondent's trustees considered the 2nd respondents request and passed a resolution. It resolved that the trustees of the 1st respondent granted permission to the 2nd respondent in terms of Rule 6.4 to complete the construction of the roof of his house on the undertaking that the 2nd respondent will then submit as built plans to the 1st respondent through normal channels by Friday 13 June 2025. Upon

acquiring legal advice after receiving communication from applicant's attorneys, the 1st respondent advised the applicant that the 1st respondent would request an undertaking from the 2nd respondent that he will halt construction of the roof of his house and not proceed with construction unless he was in possession of approved building plans. The 2nd respondent denied that the trustees' resolution of 30 May 2025 was unlawful and averred that he was entitled to place reasonable reliance thereon. The salient contents of the letter from the attorneys of the applicant to the 1st respondent's attorneys read as follows:

15. For the Committee now, given this history, to approve an application without knowing whether or not the Architectural Guidelines (and even the plans) are being complied with, and committing itself to deal with such deviations as may later be discovered, in accordance with the Constitution, not knowing whether it will have the authority to do so, is clearly, apart from all its other shortcomings, *ultra vires* the Committee.

16. This letter therefore serves to demand, as we hereby do, an undertaking that Mr Steenkamp will be instructed forthwith to cease building operations and to submit new plans which comply with the Architectural Guidelines.

The 2nd respondents' approach was that in alleging that his first plan was incapable of approval because of its failure to adhere strictly to various aspects of the Guidelines, the applicant was and continued to dispute the 1st respondent's interpretation of the Architectural Guidelines. According to the 2nd respondent, the dispute that arose with regard to the interpretation of the Guidelines was to be determined by the Trustees after consultation with the Estate Architect and where appropriate in the opinion of the Trustees, such other architect as may be nominated by them, and in terms of Conduct Rule 6.4 a determination by the Trustees will be final and binding. The 2nd respondent case was that the 1st respondent's interpretation of the Guidelines was guided by the estate architect.

[4] The 2nd respondent did not inform applicant of the submission of the last and third plan that 2nd respondent submitted to the 1st and 3rd respondents. This was because 2nd respondent held the view that the plan did not contain any controversial features which would need to be advertised for neighbour comment either in terms of the 1st respondent's regulatory framework or in terms of that of the 3rd respondent. The 2nd respondent had previously submitted a second plan, which included an application for a departure from the street building line for a feature stone wall at the house entrance. There had been objections to the plan, but the plan had been approved by the 1st respondent subject to a height restriction. When there were objections thereto, 2nd respondent withdrew his second plan on 26 June 2025 and according to him revised it to remove all causes for complaint before submitting it as the third plan. The correspondence which had been shared with 2nd respondent made it clear that he would face significant delays if he persisted with his intention to obtain approval for non-conforming features, which led to his withdrawal of the second plan. The 2nd respondent submitted his third plan on 2 July 2025 for approval. The 2nd respondents' case was that there was no provision in the 1st respondent's governance framework for neighbour comment and, where building plans did not require any special approvals such as a departure approval, a municipality would also not invite comment. He had ensured that his plan did not need any neighbour input and did not expect that either the 1st or 3rd respondent would inform his neighbours that he had submitted the plan for approval.

[5] As a consequence of being in possession of the approved third plan, approved by both the 1st and 3rd respondents, 2nd respondent proceeded to try to complete the

roof of his house from 23 July 2025. There were no material changes to the neighbours complaints about the alleged non-compliance with the site plan involving the height above natural ground level and the wall plate. 2nd respondent only attended to the complaint about the non-conforming wall and adjusted the pitch of the complained about roof to the desired 17.5-degree pitch. The third plan did not indicate a departure. 2nd respondent denied that the third plan deviated from the Building Control Plan 60 (DS64) in a manner that would require a departure application. The applicant's complaint was that the 2nd respondents ground floor should be on the 105m contour and that the height of the roof plate should be at the 108m contour. This left 2m for the design of a pitched roof. These were important parameters which 2nd respondent had disregarded. The underside of the wall plate was given as 109.60m whereas the control plan showed the wall plate level to be at 108m contour, which was a significant difference of at least 1.5m in height. The building had a ground floor at 106m which was a substantial difference. The case of 2nd respondent was that his third plan did not contain any non-conforming features and thus no departure application was required before approval.

The Governance Framework or Architectural Controls of the 1st respondent

(a) The Constitution of the 1st respondent

[6] The parties agree on the instruments that govern the erection of buildings on the Estate, as well as the responsibilities and rights of the 1st and 2nd respondent as well as the applicant. They differ on the interpretation of the instruments and more specifically as to whether there was compliance with the instruments, as well as the

conduct of each in relation to their responsibilities and rights to each other and in relation to the 1st respondent. It is the responsibility of the Trustees to enforce the Architectural Guidelines of and on behalf of the 1st respondent [section 9.1 of the Constitution of the 1st respondent]. The Architectural Guidelines and Building Regulations are applicable to building works in the Estate and were in addition to the requirements of the 3rd respondent for a particular erf [section 9.2 of the Constitution]. It was the duty of every owner, including the 2nd respondent, to ensure that any building work must also always comply with the Architectural Guidelines and Building Regulations of the 1st respondent [section 9.3 of the Constitution]. To enforce the Architectural Guidelines the Trustees had the power to interpret and to issue directives on the Design Guidelines [section 9.4.1], to take such actions as were necessary to accomplish the purposes of the Architectural Guidelines which actions included the refusal of building plans [section 9.4.2], to compel members to comply with the requirements and directives and failing compliance to take steps to remedy such non-compliance [section 9.4.3] and to appoint professional advisors e.g, an architect to scrutinize the plans to ensure that the necessary architectural controls have been met [section 9.4.4]. The functions and powers of the Trustees included that it was entitled and obliged, on behalf of the 1st respondent, to make, amend and enforce Rules and Building Regulations and to issue directives on behalf of the 1st respondent [section 11.1.3].

(b) The Architectural Guidelines and Rules of the 1st respondent

[7] The next instrument is the Architectural Guidelines and Rules of the 1st respondent. Section 1.2.1.2 under Guidelines, Architectural Style, reads:

1.2. ARCHITECTURAL STYLE

1.2.1 GUIDELINES

1.2.1.2 Roofs comprising of % pitch and up to a maximum of ½ flat will be allowed. A minimum pitch of seventeen and a half degrees will be allowed.

Section 1.13 deals with the height restrictions and building lines for portion 1 to 82. It reads:

1.13 HEIGHT RESTRICTION AND BUILDING LINES FOR PORTION 1 TO 82 (STAND NOS 8575 TO 8654)

1.13.1. Refer to Site Analysis Building Control Plan for each particular stand as referred to above for:

1.13.1.1. The number of storeys (mostly ground and first)

1.13.1.2. Footprint indicating position of area that may only be single storey and footprint indicating position that may be double storey.

1.13.1.3. Building lines

1.13.1.4. Section through erf

1.13.1.5. Height restriction to ridge of highest roof in m above mean sea level

1.13.1.6. Preferred building lower platform height in m above mean sea level

1.13.1.7. During construction owners will provide the Association with land surveyors certificates confirming that ALL slab levels and the ridge height of the highest roof meet the requirements of 1.13.1.5. and 1.13.1.6. The cost of such certificates will be for the owners' account (see also clause 3 below).

These Guidelines are applicable to all building work conducted by and on behalf of an owner on an erf in the Estate [section 4.6]. Remarks made by the Estate Architect and conditions or directions imposed by the trustees when a sketch or building plan is approved must be addressed and complied with [section 4.6]. The

approval of the design by the trustees is in general terms and is subject to approval by the 3rd respondent [section 5.2.1.9]. The Estate Architect will approve or comment on the plan submission within two weeks and a scrutiny fee per submission shall be payable to the Architect appointed by the 1st respondent before aesthetic approval of the drawings [section 6.2].

(c) Site Analysis: Building Control Plan of the 2nd respondents stand

[8] The provisions of the Site Analysis Building Control Plan for the 2nd respondents intended building are not in dispute. It provides the preferred building with a lower platform height at 102.5m above mean sea level, the upper ground floor at 106.0m, the ceiling or wall plate level at 108.0m and the height restriction to ridge of highest roof at 110.0m above mean sea level.

(d) Conduct Rules of the 1st respondent

[9] The next instrument for consideration is the Conduct Rules of the 1st respondent. The Conduct Rules are binding on all occupants of the Estate as is any decision taken by the Trustees in their interpretation [section 1.2]. Section 1.4 observes that harmonious community living is achieved when residents use and enjoy their private property as well as the common areas and amenities of the Estate whilst being generally considerate to all occupants of the Estate. The relevant provisions of section 6 provide:

6. BUILDING AND MAINTENANCE OF BUILDINGS

6.1 The provisions of the Constitution and Architectural Guidelines and Building Regulations relating to the construction of buildings and structures in the Estate shall be strictly complied with.

6.2 No building or structure may be erected, altered or added to in the Estate unless the plan submission and requirements as per the Architectural Guidelines and Building Regulations have been met and the plans, specifications and construction thereof comply with the Architectural Guidelines and Building Regulations.

6.3 The trustees assisted by the Estate Architect, may approve applications for a waiver of a minor nature from the Architectural Guidelines and Building Regulations, whereas those considered by the Trustees to be of a major nature must be referred to a General Meeting of the Association.

6.4 If the Architectural Guidelines and Building Regulations are vague and/or incomplete in any respect and/or if any dispute arises with regard to the interpretation of the Architectural Guidelines, the matter shall be determined by the Trustees after consultation with the Estate Architect and where appropriate in the opinion of the Trustees, such other Architect as may be nominated by them. The determination of the Trustees will be final and binding.

Section 13 provides for the internal dispute resolution mechanism on the interpretation and the enforcement of the rules. Section 13.1 provides that the whole of Rule 13 must be read together with clause 21 of the Constitution, which also provides for internal dispute resolution mechanisms or processes. The Trustees did not use their discretion to deal with the applicant's complaints, as well as the other homeowners who also complained about the 2nd respondents construction of his dwelling, in terms of the internal processes at their disposal.

(e) Building Regulations of 1st respondent

[10] The other instrument is the 1st respondents Building Regulations. In its cover there is a note which provides that the Building Regulations must be read together with the Architectural Regulations and the Conduct Rules. The Building Regulations must be read together with clause 9 of the Constitution and the Architectural Guidelines [section 1.1]. In respect of the development or redevelopment of an erf or addition or alteration, the approval of the Trustees is required before a building plan may be submitted to the 3rd respondent for its consideration. Section 7 deals with height restrictions. The applicable provisions read as follows:

7 HEIGHT RESTRICTIONS

7.1 The height restriction of buildings in the Whale Rock Heights Private Estate will be in accordance with the applicable Zoning Scheme and indicated on approved building plans.

7.2 Should a building or roof thereof encroach above the applicable height restriction, owners are forewarned that they will be required to demolish such part or parts of the building and roof that encroach above the height restriction and no application to deviate from the height restriction requirements will be entertained by either the Trustees or the Association in a General Meeting. To avoid encroachment of a building above the height restriction it is strongly recommended that owners in all instances and not only where this is required in terms of the Architectural Guidelines, employ the services of a professional land surveyor to confirm concrete slab heights as building progresses, to ensure that it correlates with approved building plans.

Interpretation and application of the Governance Framework of the 1st respondent on the 2nd respondents building

[11] In *Chapman's Bay Estate Home Owners' Association v Lötter and Others* (525/2023) [2024] ZASCA 153 (12 November 2024) at para 17 the following was said as regards interpretation of documents:

[17] In *Lötter N O and Others v Minister of Water and Sanitation and Others (Lötter)* [[2021] ZASCA 159; [2022] 1 All SA 98 (SCA); 2022 (1) SA 392 (SCA) para 43.] this Court said:

‘The correct approach to the interpretation of written documents, be they statutes or contracts, was set out authoritatively by this Court in *Natal Joint Municipal Pension Fund v Endumeni Municipality*. Essentially, what is required is an objective, unitary exercise that takes into account the language used, the context in which it is used and the purpose of the document concerned. Unterhalter AJA, in *Capitec Bank Holdings Limited and Another v Coral Lagoon Investments 194 (Pty) Ltd and Others*, added the following:

“I would only add that the triad of text, context and purpose should not be used in a mechanical fashion. It is the relationship between the words used, the concepts expressed by those words and the place of the contested provision within the scheme of the agreement (or instrument) as a whole that constitutes the enterprise by recourse to which a coherent and salient interpretation is determined. As *Endumeni* emphasized, citing well-known cases, “[t]he inevitable point of departure is the language of the provision itself”.’ [Emphasis added.]

[12] The enforcement of the Architectural Guidelines of and on behalf of the 1st respondent, by the Trustees, is peremptory, as envisaged in section 9.1 of the Constitution of the 1st respondent. The terminology employed indicated that the Trustees are obliged to compel observance of or compliance with the Guidelines. This meant that the Guidelines were not merely a piece of advice, but were general rules or principles required to be observed in relation to building, architecture and design in the Estate. The 2nd respondent also had a duty to ensure that any building work on his stand must also always comply with the Architectural Guidelines and

Building Regulations of the 1st respondent, as envisaged in section 9.3 of the Constitution. It is the duty of the Trustees to ensure that the necessary architectural controls have been met, and in furtherance thereof the Constitution allows them to appoint professional advisors e.g, an architect to scrutinize the plans and advise the Trustee, as envisaged in section 9.4.4 of the Constitution.

[13] In the interpretation and application of the Architectural Guidelines, the Rules and the Site Analysis: Building Control Plan, it must be understood that these architectural controls are restrictions that regulate the design and appearance of homes and properties deliberately designed to maintain a consistent aesthetic and display the fostering of a unified community vision. These architectural controls dictate the rules for design and building. Their main purpose includes to ensure that buildings and landscapes within a community share a cohesive and pleasing look. The architectural controls are a set of principles concerned with nature and appreciation of beauty. The lifestyle in the Estate includes the enjoyment of mountain and sea views, and the buildings must also add the artistic taste whilst enhancing that lifestyle. The architectural controls help the Trustees to ensure that each building on each of the stands has the particular style and appearance that the Estate has. The architectural controls are design principles which have been established with the intention of creating compatibility of architectural styles rather than repetition. The buildings erected on the stands in the Estate should be in a state in which the houses of neighbours are able to exist or occur together without problems or conflict as envisaged in section 1.1.1 of the Architectural Guidelines and Rules, especially as regards the enjoyment of mountain and sea views as part of the lifestyle. The Estate used the uniqueness of context and site, which included

the use of slopes, views and natural elements as the intended style of development as envisaged in section 1.1.4.

[14] The Guidelines permitted architects the maximum freedom to design expressions and used restrictions in the architectural controls to retain the benefits of overall harmony for the entire development as envisaged in section 1.1.6 of the Guidelines and Rules. The architectural controls included height restrictions and building lines which refer to Site Analysis: Building Control Plan for each stand. Section 7 of the Building Regulations made it very clear that the height restrictions are not only limited to the roof. It included the building. Section 7.2 commences with the words *Should a building or roof thereof encroach above the applicable height restriction, ...* and closes with the sentence *To avoid encroachment of a building above the height restriction it is strongly recommended that owners in all instances and not only where this is required in terms of the Architectural Guidelines, employ the services of a professional land surveyor to confirm concrete slab heights as building progresses, to ensure that it correlates with approved building plans.* There can be no doubt that the Building Regulations recommended to the 2nd respondent what steps he had to take to ensure that his concrete slab heights correlated with approved building plans. The 2nd respondent ignored this recommendation to his own peril. Nothing in the terminology of section 7.2 of the Building Regulations could be construed to exclude the building and only refer to the roof, as regards the encroachment on height restrictions. The building height restrictions of the 2nd respondent were in the Site Analysis: Building Control Plan for his stand.

[15] The Conduct Rules make compliance with the Constitution, Architectural Guidelines which incorporates the Site Analysis Building Control Plan and the Building Regulations relating to the construction of buildings and structures in the Estate peremptory in section 6.1. read with 6.2. None of the instruments in the governance framework of the 1st respondent defined the word *waiver*. The Concise Oxford English Dictionary, 10th ed, revised, Oxford University Press, 2002. Edited by Judy Pearsall (the dictionary) defines *waiver* as an act or instance of waiving a right or claim and defines *waive* as to refrain from insisting on or applying a right or claim. The trustees assisted by the Estate Architect may approve applications for a waiver of a minor nature from the Architectural Guidelines and Building Regulations, whereas those considered by the Trustees to be of a major nature must be referred to a General Meeting of the Association. The dictionary defines *minor* as having little importance, seriousness or significance. It defines *major* as important, serious or significant.

[16] In a lifestyle Estate where mountain and sea views are part of the aesthetics of buildings, the height of a metre more than the height restriction is a major departure. It becomes more serious when it is the lower platform height, the upper ground floor and the ceiling or wall plate level which individually are a metre more and collectively increase the extent of the departure. This is a departure which the Trustees could not by themselves deal with. In terms of section 6.3 of the Conduct Rules, it was a departure that required the General Meeting of the 1st respondent to attend to, and not the Trustees. In the event of a dispute between the applicant and the 2nd respondent, or the applicant and the 1st respondent whether with or without the 2nd respondent, it was the 1st respondent, more specifically the General Meeting of the 1st respondent and not just its Trustees, who had the power to facilitate the

resolving of such dispute as envisaged in section 4.2.6 of the Constitution read with sections 12 to 18.

[17] The Conduct Rules of the 1st respondent are binding on the 2nd respondent as envisaged in section 1.2. The 2nd respondent cannot do as he pleases, and is duty bound to play by the rules of the game for which he signed up in the Estate. Where he intended to build a home and did not intend to follow the provisions of the Site Analysis; Building Control Plan of his stand, he could not simply proceed to construct and force his own understanding of the restrictions upon other members of the 1st respondent, outside the General Meeting. Neville Adler (Adler), the professional architect, is correct that the Guidelines permit architects freedom to adjust the lower platform level to best fit site-specific conditions and other relevant design requirements. What Adler and the 2nd respondent missed, is that there was an obligation on the 2nd respondent, if he did not follow the preferred building lower platform, to apply for a waiver and depending on the view taken by the Trustees on whether this was a minor or major waiver, to either deal with the application with the assistance the estate architect or to refer it to the General Assembly for decision.

[18] As regards the wall plate height, Adler also admits that it is above 108.0m. Similarly, it was incumbent upon the 2nd respondent to apply for a waiver, and for the Trustees to deal with such application as provided for in the Conduct Rules. It is not compliance with the 3rd respondents municipal scheme regulations or the Development Management Scheme of the City of Cape Town Municipality, as regards wall plate height determination, that is in issue in this application. It is the

1st respondents wall plate height architectural controls that are under consideration. It is difficult to understand how admitted deviations from the preferred building lower platform height and the wall plate height by Adler, could lead him to conclude that the 2nd respondents building complies in all respects with the architectural guidelines as well as the Building Control Plan. The Guidelines were enabling and consider Adlers observation that ceiling height and wall plate heights are not necessarily the same especially in more luxurious homes with different configurations. The Guidelines acknowledge individual designs and different briefs, to achieve a harmonious aesthetically pleasing development character. They allow deviations, not at will. Deviations are allowed under architectural controls which are under aesthetic approval of the estate architect, the Trustee and if needs be the General Meeting of the 1st respondent. Whether it is by design or by incidence, Adler is silent on the approach of the Guidelines to a well-known contested architectural dispute amongst members of the 1st respondent. This raises concerns about his impartiality in his assistance to the court. It is difficult, when considering a professional of his experience, to conclude that after measuring the wall-plate height and determining that it was at 108.91 metres in circumstances where the Building Control Plan of the 2nd respondent refers to 108.0m, his movement out of the Building Control Plan into the Bitou Municipal Scheme Regulations to justify the difference, was innocent. These criticisms are equally applicable to Shaun McMillan (McMillan).

Review

[19] In *Trustees for the time being of the Legacy Body Corporate v Bae Estates and Escapes (Pty) Ltd and Another* (304/2020) [2021] ZASCA 157; [2022] 1 All SA 138 (SCA); 2022 (1) SA 424 (SCA) (5 November 2021) at para 37 it was said:

[37] At common law, a person who approached a court for relief was required to have an interest in the sense of being personally adversely affected by the wrong alleged.^[15] In *Jacobs v Waks*^[16] this Court set out the following requirements to determine whether an applicant has the necessary locus standi to challenge an impugned decision: (a) the applicant for relief must have an adequate interest in the subject-matter of the litigation, in other words, a direct interest in the relief sought; (b) such interest must (i) not be too far removed; (ii) be actual, not abstract or academic; (iii) be current, and not a hypothetical one. The Court further pointed out that issues of locus standi should be dealt with in a flexible and pragmatic manner, rather than a formalistic or technical one.

At para 41 and 42 the court continued:

[41] I turn now to consider the grounds on which a decision of a private body can be subjected to judicial review at common law. This would be the case where a decision-maker failed to comply with the elementary principles of justice, such as for example, where the tribunal misconceives the nature and ambit of its powers, or where it acts capriciously or mala fide, or where its findings in the circumstances are so unfair that they cannot be explained unless it is presumed that the tribunal acted capriciously or with mala fides.^[19]

[42] In *Johannesburg Consolidated Investment Co v Johannesburg Town Council*,^[20] Innes CJ observed that the grounds upon which a review may be brought under common law are ‘somewhat wider’ than those that would justify a review of judicial proceedings. It is well-established that common law review, inter alia, applies also to cases where the decision under review is taken without a hearing having taken place. And, where the duty or power is created not by statute but consensually as in relation to domestic tribunals.^[21]

At the heart of the dispute between the parties, included is the role if any, and the significance, of the wall plate heights in the Site Analysis: Building Control Plans. The 2nd respondent held the view, it seems upon advice, that a departure from the

wall plate height and the preferred lower platform height as set out in the Site Analysis: Building Control Plans was not a deviation from the Guidelines and as a result it was not necessary to obtain any input from the other members of the 1st respondent and for that reason he did not consent to have the plans circulated to the neighbours for comment. Against the background of his knowledge of known objections to his plans including by the applicant and other neighbours like Lynn Ferguson and Caorline Clark, I doubt the wisdom of his dismissive approach. Whilst one can understand the desperation of the 2nd respondent, it is the approach of the Architectural Review Committee (the ARC) of the 1st respondent and its Trustees that is shocking. Firstly, the Constitution of the 1st respondent did not make any provision of such structure as the ARC. It seems that the ARC included the Estate Architect. Ordinarily, the ARC could not usurp the function of the Trustees, and was duty bound to report its decisions to the Trustees, who could deal with those decisions as they deemed meet. The decision upon which the 2nd respondent relied, as the decision of the 1st respondent, which indicated that his third plans conformed to all the requirements of the Design Guidelines, was made by the ARC. This decision was approved by the Trustees. This decision was made by the Estate Architect and the Trustees, who were at the time all aware of the dispute between the applicant and other members of the 1st respondent on one hand and the 2nd respondent, the Estate Architect and the Trustees on the other specifically as regards whether there was compliance with the Site Analysis: Building Control Plan.

[20] The estate architect and the Trustees, individually and collectively, have no function or power to bury a dissenting view of a member or members of the 1st respondent alive. In the circumstances like the present, where there was a live

dispute between members on one side, and a member, the estate architect and the Trustees on the other side, as regards the question whether there was a deviation or not, whether minor or major, which if present would have required an application for a waiver, such member, the estate architect and the Trustees could not be the referee and player in the same game. It is the 1st respondent, in the sense of the General Assembly especially where the trustees are a party to a dispute, which had the power to take such action as it in its sole discretion deem necessary or expedient, which included the power to issue directives to regulate aspects pertaining to building in the Estate as envisaged in section 4.2 read with section 4.2.5 and 4.2.5.4 of the Constitution. The rights and responsibilities vested in the General Assembly to promote the main objective of the 1st respondent which was to exercise control over the Estate as envisaged in section 3.4 read with 4.1 and 11 of the Constitution. This dispute is one where the Trustees ought to have referred to and called for a General Meeting of the Association as envisaged in section 12 of the Constitution. It would have been helpful to the General Assembly to follow the guidance of section 6.4 of the Conduct Rules in matters which the Trustees could decide, to include more than just the estate architect and include other architects and professionals who could help resolve the dispute in pursuance of the authority provided by section 11.1.1. of the Constitution. Claire King (King) and David Friedman (Friedman) supported by Neufeld differ on whether the changes that 2nd respondent made to the approved building plans more specifically the Site Analysis: Building Control Plan caused the applicant or any other member of the 1st respondent especially the neighbours to suffer reduction in value of their property and would not obtain increase thereof. In preparation for and in attending the General Meeting, the Trustees could have asked for a Joint Statement of Experts. The Trustees could have asked the different experts upon whose opinion the members who were involved in the dispute relied, to hold conclaves and

produce a joint statement showing the expert issues that they agreed on, those which they did not agree on and the reasons they could not agree, which joint statement would be for the benefit of the parties in the dispute, the General Assembly and if need be later, the courts. The conclave would be a technical meeting of professionals of like discipline and in its nature would not be adversarial or partisan as some individual reports show.

[21] The 1st respondent and its governance framework are based on contract [Wiljay Investments (Pty) Ltd v Body Corporate, Bryanston Crescent [1984 2 SA 722](#) (T); Mount Edgecombe Country Club Estate Management Association II RF NPC v Singh [2019 4 SA 471](#) (SCA) para 20 and Pienaar and Horn *Sectional Titles* 516-517]. The trustees' conduct is examined in considering and taking the resolution to determine whether the resolution was reviewable under the common law. Failure by the 1st respondent to conceive the nature and ambit of its powers; capricious or *mala fide* acts; unfair conduct; or decisions taken without a hearing or a procedure to enable the other party to state its case are some of the principles of justice to be considered [*Trustees for the time being of the Legacy Body Corporate* para 41 to 42]. The applicant, and all other members of the 1st respondent who held a dissenting view to that of the estate architect and trustees were not afforded an opportunity to be heard when the 2nd respondent's plans were considered, all three of them. More specifically, the applicant's expert, Friedman, who holds a master's in philosophy in Housing Development and Management and has extensive experience on matters in the built environment, was simply ignored and no reasons were provided by the estate architect or the Trustees as to why his opinion was ignored or rejected. The decision of the 1st respondent on the 2nd respondents plans had no reasons provided. Friedmans opinion was that the building plans of the 2nd

respondent were not only unlawful but significantly undermined the integrity of the Estates development scheme and that in years to come owners would pay a dear price for the aberration. Friedmans conclusion was that the house being built by the 2nd respondent by reason of its nature and appearance will disfigure the area I which it was being erected and was unsightly and objectionable. Friedman also concluded that the plans did not comply with the instruments of governance of the 1st respondent and he referred to the Site Analysis: Building Control Plan.

[22] Friedman indicated that the Site Analysis: Building Control Plan was designed to limit the impact of the ridge development and soften the impact of views of the skyline from both below and above the proposed dwellings. Importantly, Friedman also indicated that Mr Friedman indicated how the failure to comply with the restrictions impacted on the views of the skyline from both below and above the proposed dwelling, the open view lines for the rear upper properties to see the valley and have sea views. He also indicated that the lateral setback lines combined with the adjoining erf 3m setback lines on the lateral boundaries created open view lines for the rear upper properties to see the valley and have sea views. These are not opinions of an experienced expert in the built environment, which can simply be swept under the carpet by an estate architect and Trustees. If they did not agree with Friedman, it was incumbent upon them firstly, to provide the reasons for their decision, and secondly, to take all the members of the 1st respondent in their confidence and disclose all the opinions of experts, as well as their own reasons for their decision, to the members, more especially those members who one expert opined may have their views impacted. The disfigurement of the Estate, the consequence of the Estate being unsightly and the derogation from the value of adjoining properties was serious matters which required a General Meeting of

members, which were conclusions reached as the aftermath of the 2nd respondents building plans. These were issues beyond the Trustees and needed members. To keep such an expert opinion out of the reach of ordinary members especially those to be affected, and to deny the members the benefit of the estate architect and the trustees reasons for approving 2nd respondents building plans under the circumstances, and further deny the members of the 1st respondent especially those who may be affected, the opportunity to engage with the contested views of the experts on the status of a Site Analysis: Building Control Plans in the Estate, was *mala fide*.

[23] The estate architect and the Trustees were wrong to simply disregard the views of the members affected, and the opinion of Mr Friedman. The estate architects decision and the Trustees' resolution was: (a) procedurally unfair and unreasonable; (b) without any justifiable basis and thus unreasonable; (c) in breach of the principles of natural justice; and (d) unjust [*Trustees of the Legacy Body Corporate* para 46]. The applicant urged this court to find that the trustees' decision is so unfair that it cannot be explained unless it is found that they were motivated by being racists. I am prepared to take it to the point of the estate architect and the trustees acting capriciously. I am slow to support a school of thought that a difference of opinion between a Black person and a White person is almost always underlined by the racism of a White compatriot. In the same vein, I am slow to support 2nd respondents thinking that the difference of opinion between him and the other members of the 1st respondent who are publicly objecting to his building without a waiver application in circumstances where they held the view that he should apply and they should be allowed to engage with his deviation, is underlined by their being narcissists. The applicant's approach to 2nd respondents

building plans and construction were amongst others informed by the expert opinion of Steven Neufield (Neufield) who was a professional valuer. Neufield said allowing 2nd respondent to contravene the architectural controls directly caused a loss of value of the applicant's property and should not be allowed. This was because amongst others due to the unlawful structure the applicant's erf would have a reduced view and a less open feeling due to the more monolithic structure in front of it. There was a reduction in aesthetic value, and a view was one of the key value-forming characteristics of property in Plettenberg Bay, and reducing the view reduced the value of the property. He estimated the decrease in value to about R1 500 000. He added that it was not merely a financial loss in the reduced value of the property. The 2nd respondent's construction, if it were allowed to proceed, would negatively impact on the applicant's enjoyment of his own house, a right which was supposed to be protected by the 1st respondent and was trodden on unjustly and unfairly.

[24] In our constitutional order, private entities are not enclaves of power, immune from the obligation to act fairly, lawfully and reasonably [*Trustees of the Legacy Body Corporate* para 50]. The standards of lawfulness, reasonableness and procedural fairness had not been adhered to by the estate architect and the trustees. The impact of the wrong interpretation and application of rules in an Estate can be widespread and ensuring effective oversight by the General Meeting is important to safeguard not only property rights but also other constitutional rights of members of a Homeowners Association. The condonation of departures in the first plan submitted by the 2nd respondent by the estate architect and the trustees, under the circumstances, without disclosing the disputed alleged impact of

the departures to the General Meeting was unlawful, unreasonable and procedurally unfair. For these reasons the order was made.

DM THULARE
JUDGE OF THE HIGH COURT