

SOUTH AFRICA / JUDGMENT

Lind and Another v Trustees for the of the time being of The Indigo Trust (T3685/96) and Another (10072/2020; 6800/2021) [2021] ZAWCHC 97 (18 May 2021)

[2021] ZAWCHC 97

COURT

Western Cape High Court, Cape Town

BEFORE

Binns-Ward

CASE / FILE NUMBER

10072/2020; 6800/2021

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Republic

of South Africa

IN THE HIGH COURT OF SOUTH AFRICA

WESTERN CAPE DIVISION, CAPE TOWN

Case numbers: 10072/2020

and 6800/2021

Before: The Hon. Mr Justice Binns-Ward

Hearing: 4 May 2021

Judgment: 18 May 2021

In the

matter between:

JASON

BRETT LIND

First

Applicant

JULIA

JANE SCOTT

LIND

Second Applicant

and

THE

TRUSTEES FOR THE TIME BEING OF

THE

INDIGO TRUST

(T3685/96)

First

Respondent
THE
CITY OF CAPE TOWN
Second
Respondent

JUDGMENT

(Delivered by email to the parties' legal representatives and by release to SAFLII.

The judgment shall be deemed to have been handed down at 10h00 on
18 May 2021.)

BINNS-WARD J:

- [1] The applicants, who are the registered owners of Erf 249 Sea Point East, have applied for the review and setting aside of the decision of the City of Cape Town on 31 January 2020 to approve building plans submitted by the owners of the neighbouring property (the trustees of the Indigo Trust) for the erection of a dwelling house on Erf 251 Sea Point East.[1] Erf 249 is situate at 39 Upper Rhine Road and Erf 251 at 37 Upper Rhine Road. The applicants contend that a building erected in accordance with the building plans would not be compliant with the applicable zoning regulations.
- [2] The impugned building plans were submitted to the City in terms of s 4 of the National Building Regulations and Building Standards Act 103 of 1977 ('the Building Regulations Act'). In terms of s 7(1) of that Act, a local authority shall approve a building plan application if it is satisfied that the application complies with the requirements of the Act and any other applicable law; aliter if it is not so satisfied.
- [3] Both properties are zoned for single residential use ('SR1 Conventional Housing') in terms of the zoning scheme referred to in Part 1 of Chapter 4 of the City of Cape Town Municipal Planning By-law, 2015 (as amended).[2] It is common ground that the By-Law is 'applicable law' within the meaning of that expression in s 7(1) of the Building Regulations Act. Zoning is directed at the regulation of land use and development rights. The use and development regulation provisions of the City's zoning scheme are contained in the 'development management scheme', which is Schedule 3 to the By-Law.
- [4] The first issue to be considered is the first respondent's preliminary objection that the application has not been brought within a reasonable time, and should on that account be dismissed irrespective of its possible substantive merit; cf. *Wolgroeiërs Afslaers (Edms) Bpk v Munisipaliteit van Kaapstad* 1978 (1) SA 13 (A). The issue of unreasonable delay was addressed in *Wolgroeiërs* case under the common law. It was held that two questions are potentially raised: first, whether there has been an unreasonable

delay (which a question of fact on which the court makes a value judgment); second, if there has been such a delay, whether, in the interests of justice, it should be condoned (which is a matter to be decided in the exercise court's discretion).[3]

- [5] The current application was brought in terms of the Promotion of Administrative Justice Act 3 of 2000 ('PAJA'), which in large measure has codified the law in respect of the judicial review of administrative decisions. In terms of s 7 of PAJA an application for the judicial review of an administrative decision must be instituted without unreasonable delay and no later than 180 days after the date upon which the impugned decision was made or upon which the applicant could reasonably have become aware of it. The court is invested with the power in terms of s 9 of PAJA on application to extend the period of 180 days referred to in s 7 if it would be in the interests of justice to do so.
- [6] The current application was brought within the 180 day period referred to in s 7 of PAJA, but the first respondent contends that it was nevertheless unreasonably delayed. Section 9 of the Act therefore does not apply on the facts, and it is consequently necessary to identify the proper approach to the adjudication of an application brought within the statutory period but alleged nevertheless to have been unreasonably delayed. Brand JA hinted at the answer in *Opposition to Urban Tolling Alliance and Others v The South African National Roads Agency Ltd and Others* [2013] ZASCA 148 (9 October 2013); [2013] 4 All SA 639 (SCA) at para 26, saying 'At common law application of the undue delay rule required a two stage enquiry. First, whether there was an unreasonable delay and, second, if so, whether the delay should in all the circumstances be condoned (see eg *Associated Institutions Pension Fund and others v Van Zyl and others* 2005 (2) SA 302 (SCA) para 47). Up to a point, I think, s 7(1) of PAJA requires the same two stage approach. The difference lies, as I see it, in the legislature's determination of a delay exceeding 180 days as per se unreasonable.' Brand JA was treating of a case in which the application for review had been brought outside the 180-day limit, but I think it was implicit in the learned judge's remarks that he considered that the common law principles would continue to apply with regard to delay in review proceedings instituted within the statutory period, but nevertheless allegedly without the required degree of expedition. In any event, counsel on both sides appeared to agree with me in the course of argument that that has to be the indicated approach.
- [7] The applicants became aware of the building plan approval on 17 February 2020. It is not suggested that they should reasonably have learned of it any earlier. The review and attendant interim interdict applications were instituted only on 29 July 2020. The applicants have sought to explain what on the face of matters would appear to have been an unreasonable delay by pointing to the generally dislocating effect of the national Covid-19-related lockdown. It is common knowledge that the so-called 'hard lockdown' obtained between 27 March and the beginning of May 2020. Lockdown measures were gradually eased in the period between late May and July. The applicants aver that the lockdown prejudiced their ability to liaise with their town planning expert witness and complicated the latter's ability to access the building plans and municipal records relating to the building

plan application.

- [8] I think that it would be unreasonable not to allow, on account of the lockdown, that what appears to have been a five-and-a-half-month delay should in practical terms be treated as if it were an approximately three-month delay. It seems to me, however, that the application should reasonably have been instituted within no more than two months of the applicant becoming aware of the building plan approval. That would imply that that their expert witness should have been timeously engaged to undertake the required

investigations at the local authority's offices before the advent of the hard lockdown. Difficulties might thereafter have been experienced in obtaining the issue and service of the papers. It should, however, have been possible to do that by early June 2020 had the applicants acted with reasonable expedition during February and March.

- [9] I would therefore uphold the first respondent's contention that the institution of the review proceedings was unreasonably delayed.
- [10] The principal reasons why delay is stigmatised are the public interest in the finality of administrative decision-making, the prejudice to administrative decision-makers in explaining their actions at a remove in time where memories have faded and relevant records might have gone astray, and the prejudice occasioned to persons who may in the intervening period have ordered their affairs based on the impugned decision. In the current case the delay was by no means inordinate. There is nothing to suggest that it caused any forensic prejudice. It also appears unlikely, due to the prevailing lockdown measures, that much in the way of building work could have (legally) taken place during the period between the applicants first learning of the building plan approval and the institution of the application. The somewhat limited prejudice occasioned by the delay means that it is the

prospects of the application's success that weigh most heavily in reckoning whether it would be in the interests of justice to grant condonation. The importance of lawful administrative decision-making in a constitutional order based on the rule of law should not be undervalued in the conspectus of considerations to which regard should be had. As much as there is a public interest in the finality of administrative decision-making, there is also such an interest in the lawfulness of administrative decisions. For the reasons that follow, I consider that the review application was well founded. In all the circumstances I therefore consider that it would be in the interests of justice to condone the delay and entertain the review.

- [11] At the heart of the applicants' complaint is their allegation that the structure contemplated in terms of the approved building plans exceeds the maximum floor space permitted in terms of the zoning scheme for a building on Erf 251; in other words, that the proposed building is larger than allowed and that the relevant functionaries of the local authority erred in failing to recognise that. An appreciation of the import of various specially defined terms in the development management scheme is required to properly understand the gravamen of the complaint.

[12] Item 1 of the development management scheme includes the following pertinent definitions:

‘maximum floor space’ means the greatest total floor space that is allowed for a building or buildings on a land unit, and is calculated by multiplying the floor factor by the area of the land unit or that portion of the land unit which is situated within a particular zoning; provided that ...;

‘floor space’ in relation to any building means the area of a floor which is covered by a slab, roof or projection; provided that:

- (a) any basement or part of a basement not intended as habitable space shall be excluded;
- (aA) any area which is reserved solely for parking or loading of vehicles shall be excluded;
- (b) external entrance steps and landings, any canopy, any stoep and any area required for external fire escapes shall be excluded;
- (bA) portions of passages, access ways and fire escapes up to 1,5m in width in a building on a land unit with a zoning other than Single Residential Zoning 1 and 2, Community Zoning 1 and 2, Agricultural Zoning and Rural Zoning, provided that they connect directly from the fire escape, vertical circulation to the entrance doors or both, shall be excluded;
- (c) a projection including a projection of eaves, and a projection which acts as a sunscreen or an architectural feature, which projection does not exceed 1 m beyond the exterior wall or similar support, shall be excluded;
- (d) any uncovered internal courtyard, lightwell or other uncovered shaft which has an area in excess of 10 m² shall be excluded;
- (e) any covered paved area outside and immediately adjoining a building at or below the ground floor level, where such paved area is part of a forecourt, yard, external courtyard, pedestrian walkway, parking area or vehicular access, and which is permanently open to the elements on at least the front or long side, shall be excluded;
- (f) any covered balcony, verandah or terrace which, apart from protective railings, is permanently open to the elements on at least the front or long side, and which does not exceed 2,5 m in width, shall be excluded;
- (g) subject to paragraph
- (h) below, any stairs, stairwells and atriums that are covered by a roof shall be included;
- (h) in the case of multi-level buildings, any stairwells, liftwells, lightwells or other wells, and any atrium, shall only be counted once;

and provided further that floor space shall be measured from the outer face of the exterior walls or similar supports of such building, and where the building consists of more than one level, the total floor space shall be the sum of the floor space of all the levels, including that of basements;

‘floor factor’ means the factor (expressed as a proportion of 1) which is prescribed for the calculation of maximum floor space of a building or buildings permissible on a land unit. If the floor factor is known, the maximum permissible floor space can be calculated by multiplying the floor factor by the area of the land unit

‘floor’ means the inner, lower surface of a room, garage or basement, and includes a terrace or atrium to which the occupants of a building have access;

‘dwelling house’ means a building containing only one dwelling unit, together with such outbuildings as are ordinarily used with a dwelling house, including domestic staff quarters

‘dwelling unit’ means a self-contained, interleading

group of rooms, with not more than one kitchen, used for the living accommodation and housing of one family or a maximum of 5 transient

guests, together with such outbuildings as are ordinarily used therewith, but does not include domestic staff quarters, or tourist

accommodation or accommodation used as part of a hotel

‘dwelling unit’ means a self-contained, interleading group of rooms, with not more than one kitchen, used for the living accommodation and housing of one family or a maximum of 5 transient guests, together with such outbuildings as are ordinarily used therewith, but does not include domestic staff quarters, or tourist accommodation or accommodation used as part of a hotel

‘domestic staff quarters’ means an outbuilding which has a floor space of not more than 50 m², including sanitary and cooking facilities, and used for the accommodation of domestic staff employed at the dwelling unit concerned; provided that:

- (a) no more than one domestic staff quarters is allowed on a land unit without the approval of the City; and
- (b) the domestic staff quarters may only have its own individual section within a sectional title scheme if it is legally tied to the dwelling unit concerned;

‘family’ means:

- (a) one person maintaining an independent household; or
- (b) two or more persons related by blood, marriage or civil union maintaining a common household; or
- (c) not more than five unrelated persons without dependants maintaining a common household; but does not exclude up to six foster children, or dependants under legal guardianship as part of a household

‘garage’ means a building for the storage of one or more motor vehicles, and includes a carport but does not include a motor repair garage or service station

‘outbuilding’ means a structure, whether attached or separate from another structure on a land unit, ordinarily used in connection with the lawfully permitted uses on a land unit

‘building’ is defined, without prejudice to the ordinary meaning of the word, to include ‘any ... portion of a building’.

‘parking bay’ means an area measuring not less than 5 m by 2,5 m for perpendicular or angled parking and 6 m by 2,5 m for parallel parking, which is clearly identified, demarcated and accessible for the parking of one motor vehicle and may be provided in the form of a garage or carport.

I have included the definition of ‘family’ because it is relevant to the consideration of acceptable size and scale in the application of the development management scheme provisions. ‘Garage’ is relevant because it is a facility that may be part of a dwelling house or housed in an ‘outbuilding’.

An ‘outbuilding’ may be a separate structure or part of another structure. It is significant that an ‘outbuilding’ is permitted for uses ‘ordinarily used in connection with the lawfully permitted uses on a land unit’, such as garaging in the case of a land unit for single residential use. When it comes to garaging there is no basis in the scheme to distinguish the extent thereof the might reasonably be provided for in an outbuilding on a single residential land unit from that provided as integral part of the dwelling house. I shall further discuss the contextually significant import of the cited terms later in this judgment.[4]

[13] It is also relevant, for reasons which will become apparent, to have regard to certain of the provisions of the parking requirements prescribed in Chapter 15 of the development management scheme.

In terms of item 141(1)(a) of the scheme ‘Parking layout configuration, minimum dimensions and ramps to a parking area shall be in accordance with the provisions of this development management scheme or an approved site development plan’. Item 141(f) prescribes that ‘Parking areas shall be constructed and maintained in a state suitable for the parking and movement of vehicles’. The term ‘parking area’ is not defined. Its ordinary meaning would denote any space intended for the parking of vehicles. In terms of item 141(2) and (3), the City may require a parking layout plan to be submitted,

indicating the way in which it is intended that motor vehicles shall park, the means of entrance and exit, landscaping proposals, and construction details and may approve or refuse the parking layout plan and impose conditions of approval. Item 138

prescribes that a minimum of two off-street parking bays must be provided per main dwelling unit on land zoned for single residential

use (Zoning SR1). It does not seem to matter whether the required off-street parking is provided in a garage or by way of

outdoor spaces.

[14] Erf 251 is 429m² in extent. The applicable ‘floor factor’ in terms of the zoning scheme is 1. In the result, the total permitted ‘maximum floor space’ in building development on the erf is also 429m². The approved plans depict a building with an actual floor area of 1006m² before deduction of the floor areas that fall to be excluded from the calculation by virtue of paragraphs (a) to (h) of the definition of ‘floor space’. In terms of the plans submitted by the first respondent in July 2018 most of a 227m² area on the ground floor of the proposed single dwelling house was designated as ‘garage’, but the greater part of the area was re-designated as ‘storage’ in revisions to the plan made in October 2019. The applicant’s complaint arises out of the exclusion of most of this floor area from the calculation of the building’s floor space.

[15] The plans submitted in July 2018 were endorsed by the City’s

Land Use Management Section as compliant with the development management scheme, but the City’s Transport Department appears

to have found them problematic. The precise basis of the Transport Department’s difficulty with the plans is not clear

on the papers. It is unfortunate that the City did not file a report to clarify the position, but perhaps, having elected to abide the judgment of the court, the City was unaware of what became the focus of the proceedings insofar as the substantive issues were concerned.

[16] It appears from the evidence of Mr Karl Markwald, who represented the owners of Erf 251, that the City’s transport officials were concerned about how the designated garage area would work in practical terms with regard to the ingress and egress of vehicles on a daily use basis. It seems probable in the circumstances that considerations of the provided for in item 141 of the development management scheme must have informed the concerns that were raised. The officials were reportedly informed that most of the vehicles that it was intended to keep in the garage space would not be used on a daily basis and would merely be stored there. Mr Markwald has indicated that the vehicles that it is intended to store in the ground floor space are two sedan motor cars, a VW minibus, a personal trailer, a large farm bed trailer, a motor cycle, two quadbikes and a large quadbike trailer.

[17] The aforementioned re-designation of the greater part of the area originally labelled as ‘garage’ on the submitted plans as ‘storage’ was reportedly to address the difficulty raised by the Transport Department. It is notable that the pictorial representation on the plan of a number of motor vehicles in parked positions in the area hitherto labelled as ‘garage’ was also erased from areas re-designated as ‘storage’. It is the contention of the first respondent, however, that the relabelling was of no consequence and would make no difference to the intended use of the space. The approach of the City’s Land Use Management Section appears

to endorse the first respondent's contention. Its reports refer to the space as 'garage and storage' and treated the space so labelled indiscriminately as 'garage' (or

'floor space' within the meaning of paragraph (aA) of the special definition of that concept) for the purposes of assessing the compliance of the proposed structure with the prescribed 'maximum floor space'. The Land Use Management Section also treated a space on the ground floor plans consistently designated as 'service equipment area' as part of the garage area. Neither the building control officer (charged with making a recommendation to the local authority in terms of s 6(1)(a) of the Building Regulations Act), nor the municipal official who approved the plans under delegated authority appears to have considered the redesignation of the greater part of the garage space as storage areas to be significant, or to have been astute to the irreconcilable difference between a 'service equipment area' and one reserved exclusively for the parking of vehicles.

[18] The applicants' complaint in this regard is two-fold. Firstly, they point out that a garage is specially defined in terms of the development management scheme and, in its defined sense, is, by virtue of paragraph (aA) thereof, one of the types of area excluded in the definition of 'floor space' from the calculation of the 'maximum floor space' permitted in any building development on the erf. There is, in contrast, no definition of 'storage area' in the scheme and the ordinary connotation of the term is not confined to the storage of motor vehicles. They point out furthermore that in any event a 'service equipment area' is irreconcilable with the defined meaning of 'garage'. Secondly,

they contend that the extent of the space involved is markedly disproportionate in respect of the reasonable provisioning of garage

space for a single residential building on Erf 251. It is evident that the applicants suspect that the area has been labelled as garage space merely to obtain the approval of a building with a much greater floor space than permitted in terms of the zoning scheme with the intention that much of the area designated as garage space can be used for other purposes after the building has been completed. In this regard, the applicants fear that the first respondent will be able at that stage to obtain departures from the zoning scheme to reconfigure the designated garage space and the void below the currently indicated ground floor for other purposes and that it will be able to motivate the grant of such departures on the basis that they will not affect the external extent of the (then) completed structure and therefore would be seen as not being prejudicial to the neighbouring properties because the size and bulk of the structure would already be established.

[19] In my judgment, there is merit in both grounds of complaint.

[20] It is obviously important that building plans submitted for approval in terms of the Building Regulation Act should speak for themselves. In the vast majority of cases the two most important considerations in the assessment of such plans in terms of s 7(1)(a) of the Act for the purposes of legal compliance are compliance with the National Building Regulations and compliance with the land use and development restrictions in terms of the applicable zoning scheme. The assessment must be objective in nature if the purpose of the legislation

is to be achieved. The legal compliance (or lack thereof) of the building plan application must be apparent not only to the officials or body charged with undertaking the assessment, but equally so to any other informed

person (including a court) reviewing the plans. Self-evidently, that cannot happen unless the plans accurately reflect not only the dimensions but also the intended usage of the components of the contemplated building that they purport to depict.

[21] Accordingly - and especially in a context in which the term 'garage' has a specially defined meaning that bears with it, by virtue of paragraph (aA) of the definition of 'floor space', a material effect on the interpretation of the plan - a plan that expressly divides a depicted floor area between garage space and differentiated use areas cannot competently be interpreted in a way that treats the entire area as a garage. The term 'storage' covers any number of possible uses quite distinguishable from the parking of vehicles. A 'service equipment area' is in its own terms something different from an area for the parking of vehicles. One does not in ordinary language usage refer to vehicles as 'equipment'.

[22] In the current case, as the applicants' counsel stressed in argument, the service equipment area alone takes the proposed structure materially above the permitted maximum floor space when it is acknowledged, as it should have been, that it does not form part of the floor area depicted as garage on any version of the approved plans. The extent of the deviation is greatly

exacerbated when regard is had to the other parts of the 227m² floor space labelled as 'storage' that the City's officials treated as 'garage'.

[23] Properly interpreted, the approved building plans depict an intended building that exceeds the maximum floor space permitted in terms of the zoning scheme by a large measure. In the circumstances the City was bound, in terms of s 7(1)(b)(i) of the Building Regulations Act, to refuse the building plan application. Its decision to instead grant the application was consequently unlawful, and falls to be reviewed and set aside.

[24] In the light of that conclusion it is strictly unnecessary to deal with the applicants' second ground of complaint. But for two reasons it might nevertheless be helpful to do so. Firstly, if this matter were taken further on appeal and a finding made that my conclusion on the first basis for review was wrong, then it would be useful for this court's finding on the second basis to be known to avoid any prospect of a remittal of the application for further consideration at first instance. Secondly, and especially in the context of the drawn-out history of litigation regarding the series of building plan applications in respect of the development of Erf 251, the court's findings on the second basis for review might conduce to desirable finality and the avoidance of further litigation.[5]

[25] The second ground of the applicants' complaint is that the City should not have accepted the indication of 227m² of garage space originally indicated on the plans at face value because that amount of garage floor space was contextually disproportionate

and far beyond what a single-family would ordinarily require. The complaint falls to be assessed with reference to the 1006m² total actual floor space in the proposed building relative to the 429m² maximum (defined) floor space permitted in terms of the development management.

[26] The City must have approved the building plans accepting that the excess of the floor factor by more than double was allowable by virtue of the exclusions from the calculation of 'floor space' provided in the definition of that term in the development management scheme (quoted above). There is nothing in the reports of the Land Use Management Section, the building control officer or the functionary who approved the plans to suggest that any consideration was given to the apparently disproportionate extent of floor space given over to features of the structure that nominally qualified for exclusion from the floor space calculation. The impression is that a mechanical approach was adopted in the evaluation. Such an approach would not have been appropriate because it would give the definition of 'floor space', read in isolation, an independently operative function without proper regard to the contextual significance of the exclusions listed in it.

[27] As with any legislation, the by-law, and the development management scheme as part of it, fall to be construed contextually. The wording of the provisions should be interpreted congruously with the apparent scope and objects of the law; see *Cool Ideas 1186 CC v Hubbard and Another* 2014 (4) SA 474 (CC) at para 28.[6]

[28] The object of zoning has been described consistently in the jurisprudence and by the academic commentators as directed at the coordinated and harmonious use and development of land; cf. *Johannesburg Turnbull-Jackson v Hibiscus Coast Municipality* 2014 (6) SA 592 (CC) (2014 (11) BCLR 1310; [2014] ZACC 24 at para 6, *Municipality v Gauteng Development Tribunal and Others* 2010 (2) SA 552 (SCA) at para 6, *Broadway Mansions (Pty) Ltd v Pretoria City Council* 1955 (1) SA 517 (A) at 523B, *Cape Town City and Another v Da Cruz and Another* 2018 (3) SA 462 (WCC) at para 80, *Da Cruz and Another v City of Cape Town and Another v City of Cape Town and Another* 2017 (4) SA 117 (WCC) at para 45, *Camps Bay Residents and Ratepayers Association and Others v Hartley and Others* [2010] ZAWCHC 215 (16 November 2010) at para 23, *Esterhuyse v Jan Jooste Family Trust* 1998 (4) SA 241 (C) at 253H-I and *Jeannie van Wyk, Open-space systems in urban land-use planning: invaluable assets in conserving the environment and enhancing the quality of life* 2005 TSAR 256 at 260 at §4 (citing *Van Wyk Planning Law* (1999) 30-35). That much has also been expressly been recognised in various legislative equivalents of the By-Law, some of which are identified in the aforementioned judgments.

- [29] The object of the legislation cannot be achieved if the provisions of the development management scheme are not interpreted and applied contextually. A mechanical application of individual provisions of the scheme with inadequate regard to how they fit contextually into the wider framework will inevitably result in the objects of the legislation being subverted.
- [30] It is evident, if regard is had to the exclusions itemised in paragraphs (a) to (h) of the definition of 'floor space', that they all relate to incidental features of a building. In respect of some of them, their incidental character is underscored by the expressly provided limitation of their dimensions if they are to qualify for exclusion. Thus, in respect of balconies and verandas the exclusion applies so long as they do not exceed 2,5 m in width. A projection is excluded so long as it does not project more than 1 m.
- [31] The definition of 'floor space' read as a whole begs the question whether the exclusion in paragraph (aA), viz. 'any area which is reserved solely for parking or loading of vehicles shall be excluded' should be read literally to imply an area without any limitation of extent.[7] If that were the case, one could conceivably provide for a structure that was principally given over to the parking and loading of vehicles with the dwelling house part occupying a relatively small part of the building; a situation at odds with the concept of single residential zoning evident upon a contextual reading of the scheme's provisions. Such a building could also push up the effective floor factor well above that contemplated for a normal dwelling house, which is the primary use permitted for land zoned single residential (Conventional Housing) SR1. Such a building might well fall within the permissible maximum floor space parameters on a mechanical application of the definition of 'floor space', but it would not be a normal (or 'conventional') single family dwelling house. It would result in a garage – whether such were contained in the dwelling house or an outbuilding is not material – of much greater proportions than would ordinarily be used in a dwelling house for a single-family.
- [32] On a plot subject to a floor factor of 1, a building plan providing for proportionately excessive space for the storage and loading of vehicles could easily posit an edifice of greater bulk than the zoning provisions, considered purposively, were intended to permit. The effect of extensive garaging facilities in a building erected on a large erf on the other hand might not have

a comparatively intrusive effect on the neighbourhood. The postulate highlights the need for a sensitively contextual application of the zoning scheme regulations if their clearly intended purpose is to be achieved. (The cogency of the illustrative example is supported by the fact that a 'floor factor' restriction in respect of the primary use of property zoned as single residential (SR1) applies only in respect of erven less than 650m² in extent.) The zoning scheme vests a discretion in the local authority. It is called upon to exercise a value judgment, but the exercise of the discretion that is involved in making the judgment must be informed by a properly informed application of the scheme.

[33] The discernible intention of the development management scheme is an important consideration in the proper application of the regulations. That is expressly acknowledged in item 6 of the scheme, which provides:

Evasion of intent of the development management scheme

The City may refuse any application in terms of this By-Law if it considers such application to constitute or facilitate an evasion of the intent of this development management scheme or any of its provisions.

It is plain that the word ‘may’ in the given context should be construed in a peremptory sense, for any application that constitutes or facilitates an evasion of the scheme is effectively non-compliant with or inimical to the scheme and could not competently be approved if the purpose of the scheme is to be respected, which the relevant authorities are bound to do.[8]

[34] A contextually appropriate application of the zoning scheme requires the local authority to accord due weight in its consideration of a building plan to whether the proposed structure would, if constructed on land zoned single residential SR1, represent a single-family dwelling house. Attention should be paid to the general description of the intention behind the single residential (SR1) zoning in the introduction to Chapter 5 of the development management scheme: ‘The single residential zonings are designed to provide locations for predominantly single-family dwelling houses in low- to medium-density

neighbourhoods, with a safe and pleasant living environment’. The quoted wording is given in italic font in the development management scheme. Item 2 of the scheme provides ‘A sentence in italics is for guidance and should be regarded as not forming part of this development management scheme.’ The clear intention, however, is that the guidance should be followed in applying the scheme. There would otherwise be no purpose served by providing it. In the case of single residential (SR1) zoning the guidance merely serves to emphasise the material import of Chapter 5 that is rendered in ordinary font and accordingly unambiguously part of its operative provisions.

[35] ‘How conventional is a 227m² (non-basement) garage in a single-family dwelling house to be constructed on a 429m² land unit?’ one might ask. Is a facility of that size one that would ordinarily be used for a single-family dwelling house? It is not for this court in these proceedings to answer the question, which is why I would be unwilling to consider the substitutive order contingently sought by the first respondent in the event of the review succeeding. It is, however, a question squarely raised in the applicants’ objection. They contend for a negative answer on the basis that the proposal is inconsistent with the intended parameters of single residential (SR1) development in terms of the scheme, which contemplates a dwelling house and associated amenities for a single family. It is recognisably the applicants’ contention that the question is one that the local authority does not appear to have asked itself in its consideration of the first respondent’s building plan application.[9] This amounts in effect to a contention that the decision to approve the building plans was the result of a failure by the City’s officials to consider relevant

considerations.[10]

[36] That there is substance in the applicants' contention is supported by the absence of any evidence in the reports rendered by the various local authority officials who processed and finally

approved the building application that consideration was given to what on the face of it appears to be a disproportionately large area of garage space in the building. Indeed, on a proper application of the provisions of the development management scheme, I would have expected to find reasoned consideration given to the fact that the submitted building plans propose a structure in which the floor area of the incidental features excluded from the definition of 'floor space' exceed the total extent of the floor space of the principal features of the proposed dwelling house that are cognisable for the determination of compliance with the restrictions on 'maximum floor space'.

[37] The applicants expanded on their contention that the City's officials had not properly applied their minds to the building plan application by reference to the building control officer's report dated 30 January 2020, in which the officer appears to have accepted without comment the Land Use Management Section's observation that 'it is important to remember that this building plan is for internal alterations and additions to an approved dwelling house as per the 2012 approved plan'. The observation was manifestly incorrect because it is evident that the building plan application approved in January 2020 provided for a materially larger building footprint than that represented in the building plans approved in 2012. Part of the increased footprint was represented by an increase in size of the contentious garage/storage area.

[38] It is evident from his report that the building control officer must have had regard to the earlier (2018) iteration of the submitted building plan application but his report did not contain any discussion on the garage issue that had necessitated the relabelling as 'storage space' of a large amount of floor space previously indicated as 'garage'. This strongly suggests that the building control officer cannot have applied his mind to the 'maximum floor space' prescriptions for building development on the erf. On the contrary, it would appear that he unquestioningly adopted the misdirected opinion of the Land Use Management Section as to the compliance of the building plans with the prescripts of the development management scheme (to which he referred in his conclusions as 'the Town Planning Scheme Regulations'). Had he properly applied his mind to the relevant considerations he would not have made the error.

[39] The building plans were approved by the Section Head: Building Development, Table Bay District on the day after the building control officer made his report. In the Section Head's internal memorandum, dated 31 January 2020, minuting the building plan approval, he stated:

‘The proposal is Zoning compliant and there was therefore no formal land use process, but I am satisfied that the Land Use Department applied their mind properly to the application.

Having assessed the plans and having had regard to all other documentation, I concur with the BCO and I am positively satisfied that the application complies with all other applicable law.

I have engaged with the building control officer and all other relevant officials regarding the building plan evaluation process on a regular basis and over a period of time and is (sic) satisfied that the application has been thoroughly considered and that all the necessary factors have been taken into account.’

[40] It is clear, for the reasons discussed above, that the functionary who approved the plans with delegated authority from the City also cannot properly have applied his mind to all the relevant considerations. Alternatively, he misapprehended the import of the pertinent provisions of the development management scheme.

[41] Ordinarily, where it is apparent on judicial review that a building plan application is not compliant with the zoning scheme no purpose is served by remitting it to the local authority because the refusal of the application would be a foregone conclusion. In the current case, however, the first respondent has sought - were the review to succeed, as it has - the remittal of the application on the grounds that the amendment of the approved plans to designate most of what the trustees intended to be garage space as ‘storage area’ was at the instance of the local authority’s officials. The first respondent asserts that the Trust is entitled to a reassessment of its building application on the basis that the areas it originally depicted as garage space be considered as such, rather than as ‘storage space’. The first respondent appears to believe that it could obtain approval of the plans on that basis if the local authority were persuaded to accept all the floor space indicated on the plans as ‘garage’ as excluded from the ‘maximum floor space’ by reason of paragraph (aA) of the definition of ‘floor factor’. It seems to me that a remittal on that basis would still leave the first respondent with the problem of the excess floor space represented by the area designated on those plans as ‘service equipment area’, but that is a matter for the City, rather than the court, to address if there is a remittal.

[42] The first respondent has also requested that in remitting the building plan application the court should direct that the application be decided by the local authority in terms of the provisions of development management scheme as they stood prior to the amendments thereto effected in September 2019. The first respondent fears that if the plans were to be reconsidered in terms of the currently applicable scheme provisions, they could not be approved, and demolition of part of the already completed building work might be necessitated to allow for a structure that would be zoning scheme compliant.

[43] The circumstances in which the building plan notations were changed from ‘garage’ to ‘storage’ are by no means clear. I am therefore not able to determine that when the amendments were made it was understood by the City that they reflected no change in intended usage of the space concerned by the building plan applicant. Without clarity on

that point, I am unwilling to give any direction as to whether the plans should be reconsidered in terms of the development management scheme as it was prior to its recent amendment or as to whether the building plan application should be reconsidered in its originally submitted or its altered form. The applicable law is objectively determined, and not a matter susceptible to alteration by a court. The first respondent would obviously be entitled to a reconsideration of its application in terms of the law applying when the application was submitted to the local authority.[11] It is for the respondents to sort out which of the iterations of the application it is that legitimately falls to be decided on reconsideration. Their determination in this regard will obviously have to be one that is objectively defensible on the

applicable facts if it is to bear scrutiny. Needless to say it would be desirable for the City or the first respondent to give the applicants notice of the iteration of the building plans that are being reconsidered before any new decision is made.

- [44] To sum up on this aspect, all that I am willing to do to accommodate the first respondent's contentions and concerns is to refrain from making a substitutive order refusing the building plan application, and instead remit it for reconsideration by the City in the light of this judgment.
- [45] Finally, it remains to determine an application brought by the applicants (under case no. 6800/2021) for an order holding Mr Markwald to have been in contempt of an order of this court granted on 20 August 2020 at an early stage of the judicial review proceedings, and imposing an appropriate sanction. The order was taken by agreement between the parties in the unopposed motion court. It prohibited the first respondent from carrying out any further building work at Erf 251 pending the determination of the review application except for certain specified items, which included the demolition of free standing columns.
- [46] It is common ground that in mid-April 2021 Mr Markwald, apparently acting for the first respondent, caused a wall that divided part of the floor area designated on the building plans as garage or storage space from the rest of the open plan area that the first respondent averred in its answering papers in the review application was to be used for garaging space to be demolished. The demolition was in clear breach of the terms of the court order. The applicant sought to hold Mr Markwald liable for contempt of the order agreed to by the Trust applying the rules of attribution well-known in the realm of company law; cf. *Els v Weideman and Others* 2011 (2) SA 126 (SCA) and *Twentieth Century Fox Film Corporation and Others v Playboy Films (Pty) Ltd and Another* 1978 (3) SA 202 (W).
- [47] Mr Markwald delivered an answering affidavit in which he averred that he had not seen a copy of the court order, but that his understanding of the interim settlement to which it was intended to give effect had been that the order would relate to 'works comprising elements of the proposed dwelling house on the property, not temporary structures such as site offices and facilities or protection and security measures and barriers, which would be necessary on the site ... if it was to be closed down as

agreed'. He explained that the wall in question, which did not appear on the approved building plans, had been erected as a temporary measure to prevent trespassing by vagrants and undesirable elements in the area. He itemised a number of other areas of the building site that had also been sealed or fenced off for that purpose. He stated that the temporary wall had been removed in mid-April because he wished to be able to demonstrate to the court at an inspection in loco 'the vehicle and parking and vehicle storage layout as intended and envisaged for the garage which [he] thought to do by way of "mock-ups" of the vehicles in order to give proper perspective of the use of the garage for parking and storage of the vehicles and the movement of vehicles therein'. He denied that he had acted in wilful contempt of the court's order.

[48] It bears recording that the first respondent had indicated in its answering papers in the review application that it would be seeking to prevail on the court to undertake an inspection in loco. Such an inspection actually occurred, and it was noted that various to-size cut-out representations of the various vehicles that it had been alleged would be stored in the garage/storage space were laid out on the floor to try to illustrate how the first respondent intended to use the area.

[49] The principles applicable in the adjudication of contempt of court applications in the post-Constitutional era have been distilled and rehearsed by the Constitutional Court in at least two recent decisions, *Matjhabeng Local Municipality v Eskom Holdings Ltd and Others* 2018 (1) SA 1 (CC)[12] and *Pheko and Others v Ekurhuleni City* 2015 (5) SA 600 (CC),[13] and it would therefore be a supererogation to re-traverse them here. The Constitutional Court endorsed the approach applied in the majority judgment of the appeal court in *Fakie NO v CCII Systems (Pty) Ltd* [2006] ZASCA 52; 2006 (4) SA 326 (SCA). The remedy sought by the applicants is that a fine be imposed on Mr Markwald. In the circumstances the criminal

standard of proof applies.

[50] I do not think that the applicants have satisfied the requirement of proving that the terms of the order were brought to Mr Markwald's notice, although it is arguable that as the Trust was party to it being taken by agreement that was not necessary. It is also, and in any event, not possible to find on the papers that Mr Markwald, representing the Trust, acted mala fide with the intention of contravening the order. His explanation for his actions cannot be rejected out of hand as far-fetched and untenable. The contempt application will therefore be dismissed.

[51] I do not intend to make any order as to costs in respect of the contempt application. It was not unreasonable of the applicants to have brought it; and whilst I accept that Mr Markwald acted in ignorance of the terms of the court order, I consider that it was cavalier of him to have done so without apprising himself of its provisions. The order was, as mentioned, made by agreement between the applicants and the Indigo Trust of which he is a trustee.

[52] Costs in the review application will follow the result. It is necessary, however, to mention that after the hearing the applicants delivered an affidavit deposed to by a transport engineer in an endeavour to prove that the garage layout shown in the building plan

application submitted by the first respondent in 2018 would not have been acceptable to the City. The issue arose because the applicants had in their supporting affidavits suggested that the layout was not compliant with the City's parking policy. At the hearing I asked counsel to provide me with particulars of the adoption and publication of the alleged policy. Their enquiries established that a policy had not been formally adopted. The affidavit that the applicants sought to have admitted out of time offered evidence that the City did nonetheless in practice apply certain externally determined engineering standards. The applicants did not formally apply for the admission of the affidavit. They merely asked me to give directions concerning its admission. The first respondent's counsel thereafter filed a note recording the first respondent's objection to the admission of the affidavit and stating the grounds for it. In my view there was inadequate reason to allow the affidavit in out of time and counsel were advised of my decision in that regard by email last week. Any costs incurred attendant on the attempt to obtain the admission of the affidavit shall be borne by the applicants.

[53] The following orders are made:

(a) In case no. 10072/2020 (the judicial review application):

(i) The decision of the City of Cape Town, dated 31 January 2020, to approve the building plan application submitted by the first respondent for the construction of a dwelling house on Erf 251 Sea Point East is hereby reviewed and set aside.

(ii) The building plan application submitted by the first respondent is remitted to the City of Cape Town for reconsideration in the light of the judgment in WCC case no. 10072/2020, dated 18 May 2021.

(iii) Save in respect of the costs referred to in paragraph (iv) below, the first respondent shall be liable to pay the applicants' costs of suit, including the costs in respect of the first respondent's application for condonation, dated 13 February 2021, and the qualifying fees of the applicants' expert witness, Mr Brummer.

(iv) The applicants shall be liable jointly and severally, the one paying the other being absolved, for the costs incurred by the first respondent in respect of the attempt by the applicants to obtain the admission out of time of the affidavit concerning the parking standards allegedly applied by the second respondent.

(b) In case no. 6800/2021 (the contempt of court application):

The application is dismissed, with no order made as to costs.

A.G. BINNS-WARD

Judge of the High Court

APPEARANCES

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Cape Town

[1] The first respondent's property is sometimes incorrectly described in the applicants' founding papers as Erf 215.

[2] The text of the By-law can be accessed online at https://resource.capetown.gov.za/documentcentre/Documents/Bylaws%20and%20policies/Municipal_Planning_Amendment_Bylaw_2019_Consolidated.pdf (last accessed on 15 May 2021).

[3] See also (amongst others) *Setsokosane Busdiens (Edms) Bpk v Voorsitter, Nasionale Vervoerkommissie* 1986

(2) SA 57 (A) at 86D-87A, *Gqwetha v Transkei Development Corporation Ltd and Others*

[2005] ZASCA 51; 2006 (2) SA 603 (SCA); [2006] 3 All SA 245 SCA) at para 22-33 and *Khumalo and Another v MEC for Education, KwaZulu-Natal* 2014

(5) SA 579 (CC) at para 39-57. The suggestion in para 34 of *Gqwetha* that the prospects on the merits of the review application are not a material consideration in the exercise of the court's

discretion to condone an unreasonable delay in bringing it was disapproved by the Constitutional Court in *Khumalo*.

[4] Underlining supplied for emphasis.

[5] Building plans for the erection of a new house on Erf 251 were originally submitted in 2012. Construction commenced in 2013, but was interrupted when amending plans approved by the City in 2014 were taken on review by the applicants and set aside in

2017. The current building plan application was submitted in July 2018 and the building work subsequently undertaken in accordance with the plans was stopped in 2019 after a further interdict application was launched by the applicants. The plans were thereafter revised in October 2019 after a meeting between Mr Markwald and representatives of the City's Transport Department in September 2019. As indicated in the body of this judgment, the revised plans were approved on 31 January

2020.

- [6] Where Majiedt AJ wrote 'A fundamental tenet of statutory interpretation is that the words in a statute must be given their ordinary grammatical meaning, unless to do so would result in an absurdity. There are three important riders to this general principle, namely: (a) that statutory provisions should always be interpreted purposively; (b) that the relevant statutory provision must be properly contextualized; and (c) all statutes must be interpreted consistently with the Constitution, that is where reasonably possible, legislative provisions ought to be interpreted to preserve their constitutional validity. This proviso is closely related to the purposive approach referred to in (a).' (Footnotes omitted.)
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 - (c) all statutes must be interpreted consistently with the Constitution, that is where reasonably possible, legislative provisions ought to be interpreted to preserve their constitutional validity. This proviso is closely related to the purposive approach referred to in (a).' (Footnotes omitted.)
- [7] Although the word 'shall', when used in legislation, generally implies an imperative or peremptory effect, it is not unusual to encounter instances where is permissive or directory; see e.g. *Motlounge and Another v Sheriff, Pretoria East and Others* 2020
- (5) SA 123 (SCA) at para 11, with reference to the locus classicus on the applicable principles: *Sutter v Scheepers* 1932 AD 165 at 173-174. In the context currently under consideration, it is plain, on a purposive interpretation of the development management scheme, that the City is not obliged to exclude any of the features (or any part thereof) in paragraphs (a)-(h) of the definition of 'floor space' if doing so would result in the approval of a structure that would be incongruent with the object of the zoning regulations.
- [8] Cf. e.g. *CIR v King* 1947 (2) SA 196 (A) at 209-210, *Van Rooyen and Others v The State and Others* (GCB of SA intervening) 2002 (5) SA 246 (CC) at para 181-182 and footnote 163, and *Botha and Another v Rich and Others* 2014 (4) SA 124 (CC) at para 35 and footnotes 50 and 51.

- [9] The deponent to the applicants' founding affidavit declaimed (in para 34) 'It is, of course, astounding that anyone should claim to have a garage of 227m², which is larger than the average house'.
- [10] Section 6(2)(e)(iii) of PAJA.
- [11] Section 142(9) of the Municipal Planning By-law (which was inserted in terms of the 2019 amendments to the instrument) seems to me to restate the applicable common law principle in this regard.
- [12] At para 46 – 67.
- [13] At para 25 – 37.
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