



IN THE HIGH COURT OF SOUTH AFRICA
[WESTERN CAPE HIGH COURT, CAPE TOWN]

Case No: 22784/12

In the matter between:

KOTHUIS (PTY) LTD

Applicant

and

PROVINCIAL MINISTER OF CULTURAL AFFAIRS

AND SPORT, WESTERN CAPE

First Respondent

HERITAGE WESTERN CAPE

Second Respondent

STELLENBOSCH INTEREST GROUP

Third Respondent

STELLENBOSCH HERITAGE FOUNDATION

Fourth Respondent

THE CHAIRPERSON, INDEPENDENT APPEAL

TRIBUNAL

Fifth Respondent

JUDGMENT DELIVERED: 20 SEPTEMBER 2013

FOURIE, J:

INTRODUCTION

[1] In and during 1986, Mr. André Pieterse, a director of applicant, acquired certain immovable property, known as Erf 9547, Stellenbosch (“the property”). The property borders on two well-known streets in Stellenbosch, namely Dorp Street and Andringa Street. Pieterse reconstructed and restored the existing historical buildings and established the Stellenbosch Hotel on the property.

[2] Due to the restoration of the buildings, a portion of the property was declared a national monument on 27 June 1986. During the late 1980’s, a four-storey annex to the hotel was constructed. On 16 March 1989, the property was registered in applicant’s name.

[3] Since the commencement of the National Heritage Resources Act 25 of 1999 (“the Act”), the portion of the property that had been declared a national

monument, is now regarded as a provincial heritage site as contemplated in the Act.

[4] Since approximately 2007, applicant has attempted to obtain permission to enable it to add six rooms to the existing hotel building. As the hotel buildings enjoy formal protection as a heritage site in terms of the Act, a permit has to be obtained from second respondent in terms of section 27 (18) of the Act, authorising the addition of the six rooms.

[5] After initial unsuccessful attempts by applicant to obtain the necessary permit, second respondent's Built Environment and Landscape Committee ("Belcom") eventually granted the application and on 10 January 2012, second respondent issued the necessary permit authorising the extension of the hotel by the addition of six rooms.

[6] The Belcom decision was then taken on appeal by third and fourth respondents, but second respondent's appeal committee dismissed the appeal. Thereupon, third and fourth respondents lodged a further appeal with first respondent, who appointed an independent appeal tribunal ("the tribunal") to consider the appeal in terms of section 49 (2) of the Act.

[7] On 5 June 2012, the tribunal upheld third and fourth respondents' appeal, thereby effectively revoking the permit granted by second respondent to applicant to extend the hotel by the addition of six rooms.

[8] Pursuant thereto, applicant brought the present application, in which it seeks an order reviewing and setting aside the decision of the tribunal upholding the appeal of third and fourth respondents.

[9] First and second respondents do not oppose the application for review and have given formal notice of their intention to abide the decision of the court. No notice of intention to oppose the application for review has been given by third and fourth respondents.

[10] However, the tribunal, represented by its chairperson (fifth respondent), has given notice of its intention to oppose the application and fifth respondent has deposed to an opposing affidavit, in which he deals at length with the merits of the application and prays that the application be dismissed with costs.

GROUNDS OF REVIEW

[11] The grounds of review relied upon by applicant, are summarised as follows in paragraph 58 of its heads of argument:

“Kothuis contends that, in taking the decision, the tribunal took irrelevant considerations into account while failing to consider relevant considerations, including updated information as regards the heritage grading of the various components of the hotel, resulting in the decision being taken arbitrarily or capriciously, and not rationally connected to the information before the tribunal or to the reasons given by the tribunal for the decision.”

[12] The review application is predicated upon the provisions of the Promotion of Administrative Justice Act 3 of 2000 (“PAJA”). In particular, applicant purports to rely on sections 6 (2) (e) (iii); 6 (2) (e) (vi); 6 (2) (f) (ii) (cc) and 6 (2) (h) of PAJA.

[13] In addition, applicant contends that the tribunal was biased and that it took its decision in bad faith (Section 6 (2)(a)(iii) of PAJA). Finally, applicant submits that the court, upon reviewing and setting aside the tribunal’s decision, should itself take the decision, as envisaged in section 8 (1) (c) (ii) (aa) of PAJA.

[14] I should add that it is not in dispute that the impugned decision of the tribunal constitutes “*administrative action*”, as defined in section 1 of PAJA. Therefore, the decision would, in appropriate circumstances, be reviewable in terms of the provisions of PAJA.

APPLICABLE LEGAL PRINCIPLES

[15] In **Seafront For All and Another v MEC, Environmental and Development Planning, Western Cape and Others** 2011 (3) SA 55, a two judge court of this Division emphasised, at para 29, that judicial review is in essence concerned, not with the decision, but with the decision-making process. Review is not directed at correcting a decision on the merits, but, in general terms, concerned with the legality of the decision.

[16] In the recent decision of the Supreme Court of Appeal, in **MEC for Environmental Affairs and Development Planning vClairison’s** CC,(408/2012) [2013] ZASCA 82 (31 May 2013) the following was said:

“It bears repeating that a review is not concerned with the correctness of a decision made by a functionary but with whether he performed the function with which he was entrusted. When the law entrusts a functionary with a discretion it means just that: the law gives recognition to the evaluation made by the functionary to whom the discretion is

entrusted, and it is not open to a court to second-guess his evaluation. The role of a court is no more than to ensure that the decision-maker has performed the function with which he was entrusted.”

[17] As to the findings made by a tribunal of experts, the following was said in **Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others** 2004 (4) SA 490 (CC) at para 48:

“A court should thus give due weight to findings of fact and policy decisions made by those with special expertise and experience in the field...a decision that requires an equilibrium to be struck between a range of competing interests or considerations and which is to be taken by a person or institution with specific expertise in that area, must be shown respect by the courts. Often a power will identify a goal to be achieved, but will not dictate which route should be followed to achieve that goal. In such circumstances a court should pay respect to the route selected by the decision maker.”

[18] In **Corrans v MEC for the Department of Sport, Recreation, Arts and Culture, Eastern Cape and Others** 2009 (5) SA 512 (ECG) at para 21, it was stressed that, in a review application under the Act, *“...a court of law must give due weight to policy decisions and findings of fact by a decision-making body, particularly where, as here, the decision appears to conform to the overall scheme of the legislation.”*

[19] However, this does not mean that, where the decision of the decision-making body is not reasonably supported on the facts or not reasonable in the light of the reasons for it, a court may not review that decision. As was stated in **Bato Star** at para 48, “*a court should not rubber-stamp an unreasonable decision simply because of the complexity of the decision or the identity of the decision-maker*”.

[20] Notwithstanding the blunderbuss approach adopted by applicant in its founding papers, I believe that a proper analysis of the grounds relied upon by applicant, shows that the review is essentially one based on the absence of rationality on the part of the tribunal. Section 6(2) (f) (ii) (cc) of PAJA confers the power to review administrative action judicially if the action itself is not rationally connected to the information before the decision-making body.

[21] In **Carephone (Pty) Ltd v Marcus NO and Others** 1999 (3) SA 304, the Labour Appeal Court put the question to be asked by the court in a rationality based review, as follows at para 31:

“Is there a rational objective basis justifying the conclusion made by the administrative decision-maker between the material properly available to him and the conclusion he or she eventually arrived at?”

[22] This formulation has been approved by the Supreme Court of Appeal in the context of section 6 (2) (f) (ii) of PAJA, in **Trinity Broadcasting (Ciskei) v Independent Communications Authority of South Africa** 2004 (3) SA 346, as follows at para 21:

“In the application of that test (the rationality test), the reviewing court will ask: is there a rational objective basis justifying the connection made by the administrative decision-maker between the material made available and the conclusion arrived at”.

RELEVANT PROVISIONS OF THE ACT

[23] In the preamble to the Act, it is recorded that the purpose of the Act is, *inter alia*, to introduce an integrated and interactive system for the management of our national heritage resources. In so doing, heritage resources authorities, such as second respondent, are empowered to prescribe principles for the management of heritage resources. In terms of section 5 of the Act, general principles for heritage resources management are laid down and sub-section (6) requires that policy, administrative practice and legislation must promote the integration of heritage resources conservation in urban and rural planning and social and economic development. Further, sub-section 5 (7) (d) prescribes that the identification, assessment and management of the heritage resources of South Africa, must contribute to social and economic development.

[24] Section 49 of the Act, provides for a system of appeals, firstly to a provincial heritage resources committee against a Belcom decision, and, thereafter, an appeal to the Minister or MEC, who shall then appoint a tribunal, consisting of three experts, having expertise regarding the matter in question, to adjudicate the appeal.

[25] In terms of section 49 (3) of the Act, the tribunal must, in adjudicating the appeal, have due regard to:

- (a) the cultural significance of the heritage resources in question;
- (b) heritage conservation principles; and
- (c) any other relevant factor which is brought to its attention by the appellant or the heritage resources authority.

THE TRIBUNAL'S REASONS FOR UPHOLDING THE APPEAL

[26] In a written communication of 5 June 2012, first respondent recorded that the tribunal had arrived at its decision for the following reasons:

- (a) Applicant's proposed development - in its re-submitted form - continues to have a negative impact on the site.

- (b) Applicant restored the historic buildings, thereby restoring heritage value to those buildings which have to be protected.
- (c) Despite the reduction in height of the proposed addition of approximately 0,990 metres, the negative impact of the addition is still evident. The courtyard as “*open space*”, around which historic buildings are grouped, is an important element of the whole ensemble that makes up the historic fabric of this part of Dorp Street, Stellenbosch. By filling up this last remaining open space with a new building, the historic value of the buildings will be negatively impacted upon.
- (d) The re-submitted development proposal has in essence not addressed the concerns raised by the previous appeals process -the site remains over-developed; the “*open-space quality*” of the courtyard is highly compromised and the development has a negative impact on the surrounding historic buildings. In this regard, reference is made to previous findings of other entities dealing with the proposed development.
- (e) Having regard to the cultural significance and provincial heritage status of the grouping of buildings in question and the important prevalence of open space/courtyard places which make up the nature of the built fabric in this area and form part of the historic

landscape/streetscape of Dorp Street, Stellenbosch, the revised proposal is out of character and continues to have a negative impact.

[27] In his opposing affidavit, fifth respondent provides further detail regarding the grounds upon which the tribunal reached its decision. It is clear from the material before the court, that the essence of the decision of the tribunal pertains to the historic and heritage value placed by it on the courtyard of the hotel as open space, situated within its surrounding context. In this regard fifth respondent stresses, what the tribunal perceived to be, the negative impact on the site by virtue of its over-development.

[28] As to the approach followed by the tribunal, fifth respondent says that there are a number of principles in the Act, which must be applied when assessing heritage applications, some of which may be in conflict with each other and require a balancing exercise. He reiterated that it is a very difficult argument to what extent you permit change on a site to the point that it compromises the fundamental values of the site. He adds that experts may legitimately differ on that question.

DISCUSSION

[29] I should mention that, during argument, the parties appeared to be *ad idem* that the wording of section 49 (3) of the Act, indicates that an appeal to the tribunal is a “wide” appeal, and not an appeal in the ordinary restricted legal sense. Section 49 (3) expressly requires the tribunal to have regard to any relevant factor brought to its attention by the appellant or the heritage resources authority. This is indicative of a wide appeal which, effectively, constitutes a hearing *de novo*.

[30] In my view, it is important to note that Pieterse and applicant, as the owners of the property, reconstructed the historic buildings on the site, thereby restoring heritage value to those buildings. There can be no doubt that this heritage value has to be protected in a manner which is consonant with the overall scheme of the Act. In this regard, I believe it is necessary to bear in mind what Mr. Andrew Hall, the Chief Executive Officer of second respondent, had to say about the purpose of the Act, during his presentation to the tribunal. He put it as follows:

“We are no longer dealing with memorialisation of sites and we live now in a dynamic world where heritage is part of dynamism of society and the Act makes provision for that and we’re required to take that into consideration.”

[31] Hall added that, in performing their functions, the heritage authorities are required to strike a balance between the need for conservation and the need for development. As I have mentioned earlier, section 5 (6) of the Act expressly requires the promotion of the integration of heritage resources conservation and social and economic development. Section 5 (7) (d) of the Act requires that the management of our heritage resources must contribute to social and economic development.

[32] Seeing that the courtyard occupies centre stage in this application, it is necessary to have regard to the origin thereof. It now seems to be common cause that the existing form of the courtyard was created as an integral part of the establishment of the Stellenbosch hotel, when the hotel buildings were constructed in the 1980's. As it currently exists, the courtyard has no specific historical reference, as a courtyard, within the context of the heritage site. In fact, it did not exist as a courtyard before the construction of the hotel. It appears that the correct approach would be to regard the courtyard as open space which may have heritage value in its setting adjacent to the surrounding reconstructed buildings.

[33] The reasoning of the tribunal, as appears from its written reasons, is that by “*filling up this last remaining open space with a new building, the historic value of the buildings will be negatively impacted upon.*” It seems to me that this overstates the factual position, as the courtyard itself will not be filled up with a new building. In his opposing affidavit, fifth respondent seems to alter this stance, by rather stressing the impeding of the view from within the courtyard by the proposed development. He says that, currently, one is able to view historic aspects of the surrounding buildings from within the courtyard. Therefore, the “*open-space quality*” of the courtyard would be highly compromised by the proposed development.

[34] It appears to me that, on the strength of the evidence before the tribunal, the “*open-space quality*” of the courtyard is seriously overstated. In fact, the courtyard is the product of the reconstruction of traditional buildings on the site and the addition of a four-storey annex that forms part of the hotel building. Also, according to applicant’s representatives, one does not have the views from the courtyard as described by fifth respondent, as only persons staying in the rooms on the third and fourth floors of the annex, would have such views. Upon completion of the proposed addition only the fourth floor rooms will have such views. I should add that the impression gained from the photographs before the court, is that the courtyard seems to be a by-product of the construction of the

hotel and its annex, and that any view from the courtyard, at present, is rather limited.

[35] In any event, it should be borne in mind that the footprint of the courtyard will not at all be restricted by the proposed addition of six rooms. The planned intrusion by balconies into the courtyard, as initially envisaged, has also been removed. All of this has substantially mitigated any negative impact on the courtyard as open space.

[36] Further, it appears that, initially, the major heritage concern was that the addition of the six rooms would have a visual impact on the streetscape and negatively affect how one experiences the historical Dorp Street from a pedestrian level. This concern has been substantially alleviated by lowering the proposed extension by approximately one metre. Also, the existing foot-print of the building would not be extended, as the new rooms are to be constructed on top of the existing kitchen. As depicted in the photographs at pages 95-6 of the record, this would result in the extension being hardly noticeable from Dorp and Andringa Streets.

[37] It appears to me that, having regard to the aforesaid mitigatory measures, and considering the proposed development within the context of the existing reconstructed buildings and the four-storey annex to the hotel, the conclusion that the proposed addition would have a material negative impact on its surroundings, cannot be rationally justified. In this regard, it is important to note that second respondent's Belcom, as well as its internal appeal committee, were satisfied that the addition should be given the green light. It is also significant to note that, after the proposal was initially rejected by second respondent, applicant amended the building plans and consulted with second respondent in taking measures to ameliorate the impact of the addition. In view thereof, second respondent, as the authority responsible for the management of heritage resources in the Western Cape, approved of the changed plans and its Belcom granted the application for a permit in terms of section 27 (18) of the Act.

[38] In addition thereto, applicant's proposals were submitted to the Aesthetics Committee of the Stellenbosch Municipality, which approved the building plans after mitigatory measures were taken to limit the scale of the additions. Local architects, as well as representatives of various local heritage bodies and municipal officials, constitute this committee.

[39] As indicated above, I believe that it is important to bear in mind that second respondent has no objection to the addition being added in accordance with the amended plans. Hall explained the reasoning of second respondent to the tribunal. This would certainly have been a relevant factor to be taken into account by the tribunal in terms of section 49 (3) of the Act. Strangely enough, the tribunal appears to have been of the view that the evidence of Hall should be approached with circumspection. This approach of the tribunal was apparently prompted by Hall's statement that second respondent sided with applicant and collaborated with applicant's representative in preparing their presentations to the tribunal.

[40] In so doing, the tribunal, in my view, failed to consider the second respondent's views objectively and independently. The fact that second respondent approved of the proposed development and supported applicant in the hearing before the tribunal, certainly does not mean that second respondent's views are tainted to the extent that it should be approached with circumspection. There is nothing to indicate that second respondent did not approach this matter professionally and in accordance with sound heritage conservation principles. This is borne out by the evidence presented by Hall to the tribunal. As I see it, second respondent, through Hall, complied with its duty to give its objective views and state its stance with regard to the application.

[41] It does not necessarily follow that the tribunal failed to take account of second respondent's views, but in approaching it with circumspection, the reasonable inference is that it failed to adequately consider the merits of second respondent's views and to have due regard thereto, as required by section 49 (3) (c) of the Act. The view of the tribunal, that the submissions made on behalf of second respondent should be approached with circumspection, is reiterated in fifth respondent's opposing affidavit.

[42] In my view, the tribunal thereby failed to pay sufficient attention to an important aspect raised by Hall in his submissions to the tribunal. This relates to the management and conservation of heritage resources in the context of urban planning, where social and economic development issues are to be considered. A perusal of the reasons furnished by the tribunal for its decision, shows that no reference at all is made to the impact upon social and economic development.

[43] I have already alluded to the submissions of Hall, in which he stressed the importance of striking a balance between the need for conservation, on the one hand, and the need for development, on the other. I have also referred to section 5 (7) (d) of the Act which expressly requires that the management of heritage resources must contribute to social and economic development.

[44] The record shows that Hall, *inter alia*, made the following submissions in this regard:

“One of the considerations in this project is that these extra rooms are needed in order to allow this hotel to house an entire tour bus and till that happens there are issues of economic viability, they cannot tap into (this?) aspect of the tourism market and that is something that we have to take into consideration in balancing the desires of the community concerned and the need for a viable business on the site...When we are dealing with heritage resources that are in private hands considerations have to be different, there’s a reality that we have to deal with but would not do us credit- it doesn’t do us credit as a heritage resources agency to take decisions of this sort that SIG (third respondent) would like us to and that is the problem here. We might like to consider that courtyard or whatever you call that space but the way that the Act requires us to look at things, the way that we are required to consider economic necessity and needs, determine that isn’t always possible for us to operate on an idealistic way.”

[45] In considering this issue, I believe it is important to stress that Pieterse, and thereafter applicant, reconstructed the old buildings to serve as a hotel. The hotel was extended and by all accounts it is a popular abode in Stellenbosch and provides much-needed accommodation for the busy tourist centre that the town of Stellenbosch has become. According to the submissions made on behalf of applicant, the modern trend is for hotels to offer enough beds for a busload of tourists to be accommodated in tour stop-overs. To keep up with this current

trend, the Stellenbosch hotel will have to add more rooms. Not doing so, the submission continues, will limit the business and, over time, the economic viability of the hotel. This could have a negative impact on the heritage resources and it is important to bear in mind that, since the complex was restored in the 1980's, it has remained in an excellent state of repair and has continually been used as an hotel providing good service and accommodation.

[46] These submissions made on behalf of applicant, do not appear to have been gainsaid by third and fourth respondents at the hearing before the tribunal. It is significant to note that, although it did not form part of the material considered by the tribunal, third respondent's representative responded rather emotively at the hearing before an earlier tribunal, by stating that Pieterse had "*made enough money*" and should not be allowed to construct the proposed six additional hotel rooms. An unguarded and apparently unsubstantiated statement of this nature, raises a concern about the sincerity of third respondent's opposition to the proposed development.

[47] As mentioned earlier, the reasons furnished for the tribunal's decision, do not indicate that socio-economic considerations were taken into account in arriving at the decision to uphold the appeal. In his opposing affidavit in the

present application, fifth respondent deals with the issue of economic considerations, as follows in sub-paragraph 37.8:

“The tribunal took into account the applicant’s economic development considerations. The applicant has been able to maximise development opportunities in respect of the historic property and has extracted substantial development value.”

Also, in sub-paragraph 37.2, fifth respondent states that applicant has extracted economic benefit from the restoration and its associated heritage status.

[48] Whilst it is so that applicant has extracted some economic benefit from the restoration of the buildings, by conducting the hotel business, it is not clear to me what is meant by the statement that applicant has been able *“to maximise development opportunities”*. In any event, the evidence seems to the contrary. Also, fifth respondent does not say to what extent applicant’s economic development considerations were taken into account by the tribunal, nor does he indicate what impact (if any) such considerations may have had upon the decision of the tribunal to uphold the appeal. Nor does one find any evidence of an attempt by the tribunal to strike a balance between the need for conservation and the need for development.

[49] Returning to the reasons furnished for the decision of the tribunal, it appears that the tribunal was of the view that the re-submitted development proposal has in essence not addressed the concerns raised in the earlier appeals process. In particular, reference is made to the reasoning of a former appeal committee of second respondent and a former independent appeal tribunal, that the proposed development will have a negative impact on the courtyard, which is described as one of the few remaining examples of a courtyard on a provincial heritage site in the area. As explained earlier, the courtyard has no specific historical reference within the context of this heritage site. The earlier concerns raised in this regard, are accordingly unfounded and ought not to have been relied upon by the tribunal as a reason why the proposed development would have a negative impact on the surrounding historic buildings.

[50] As to the perceived negative impact on the surrounding historic buildings, it does not appear to me that the addition of six rooms would, in a manner of speaking, push it beyond the tolerance level. On the contrary, I am of the view that this perception is not justified on the evidence placed before the tribunal. The evidence shows that the additional six rooms are to be erected on the existing footprint of the kitchen and would be similar to the already existing four storey annex, which forms the northern boundary of the courtyard. The annex forms part of a building complex which also houses a number of apartments, a

restaurant, conference venues, shops and an underground parking. It has to be borne in mind that the site has been sectionalised and that the open backyard to the north, as it existed historically, has been fully utilised for this sectional title development, which includes the annex. The courtyard is a creation of the developments on the site and it was constructed in this manner to allow access to the reception of the hotel by means of the courtyard.

[51] As I have mentioned earlier, the main concern of those objecting to the development, initially centred on the negative impact which it could have on the streetscape from Dorp Street. This concern has been taken care of by the lowering of the proposed extension by approximately one metre. This has prompted all the other experts in the field, who formed part of the various committees described above, to approve the proposed development. It seems to me that the perceived negative impact which the development in its reduced form may have, has been grossly over-emphasised by those opposing the development. It rather seems to me that, if one objectively balances the extent of any negative impact which the proposed development may have, against the economic necessity to have the hotel extended by six rooms, thus enhancing its viability, the scale should, for the reasons aforesaid, tip convincingly in favour of allowing the development to proceed.

[52] In my opinion, the decision of the tribunal to uphold the appeal, was, in these circumstances, irrational in relation to the evidence placed before it. Put differently, there is, in my view, on the evidence before the tribunal, no rational objective basis justifying the upholding of the appeal.

[53] I have come to this conclusion, whilst accepting that the balancing of possibly competing heritage principles is, most appropriately, undertaken by heritage experts, such as the members the tribunal. I furthermore accept, as stated by fifth respondent, that it is difficult to decide to what extent change on a site should be permitted to the point that it compromises the fundamental heritage values of the site. Experts could certainly legitimately differ on this question and, therefore, a court should not lightly interfere when experts have reached a decision in this regard.

[54] However, I believe that, for the reasons furnished, the present is a case where the court should interfere, by virtue of the fact that the tribunal did not come to a rational decision on the evidence before it. In my view, this decision of the tribunal, which is not only at odds with the views of second respondent, but also with the Belcom decision; the decision of second respondent's appeal

committee and the decision of the Aesthetics Committee of the Stellenbosch Municipality, should accordingly be reviewed and set aside.

COSTS OF THE REVIEW APPLICATION

[55] I was initially rather surprised by the tribunal's vigorous opposition of the application for review. It was the only party that opposed the application, although it has no personal interest in the outcome thereof. Upon reflection, I believe that there was sufficient reason for the tribunal to defend its own decision on review. In particular, as applicant's papers included criticism pertaining to the manner in which the tribunal's decision was taken, as well as allegations that the tribunal was biased and that its decision was taken in bad faith.

[56] In view of these serious allegations, the members of the tribunal were certainly justified in filing affidavits under oath to defend their integrity. I should add that, in any event, there is no evidence at all on the papers that the tribunal acted in bad faith or displayed bias. In the circumstances, I believe that, although the tribunal has been unsuccessful in its opposition, no costs order should be made against its members.

[57] It was submitted on behalf of applicant that first respondent should be held responsible for the costs of the application, notwithstanding his decision to abide the outcome of the proceedings. Applicant argued that, in appointing the tribunal, first respondent exercised a statutory duty for which his office should take responsibility.

[58] I do not agree with this submission. First respondent was required in terms of the Act to appoint the tribunal, but, once appointed, the tribunal acts independently. It cannot be just and equitable to saddle first respondent with the liability for costs, where the independent tribunal decided to unsuccessfully oppose the review application. Particularly so, in circumstances where first respondent has not opposed the application and abides the decision of the court.

[59] I believe that, in the exercise of my discretion in this regard, no order as to costs should be made.

SECTION 8(1)(c)(ii)(aa) OF PAJA

[60] This section of PAJA provides that a court may itself vary or substitute an impugned administrative decision in exceptional circumstances. PAJA does not offer guidelines as to what exceptional circumstances are, but the point of

departure should be that, in the ordinary course, a court will refer the matter back because the court will be slow to assume a discretion which has by statute been entrusted to another functionary or repository of power. See the restatement of the law in this regard in **University of the Western Cape & Others v Member of the Executive Committee for Health and Social Services & Others** 1998(3) SA 124 (C) at 130I-131I.

[61] Our courts have through the years acknowledged certain circumstances in which a court would be prepared to substitute its own decision for that of an administrative or statutory body. There is, however, no *numerusclausus* of the instances in which a court may so decide. What the court has to do, is to have regard to the peculiar circumstances of the case, to determine whether it would be fair for the court to take the decision itself rather than refer it back to the appropriate functionary.

[62] I believe that the present is a case where exceptional circumstances exist, requiring the court to take the decision itself rather than referring the matter back to the tribunal. The circumstances are the following:

- a) The merits and demerits of the addition of six rooms to the hotel building, have received exhaustive ventilation over a number of years. The application

to obtain the necessary permit has not only been the subject of discussion and decision by the various tribunals and committees referred to above, but in the present review application all the relevant material has again been aired and debated exhaustively.

- b) All the relevant information and documentation is before the court. There is no suggestion that further evidence or information exists which could possibly lead to a different result.
- c) The tribunal has expressed itself in such clear terms in opposing the review application, that its members would find it extremely difficult to re-assess the matter objectively.
- d) To request first respondent to appoint a new tribunal for a re-hearing of the appeal, will necessarily lead to delay and resultant prejudice to the applicant.
- e) In my view, the outcome of the application should be inevitable. This is not only the finding of the court, but also the view of second respondent; second respondent's Belcom committee; second respondent's appeal committee and the Aesthetics Committee of the Stellenbosch Municipality. In the circumstances, I believe that this court is best placed to determine the matter finally.

ORDER

[63] In the result, I make the following order:

1. The decision dated 5 June 2012, taken by the independent appeal tribunal pursuant to section 49(2) of the National Heritage Resources Act 25 of 1999 (“the Act”), upholding third and fourth respondents’ appeal against a decision of second respondent’s appeal committee which, in turn, had refused third and fourth respondents’ appeal against a decision of second respondent’s Built Environment and Landscape Committee to grant applicant’s application for a permit in terms of section 27(18) of the Act to allow certain additions to the Stellenbosch Hotel buildings situated on Erf 9547, Stellenbosch, is reviewed and set aside.
2. Pursuant to the provisions of section 8(1)(c)(ii)(aa) of the Promotion of Administrative Justice Act 3 of 2000, the third and fourth respondents’ appeal in terms of section 49 (2) of the Act, is dismissed.
3. Pursuant to the provisions of section 8 (1) (d) of the Promotion of Administrative Justice Act 3 of 2000, it is declared that the permit issued by second respondent on 10 January 2012, in terms of section 27 (18) of the Act, to allow certain additions to the

Stellenbosch Hotel buildings situated on Erf 9547, Stellenbosch, is valid and binding.

4. No order as to costs is made.

P B Fourie, J

Counsel for Applicant : Adv. Jan-Hendrik Roux (SC)
: Adv. Susan Van Zyl

Counsel for Fifth Respondent : Adv. S Rosenberg (SC)

Attorney for Applicant : Thomson Wilks (Mr. Derek Wille)

Attorney for Fifth Respondent : State Attorney, Cape Town

Date(s) of hearing : 1 August 2013

Date of Judgment : 20 September 2013